THE INTRICACIES OF INTOLERABLE EMPLOYMENT RELATIONSHIP: A CRITICAL APPRAISAL OF SECTIONS 186(1)(e) AND 193(2)(b) OF THE LABOUR RELATIONS ACT 66 OF 1995

by

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MINI-DISSERTATION

Submitted in partial fulfilment of the requirements for the degree of

MASTER OF LAWS

in

LABOUR LAW

in the

FACULTY OF MANAGEMENT AND LAW

(School of Law)

at the

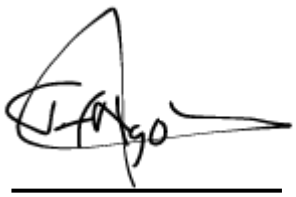
UNIVERSITY OF LIMPOPO

SUPERVISOR: Prof. T.C Maloka

2024

DECLARATION

I hereby declare that this mini-dissertation titled `**The intricacies of intolerable employment relationship: A critical appraisal of sections 186(1)(e) and 193(2)(b) of the Labour Relations Act 66 of 1995'** is my own work. I further declare that this mini-dissertation has not been submitted by me or any person to this or any other institution. All the sources used have been acknowledged by means of references.



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Date: 16 NOVEMBER 2023

Acknowledgements

Firstly, I would like to thank the Almighty God for his love and strength, as without Him, this dissertation would not have been completed. Secondly, I would like to thank my family for their continued support throughout this journey. They served as the pillars of my strength during my most down days when I had fatigue and wanted to give up. I will always be grateful.

Moreover, I would like to extend my utmost gratitude to my supervisor Professor Tumo Charles Maloka, for his guidance and for pushing me to complete this project in record time, although it was not easy.

This work is based on the research supported wholly by the National Research Foundation of South Africa (Grant Number 144916).

I dedicate this project to my lovely daughter Xivono.

ABSTRACT

Intolerability is ubiquitous in the modern law of unfair dismissal in South Africa. It is first encountered in the context of section 186(1)(e) of the Labour Relations Act 66 of 1995 (LRA). There is a correlation between intolerability and constructive dismissal. A perusal of cases indicates that, constructive dismissal occurs because the behaviour of the employer has made continued employment unbearable with the result that the employee has no other alternative except, to resign. The jurisdictional complexities surrounding constructive dismissal concern whether the employee was dismissed or resigned voluntarily.

The second aspect of the intricacies of intolerability relates to section 193(2)(b) of the LRA. The correlation between the breakdown of the trust relationship as well as intolerability of restoration of employment relationship is pronounced. This invites considerations of "non-reinstatable conditions". Whether or not the primary relief for unfair dismissal, namely, reinstatement or re-employment is feasible hinge on the following: (a) the practicability of carrying out the order, which is intertwined with the trust relationship and the employee's misconduct within and outside employment and (b) intolerability of the employment relationship between the parties.

Key Words: Breakdown of trust, constructive dismissal, employment relationship, intolerability, re-employment, reinstatement.

List of abbreviations

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
SCA	Supreme Court of Appeal

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CHAPTER 1
THE NATURE AND CONCEPTUALISATION OF THE INVESTIGATION

1.1 The scope of the inquiry

The breakdown of the trust relationship as well as intolerability of the employment relationship are the defining features of the modern law of unfair dismissal. The link between intolerability and constructive dismissal is obvious. An employee is said to have been constructively dismissed, if the employer had made his or her work environment intolerable for him or her.[1] In such circumstances, the employee ends the relationship of employment by resigning owed to the behaviour of the employer.[2] The duty to prove that an intolerable place of work has been created by the employer is on the employee, and he or she ought to prove constructive dismissal on a balance of probabilities.[3]

From the lens of the common law, intolerable working environment constitutes refutation of the employment contract, which provides the employee an option to either adhere to it or accept such repudiation and resign. The employee does not have an obligation to demonstrate that he or she had the intention to repudiate the employment contract.[4] Nor does the test for constructive dismissal necessitate that an employee must be left without any other choice, except resignation, it only requires that continued employment was made unbearable by the employer`s behaviour.[5] This

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1 Section 186(1)(e) of the Labour Relations Act 66 of 1995(`LRA'); See also *Minister of Home Affairs v Hambibge NO* 1999 20 *ILJ* 2632 (LC); *Sappi Kraft (Pty) Ltd v Majake NO* 1998 19 *ILJ* 1240 (LC);*Jordaan v CCMA* 2010 31 *ILJ* 2331 (LAC) (*Jordaan*).

2 See *Jooste v Transnet Ltd t/a SA Airways* 1995 5 BLLR 1 (LAC)(*Jooste*). See also *Woods v WM Car Services (Peterborough)* 1982 IRLR 413 (CA).

3 See for e.g. *Jooste*.

4 See *Mahlangu v Amplats Development Centre* 2002 23 *ILJ* 910 (LC) para 19(*Mahlangu*); *Pretoria Society for the Care of the Retarded v Loots* 1997 6 BLLR 721 (LAC) at 725A-C (*Loots*); See also *CEPPWAWU v Glass and Aluminium 2000 CC* 2002 23 *ILJ* 695 (LAC).

5 See *Strategic Liquor Services v Mvumbi NO* 2010 2 SA 92 (CC)(*Mvumbi*) para 4.

is due to the fact that if the employee had other reasonable options,[6] then, the employer`s behaviour was not intolerable or could be tolerated.[7]

An employee cannot claim constructive dismissal in circumstances where he is not patient enough to be able to await for the conclusion of the efforts made by the employer to obtain resolutions regarding such alleged unbearable *status quo* and quits his job;[8] where he or she resigns as an alternative of defending himself or herself in a disciplinary procedure or performance counselling procedure; [9] or where he or she resigns for the reason that he cannot bear working in a specific place of work or company which is not related to the employer`s behaviour.[10]

Intolerability of continued employment is a controlling factor when the employment relationship comes to an end. Here the "non-reinstatable conditions" according to section 193(2) of the Labour Relations Act 66 of 1995 (LRA) take a centre stage. These are: (a) the practicability of carrying out the order, which is linked to the trust relationship and the employee's misconduct within and outside employment and (b) intolerability of the employment relationship between the parties.

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6 *Jordaan* at 2336A-B. In *Bakker v CCMA* 2018 39 *ILJ* 1568 (LC) paras 55–60 and 97–98, the applicant was seeking reinstatement when she took the matter to the CCMA claiming constructive dismissal after she resigns from her workplace. However, the Commissioner held that there was no constructive dismissal. The Labour Court concurred with the Commissioner`s decision where it held that ABSA: (a) had taken every reasonable step to solve the complaints of the applicant regarding the selective imposition of a production target although the complaints were not substantiated. (b) the applicant failed to provide proof to show the employer intentionally and pressurized her to resign in an unfair manner, but she was rather considered as an employee who was valuable, and ABSA wanted to keep her in the job. (c) the manner in which the applicant resigned was impulsive as well as precipitous.; (d) although the applicant alleged that there was an intolerable employment relationship which led to her resignation, she was prepared to be reinstated even if it was on a fixed term contract; (e) the applicant failed to establish that her employment was threatened which suggested that her fear was not called for as she would be counselled on her performance in case she failed to perform accordingly; (f) the applicant was given an opportunity to change her mind about resigning but she did not; and (g) consequently, it was clear that her resignation was not reasonable.

7 See *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (MIBC)* 2013 JOL 30442 (LC) paras 129–130.

8 See *Smith Kline Beechman (Pty) Ltd v CCMA* 2000 21 *ILJ* 98 (LC) (*Smith Kline*).

9 See *Hickman v Tsatsimpe NO* 2012 33 *ILJ* 1179 (LC).

10 See *Solid Doors (Pty) Ltd v Theron* 2004 25 *ILJ* 2337 (LAC) para 28 (*Solid Doors*).

Many employees tend to confuse what constitutes intolerability thereby leading to constructive dismissal. It is worth noting that, an employee cannot simply aver that he or she has been constructively dismissed if certain requisites are disgruntled. According to the Labour Appeal Court (LAC), constructive dismissal materializes when an employee terminates, that is, resigns from his or her workplace in circumstances wherein he or she would not have done so, if it was not for the employer`s behaviour tainted by unfairness on the employee, which had the negative repercussions of creating continued employment that is unbearable on the employee.[11] This entails that there ought to be a direct link between the act of the employee of resigning as well as the conduct of the employer. An employee who fails to prove this, will not succeed in proving a claim for constructive dismissal. Put differently, an employee who resigns from the workplace owed to other reasons not linked to the employer`s conduct cannot claim that he or she was forced to resign, that is, was constructively dismissed.

An employee who does not make the employer aware of any intolerability in the workplace during the course of employment, or in his resignation letter, cannot succeed in a claim for constructive dismissal.[12] In order for the employer to cure the intolerability that may be faced by the employee emerging from the workplace, it must have knowledge of such. If the employee does not bring such information to the employer`s attention there may be a reasonable postulation that the intolerability claimed by the employee was not even extant, or the behaviour was tolerable. According to the LAC, intolerability is defined as follows:

> The word 'intolerable' implies a situation that cannot be tolerated or endured; or is insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance.[13]

If an employee can tolerate a situation which is 'unbearable' this clearly shows that he or she may just be exaggerating and there is no intolerability hence there are no

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11 See *National Health Laboratory Service v Yona* (2015) 36 *ILJ* 2259 (LAC) para 30 (*Yona*).

12 See for *Chimphondah v Housing Investment Partners (Pty) Ltd* (2021) 42 *ILJ* 1720 (LC) para 34 (*Chimphondah*).

13 See *Solidarity* para 39. See also *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC)*(Asara)*.

complaints about intolerability brought to the attention of the employer. Bringing such information to the knowledge of the employer will enable the employee to lodge formal complaints in line with the dispute resolution structure in the workplace. This must be done to ensure that the employee exhausts all the available internal remedies to remedy the issues in question before resigning.[14]

In certain circumstances, when an employee resigns without using the grievance procedure available to him or her, such resignation will not be deemed a dismissal owed to the fact that termination of employment was not the only option left.[15] Nevertheless, each case must be decided on its own merits, and reasonability.[16] This is the case since sometimes it may not be possible to use the grievance procedure because it is not effective, or it would be pointless to utilise it. It is worth noting that in circumstances where the channels are available and effective, there is a reasonable expectation that the employee must use them.[17] However, if the employer does not want to listen to reason and accordingly address the employees` complaints, thereby dismissing them, they would have done their part and thus can resign due to this and successfully claim constructive dismissal.

In the same respect, proving intolerability requires adherence to certain elements. It is worth noting that:

> Intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter, an obnoxious, rude and uncompromising superior who may treat employees badly.[18]

In essence, an employee cannot claim that continued employment will be intolerable simply because he or she is subjected to a difficult or stressing working environment. Hence it is very difficult to prove intolerability, the fact

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14 See *Albany Bakeries Ltd v Van Wyk* (2005) 26 *ILJ* 2142 (LAC) 2150C–E. See also *Lubbe.*

15 See for *Centre for Autism Research and Education CC v CCMA* (2020) 41 *ILJ* 2623 (LC) para 35 (*Centre for Autism Research*).

16 See *Centre for Autism Research* para 35.

17 See *Centre for Autism Research* para 35.

18 See *Billion Group (Pty) Ltd v Ntshangase* (2018) 39 *ILJ* 2516 (LC) para 11.

that an employer does something which affect the employee may be found to be tolerable, contrary to what such an employee assert.

Intolerability involves an unbearable or excruciating circumstance marked by the employer`s behaviour that ought to have made the tolerance of the employee to reach a breaking point.[19] Moreover, it goes without saying that an employee will be faced with difficult working conditions throughout the course of employment, which may include being irritated and frustrated amongst others.[20] This is normal in every employment relationship hence an employee cannot just resign owed to these and claim constructive dismissal successfully. The onus is on the employee to demonstrate that the relationship of employment has become so unbearable to such a degree that, the employee is without any other reasonable alternative except for resignation.[21]

It is undisputed that an employee who fails to establish that continued employment will be unbearable will not succeed in claiming constructive dismissal. The same applies to an employee who fails to prove that there was no other reasonable option available to him, but to terminate his or her employment contract and that if it was not for the employer`s conduct, he would not have done so.[22] The employee ought to have resigned involuntarily, and the resignation must not have been intended to end the relationship between her and the employer to be successful in a constructive dismissal claim.[23] However, it must be as consequence of the unfair behaviour by the employer towards her and it is irrelevant whether or not employer`s conduct was aimed at terminating the employment relationship.[24]

An employee was successful in claiming constructive dismissal where the employer ignored his mental health issues as this was rendered as unfair conduct on its

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19 See *Solidarity* para 39.
20 See *Jordaan* 2336.See also *Old Mutual Group Schemes v Dreyer* (1999) 20 *ILJ* 2030 (LAC) 2036; See also *Asara.*
21 See *Jordaan* 2336; *Dreyers* 2036.
22 See *Chimphondah* para 44; *Solidarity* para 39.
23 See *Yona* para 44.
24 See *Yona* para 44.

part because of its effect of creating an intolerable employment relationship.[25] Employers faced with employees with mental health issues must attempt to meet their needs.[26]

Although proving intolerability is difficult, and that tension, frustration and irritation innate in the place of work is inadequate to enable an employee to succeed in claiming constructive dismissal, if there is something more than that, an employee can actually succeed.[27] Rycroft[28] avers that:

> Bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers the self-esteem or self-confidence of an employee. Being humiliated or demeaned lies at the heart of the concept of dignity and that the public humiliation of an employee is almost certain to destroy or seriously damage the relationship of trust and confidence between an employer and employee.

When an employee is bullied by the employer, such has the effect of creating a hostile working environment. No reasonable person can be expected to cope with being insulted or humiliated, having their privacy violated or sexually harassed in his or her workplace daily. These can be good grounds for claiming a constructive dismissal successfully as was seen in the case of *Centre for Autism Research*.

The Labour Court (LC) found that the evidence led by the third and fourth respondents demonstrated a workplace ran by an egocentric person whose belligerent as well as undesirable behaviour had the capability of resulting in a noxious workplace characterised by discriminatory, degradation, and disparaging conduct.[29] It held further that the nature and extent of bullying experienced at their workplace by the third and fourth respondents demonstrated that continued employment will be intolerable according to the provisions of the LRA in s

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25 See *Mogomatsi v Goredema N.O.* [2022] ZALCCT 20 paras 19-20 (*Mogomatsi*).

26 See *Mogomatsi* para 19.

27 See *Centre for Autism Research* para 33. The employees were subjected to demeaning behaviour, the employer would constantly shout at them, humiliate them in public spaces, violate their privacy during work conferences by making them dress in front of her and at the same time would comment about their bodies in a sexual way, amongst others. This was clearly beyond limits and no reasonable person could be expected to put up with such behaviour, although they were committed to their learners the employer ensured that they left the workplace due to her behaviour.

28 See Rycroft, A `Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice' (2009) 30 *Industrial Law Journal* 1431(Rycroft on `Workplace Bullying').

29 *Centre for Autism Research* para 45.

186(1)(e).[30] Put differently, the employer`s conduct made continued employment to be unbearable for the employees, consequently, they were unfairly dismissed.[31]

1.2 Research questions

Many interesting questions of principle and technique emerge in consideration of the intricacies of intolerable employment relationship, in particular, the intersection between sections 186(1)(e) as well as 193(2)(b) of the LRA:

- Does the law strike a fair balance between the interests of the employers and employees in determining the intolerability of continued employment relationship? This question can be divided into an examination of precipitate resignation and resignations to evade disciplinary or incapacity inquiries.
- To what extent does breakdown of trust relations inexorable leads to intolerability of continued employment relationship?
- How can an assessment of whether there has been a loss of trust and confidence be soundly and rationally based and yet prove sensitive to the variety of contexts in which disciplinary dismissal occur?
- What is the effect of post-dismissal misconduct on the intolerability of continued employment relationship?

1.3 Way forward

Intolerability of continued employment in the context of constructive dismissal raises the pressing need for fair dealing between the parties to the employment relationship. Intolerability also calls for an urgent and dedicated response by employers to address and manage the impact of depression on an individual employee's performance. Intolerability connected with the prospect of restoration of employment relationships, holds profound lessons for employees: irrevocable

30 *Centre for Autism Research* para 45.
31 *Centre for Autism Research* para 51.

breakdown of trust and post-dismissal misconduct may render restoration of the employer-employee relationship impractical.

1.4 Literature review

According to section 186(1)(e) of the Act, constructive dismissal entails that:

> "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".[32]

It is worth noting that an employee cannot merely aver that he or she was constructively dismissed, certain prerequisites ought to be first satisfied. Failure to satisfy all these, simply implies that a constructive dismissal did not materialize. These were outlined in *Solid Doors* and *Murray v Minister of Defence*[33] as follows:

- What is required is that the employee ought to have been the one who terminated the employment contract.
- The employee ought to have terminated the employment contract owed to the fact that continued employment has become intolerable for him or her.
- The employer ought to have been responsible for making continued employment intolerable by either an act or omission, albeit no intention to terminate the relationship of employment was extant.
- The employee must comply with the onus to prove that there has been a constructive dismissal as well as that the resignation was not voluntary.
- The employee must not delay too long to resign in response to the behaviour of the employer.
- Moreover, the employee is obliged to establish that he or she would have continued working for the employer had it not been for the behaviour of the employer in question.
- Furthermore, the employee is obliged to make use of all the available remedies before considering resignation.

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32 See Section 186(1)(e) of the LRA.

33 2008 29 ILJ 1369 (SCA)(*Murray*); See also Kasuso, TG 'Resignation of an Employee Under Zimbabwean Labour Law: A Unilateral Act' (2017) 3 *Midland State University Law Review* 51 (Kasuso); See also Munro, L 'Constructive dismissal' (2008) *South African Radiographer* 18.

In addition to the above requirements, there ought to be a two-stage enquiry for determining whether there was a constructive dismissal.[34] It is worth noting that in circumstances wherein this two-stage enquiry is not adhered to, the arbitrating authority can review the decision regarding constructive dismissal as it constitutes indiscretion.[35] The first stage of the enquiry places two obligations on the employee, these are as follows:[36]

- The employee ought to satisfy the onus of proving that the main reason for his or her termination of employment was merely owed to the employer`s conduct of making continued employment intolerable.
- The employee ought to show that consequent to the employer`s conduct of making continued employment intolerable, he or she was dismissed by the employer in effect, as outlined in section 192 of the LRA.

The second stage of the enquiry places an obligation on the employee to prove that the dismissal was not fair.[37] It is worth noting that a constructive dismissal which can be considered fair, is one whereby the employee has resigned from the workplace owed to an intolerable employment relationship that cannot be attributed to the employer.[38] Although these stages are discrete, they should not be considered in isolation from each other, that is, they ought to be considered completely dependent of each other.[39]

In order to establish whether or not, an employee was constructively dismissed, the court ought to make an appraisal of the conduct of the employer holistically.[40] This is done to establish whether, objectively speaking, the conditions at the workplace were intolerable to such an extent that no one could expect the employee to endure

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34 See *Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake* 1998 19 ILJ 1240 para 20.
35 See *Doornpoort Kwik Spar cc v Odendaal* 2008 29 ILJ 1019 (LC).
36 See Whitear-Nel, N, Rudling, M `Constructive Dismissal: A Tricky Horse To Ride *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC)' (2012) 33(1) *Obiter* 196 (Whitear-Nel and Rudling).
37 Whitear-Nel and Rudling ,196.
38 Whitear-Nel and Rudling, 196.
39 Whitear-Nel and Rudling,197.
40 See *Marsland v New Way Motor and Diesel Engineering* 2009 30 ILJ 169 (LC); See also *Murray.*

them and thus was compelled to resign.[41] In simple terms, an objective test is used to prove that an employee was constructively dismissed.[42] This entails that the subjective view of the employee that he or she is compelled to terminate the employment contract is not sufficient, it ought to also be objectively reasonable.[43]

Dekker concurs that this test requires that the conduct of the employer be judged in an objective manner from the lenses of a reasonable person in the same position as the employee in question.[44] The test entails that when the employer`s behaviour is taken into consideration it must have the effect that there exists no reasonable expectation that the employee could endure it.[45] In the circumstance that there exists even the slightest expectation that the employee can cope with the employer`s behaviour, the test would not have been satisfied.

If the employee is of the opinion that the employer will never change its way of doing things, that is, will continue creating an intolerable working environment, then he or she resigns, a claim of constructive dismissal will have prospects of success.[46] However, if the employee resigns hiding behind constructive dismissal wherein he or she knows that his or her true intentions are to work elsewhere or to benefit from a pension fund, he or she will not succeed in a claim for constructive dismissal.[47]

Tshoose postulates that the enquiry concerning constructive dismissal ought to be whether the employer without any good justification behaved in a way that has prospects of breaking or seriously harm the relationship of employment.[48]

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41 See *Jooste.*

42 See *Mafomane v Rustenburg Platinum Mines* 2003 (10) BLLR 999 (LC) (*Mafomane*) para 46; See also *Foschini Group v CCMA* 2008 29 ILJ 1515 (LC) (*Foschini Group*); See also *Yona* para 30.

43 See *Smithkline*; See also Whitear-Nel and Rudling 197.

44 Dekker, AH `Did He Jump or Was He Pushed? Revisiting Constructive Dismissal` (2012) 24 *SA Merc* 346.`

45 See *Yona* para 30; See also *Lubbe* para 8; See also *SmithKline.*

46 See *Beukes v Crystal – Pier Trading CC T/A Bothaville Abattoir* (2009) JOL 23285 (CCMA); See also Smit, E *Constructive Dismissal and Resignation due to Work Stress* (LLM-dissertation UNW Potchefstroom Campus, 2013) 11 (Smit).

47 Tshoose, CI 'Constructive dismissal arising from work related stress' (2017) *Journal for Juridical Science 129* (Tshoose).

48 Tshoose 129.

It is worth noting, that in the circumstances, the employee must have opted to resign as it was a step which was reasonable to take.[49] This entails that in circumstances, wherein the employee blows the employer`s behaviour out of proportion, thereby not making it reasonable for any reasonable man to resign, such an employee will not succeed in a claim for constructive dismissal. An employee ought to find the employment intolerable subjectively.[50] In essence, continued employment ought to be found to be unbearable, both objectively as well as subjectively.

Kasuso avers that, as soon as an employee terminates an employment relationship owed to external factors such as undue influence, coercion, or duress, amongst others, such a resignation is involuntary and accordingly qualifies as constructive dismissal.[51] It goes without saying that the opposite is true. According to Nkosi constructive dismissal comes to the rescue of those employees subjected to intolerable status quo in their places of work, by ascertaining that they are afforded recourse of resigning without taking the blame, which would not be possible if they resigned voluntarily in circumstances where the employer was not responsible for such actions.[52]

In this regard, constructive dismissal is considered useful for protecting employees from an employer who creates intolerability in the workplace which has the effect of resulting in many resignations wherein such employees are left without their rights to recourse against such an employer.[53] The requirement that an employee had to be without any other reasonable alternatives to resignation, or had to resign as a measure of last resort when faced with an intolerable employment was rejected and no longer applies.[54] Currently, an employee can resign and successfully claim constructive dismissal even if there are other alternatives to resignation, that is, resignation was not a matter of last resort.[55] It is worth noting that the list of what

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49 *Yona* para 30.

50 See *Solidarity obo Van Tonder v Armanents Corporation of South Africa (SOC) Ltd* (2019) 40 *ILJ* 1539 (LAC) (*Van Tonder*) para 40.

51 See Kasuso 52.

52 See Nkosi, TG `*The President of RSA v Reinecke* 2014 (3) SA 295 (SCA)´(2015) *De Jure* 232(Nkosi).

53 See Dekker 346.

54 See *Mvumbi* para 4.

55 See Nkosi 242.

can create an intolerable employment relationship and thus lead to constructive dismissal is not exhaustive.

An objective test is used when determining whether or not the reason for resignation by the employee was an intolerable employment environment, this test is independent of the employer`s view.[56] Smit, avers that a mere inconvenience on the part of the employee is not sufficient to be considered as intolerability, what is required is for the employer`s behaviour to have persisted for some time, although at times this may not be the case.[57] The vicious as well as incompatible behaviour of an employer can be good grounds for a claim of constructive dismissal.[58] Neither, a wide interpretation should be adopted as to what amounts to constructive dismissal, nor a restrictive one should be adopted as this can open the floodgates of employees who resign and wrongfully claim constructive dismissal.[59]

The general trend is that scholars focus on intolerability which is caused by an employee in the workplace which has prospects of breaking down the relationship of mutual trust and confidence. There is not much on intolerability which is caused by the employer which results in an employee terminating the relationship of employment. This is clearly a gap in our law and needs to be remedied, hence this study attempts to provide an insight into the matter.

Usually, an employee is dismissed due to his or her conduct that is breaching the employment contract. However, constructive dismissal is not concerned with the conduct of the employee, hence the study attempts to fill that gap. It is significant to consider both sides of the coin, intolerability caused by the employer which results in an employee finding continued employment intolerable hence tendering his or her resignation as well as intolerability caused by the conduct of the employee. It is not only an employee who can render continued employment relationship intolerable, the employer is equally capable.

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56 *Watt v Honeydew Dairies (Pty) Ltd* (2003) 24 ILJ 466 (CCMA).
57 Smit 15.
58 *Beets v University of Port Elizabeth* 2000 8 BALR 871 (CCMA).
59 Smit 28.

It is clear that, a substantial body of literature on contemporary labour law has examined[60] and re-examined[61] developments on constructive dismissal. Despite a wide acknowledgement of its importance, however, the all-encompassing issue of intolerability[62] remains by far less examined aspect of sections 186(1)(e) and 193(2)(b) jurisprudence.[63] Seminal cases[64] that have captured the public imagination compel sustain appraisal of the intricacies of an intolerable employment relationship. Emerging case law[65] as well as recent contributions[66] also signal that intolerability is a fruitful site for scholarship.

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60 See Dekker, AH 'Gone With The Wind And Not Giving A Damn: Problems And Solutions In Connection With Dismissal Based On Desertion' (2010) *South African Mercantile Law Journal* 104; See also Le Roux, PAK 'Resignations – An Update: The Final, Unilateral Act of an Employee' (2010) *CLL* 51; See also Kasuso 46; Munro L 'Constructive dismissal' (2008) *South African Radiographer* 18.

61 See Nkosi 38 ; See also Whitear-Nel 193; Van Zyl, B 'Complexity of Constructive Dismissal' (2016) *HR Future* 40. See generally Tshoose 121; See also Vettori, S 'Constructive Dismissal and Repudiation of Contract' (2011) *Stellenbosch Law Review* 173; See also Van der Walt, A Abrahams, D and Qotoyi, T 'Regulating the Termination of Employment of Absconding Employees in the Public Sector and Public Education in South Africa' (2016) *Obiter* 140.

62 See Rycroft, A 'The Intolerable Employment Relationship' (2013) *ILJ* 2271-2287 (Rycroft on Intolerable Employment Relationship); See also Le Roux R 'Reinstatement: When Does a Continuing Employment Relationship Become Intolerable' Z2008 Obiter 69-76 (Le Roux).

63 See generally, Smit, E *Constructive Dismissal and Resignation due to Work Stress* (LLM-dissertation UNW Potchefstroom Campus, 2013); See also Mabiana, PT *Constructive Dismissal in South Africa Prospects and Challenges* (LLM-dissertation University of Limpopo 2014); See also Ngcobo, S *An Analysis of Intolerable Conduct as a ground for Constructive Dismissal (*LLM- dissertation University of Kwa-Zulu Natal 2014). See *Old Mutual Ltd v Moyo* (2020) 41 *ILJ* 1985 (GJ)*;* See also *Moyo v Old Mutual Ltd* [2019] ZAGPJHC 229; See *Moyane v Ramaphosa* [2019] 1 All SA 718 (G); *Masetlha v President of the RSA* 2008 (1) SA 566 (CC).

64 See *Old Mutual Ltd v Moyo* 2020 41 *ILJ* 1985 (GJ)*;* See also *Moyo v Old Mutual Ltd* 2019 ZAGPJHC 229; See also *Moyane v Ramaphosa* 2019 1 All SA 718 (G); See also *Masetlha v President of the RSA* 2008 (1) SA 566 (CC). Other recent examples include: Payne, S 'Prasa fires Zolani Matthews as CEO for not disclosing dual citizenship' *Daily Maverick* 02 December 2021 available at https://www.dailymaverick.co.za/article/2021-12-02-prasa-fires-zolani-matthews-as-ceo-for-not disclosing-dual-citizenship/; See also Mahlaka, R 'Absa fires Sipho Pityana from its board' *Daily Maverick* 24 November 2021 available at https://www.dailymaverick.co.za/article/2021-11-24-absa-fires-sipho-pityana-from-its-board/?utm_medium=email&utm_campaign=Afternoon%20Thing%20Wednesday%2024%2 (accessed on 24 March 2022). For a helpful analysis: Van Staden and Van der Linde 'Uneasy lies the head that wears a crown: *Moyo v Old Mutual Limited* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019) and *Old Mutual Limited v Moyo* (2020) 41 *ILJ* 1985 (GJ) (2021) *SA Merc LJ* 137; See also Raligilia KH and Bokaba KM "Breach of the implied duty to preserve mutual trust and confidence: A case study of *Moyo v Old Mutual Limited* (22791) [2019]' 2021 42 *Obiter* 714-719.

65 See *Woolworths (Pty) Ltd v CCMA* [2021] ZALAC 49.

66 See generally, Okpaluba, C and Maloka, T 'The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (1)' (2021) 35(1) *Speculum Juris* 71-86, 'The Breakdown of the Trust Relationship and

1.5 Aim and objectives

The aim of the research is to contribute to the evolving labour law *corpus*. To achieve the purposes of the study, the following objectives form the basis of the investigation:

- Identifying the correlation between intolerability and constructive dismissal.
- Isolate novel issues concerning intolerability of continued employment prompted by stresses and pressures of modern post global pandemic – depression in the workplace.
- Exploring the repercussion of the permanent breakdown of the trust relationship caused by an employee's misconduct and intolerability of continued employment rendering reinstatement or re-employment impractical.

1.6 Methodology

The study premised on literature. The focal point of the investigation is the jurisprudential materials, statutory authorities and electronic sources.

1.7 Design and outline of the study

This study comprises of the following four chapters summarised below:

Chapter 1 The nature and conceptualisation of the investigation:

This chapter furnishes a summary of the study thereby introducing the nature as well as background of the study to the reader.

Chapter 2 Intolerability in the context of section 186(1)(e) of the LRA

This chapter provides in depth account of intolerability in the workplace according to the provisions of the LRA in section 186(1)(e).

Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (2)' (2021) 36(1) *Speculum Juris* 105-124 and 'Employee's Incompatibility As A Ground For Dismissal In Contemporary South African Law Of Unfair Dismissal: A Review of *Zeda Car Leasing, Mgijima* and *Watson'* (2021) *South African Mercantile Law Journal* 238-259.

Chapter 3 Intolerability within the ambit of section 193(2)(b) of the LRA

This chapter expounds on intolerability within the scope of section 193(2)(b) of the LRA.

Chapter 4 Conclusions and recommendations

This chapter summarises and analyses what has been discussed in all the preceding chapters and provides recommendations on what can be done to solve the research problem.

1.8 Conclusion

It is not easy for an employee to prove that he or she has been constructively dismissed, which was consequent to an intolerable employment environment. Accordingly, employees must guard against claiming such if the requirements discussed above are not satisfied. In circumstances wherein the employer is not to be held responsible for a certain action that resulted in the employee finding continued employment intolerable, a claim for constructive dismissal will be unsuccessful. The employer must have directly contributed to the employee`s decision to resign, if the opposite is true, an employee will simply be wasting his or her time in resigning and claiming constructive dismissal.

The conduct of the employer must be excessive and beyond the limits of tolerance. Moreover, it must be such that no reasonable man can be expected to endure, if the contrary is proven, this will show that there was no intolerability, or even if there was, it was one which could be tolerated, and the employee just blew it out of proportion by resigning. The breakdown of the trust relationship between the employer and employee can be one of the causes of intolerability. If an employee is subjected to an intolerable working environment by the employer, he or she can succeed in a claim for constructive dismissal when he or she eventually terminates the contract of employment, in terms of the law of unfair dismissal. In this regard, there are remedies available to such an employee which include compensation and reinstatement, however, each case will be decided on its own merits. The following chapter focuses on intolerability in the context of section 186(1)(e) of the LRA.

CHAPTER 2

INTOLERABILITY IN THE CONTEXT OF SECTION 186(1)(e) OF THE LRA

2.1 Introduction

Section 186(1) (e) of the LRA provides that an employee is deemed to have been constructively dismissed in circumstances where he or she terminates the employment contract, regardless of whether or not he or she has served notice, owed to the employer`s intolerable conduct. This provision can be considered as a deviation from the usual termination of employment, as the tables are turned in the case of constructive dismissal. The usual act of terminating the employment contract is done by the employer, but in cases of constructive dismissal, the employee does the onus. What may be intolerable for one employee may not be the case for another, hence the employee bears a huge onus of proving intolerability in the workplace.

The employer`s conduct in claims for constructive dismissal is a *sine qua non.* This entails that had the employer not acted in a certain way which resulted in the employee`s intolerability, he or she would not have let go of his or her job.

It must be borne in mind that once a contract of employment is concluded between an employer and employee, they owe each other a duty of mutual trust and confidence in terms of the common law.[67] Once this duty is breached, a repudiation of the contract comes into being. This has the effect that the party which can either be the employer or employee, who repudiates it, is liable for breach of contract. The aggrieved party can then seek to have the other perform in terms of such a contract or resign in the case of an employee or dismiss the employee in the case of the employer. Accordingly, it is a safe assumption that in cases of constructive dismissal, the employer is the one that repudiates the contract of employment. Put differently, the employer is the one that breaches the duty of mutual trust and confidence. It goes without saying that any repudiation can result in the irretrievable breakdown of an employment relationship. Such can cause intolerability, depending on who is the party

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67 See Raligilia,KH ` A Reflection On The Duty Of Mutual Trust And Confidence: Off-Duty Misconduct in the case of *Biggar v City of Johannesburg* revisited' (2014)38(2) *South African Journal of Labour Relations* 70 (Raligilia).

that repudiates it. For our purpose however, focus will be on the effects of the repudiation by the employer, that is, the employer acts in a certain way which results in the employee finding the employment to be intolerable and then resigns.

2.2 The breakdown of a trust relationship

The breakdown of a trust relationship in employment comes into being as soon as the employer or the employee breaches his or her implied duty to preserve mutual trust and confidence. Although this implied term of trust and confidence imposes obligations on both employers and employees, its most substantial consequence lies in its application to employers.[68] This duty entails that the employer is prohibited without reasonable and proper cause from acting in a way as would be calculated or likely to destroy or seriously damage the trust and confidence relationship extant in a relationship of employment.[69] This duty provides protection to susceptible employees because of the unequal balance of power which exists between employer and employee.[70]

In *Murray*, the Supreme Court of Appeal (SCA) held that an employer has a duty of 'fair dealing' and an obligation not to damage the relationship of confidence and trust with the employee.[71] Bosch[72] avers that the employer is not allowed to behave in a dishonest or corrupt way when the relationship of employment is extant, or to participate in gratuitous infringements of the dignity as well as psychological integrity of the employee.

Since the employer can damage the dignity or psychological integrity of the employee through a behaviour which is abusive towards him or her, such an employee must be able to trust that the employer will not do so.[73] It is worth noting that in circumstances where the employer disdains that trust it will incur liability under the

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68 See Raligilia 72.

69 See *Council for Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (AD)(*Fijen*); See also Raligilia, KH and Bokaba, KM `Breach of The Implied Duty To Preserve Mutual Trust And Confidence in an Employment Relationship: A Case Study of *Moyo v Old Mutual Limited* ([2019] ZAGPJHC 229 (30 July 2019)' 2021 42 *Obiter* 714.

70 See Raligilia 73.

71 See *Murray* para 5.

72 See Bosch, C `The Implied Term of Trust and Confidence in South African Labour Law '(2006) *Industrial Law Journal* 36 (Bosch).

73 See Bosch 36.

implied term for breaching the employment contract.[74] Put differently, the employer may be required to reinstate or re-employ or compensate an employee,[75] for forcing his or her hand to resign by inflicting an intolerable behaviour towards him or her. That is, he or she will be held liable for infringing on his or her right to fair labour practices.[76]

An employer who fails to solve a situation which is likely to create or has created an intolerable employment relationship breaches his or her implied duty to trust and confidence. A typical example was seen when the employer failed to take the essential steps to eradicate the off-duty racial abuse directed towards an employee by the white co-workers.[77] As soon as the trust relationship has broken down, termination of the employment contract may be exonerated because of the parties` behaviour in the relationship of employment.[78]

In essence, this entails that an employee`s conduct of resigning owed to the intolerability caused by the employer in the workplace is justified. Since an employer has a remedy against the employee for breaching the trust relationship by dismissing him, the employee also has a remedy against him or her in similar circumstances. This remedy comes in the form of constructive dismissal where the employee resigns because of the intolerability caused by the breakdown of the trust relationship. In essence, intolerability has the effect of breaching the trust relationship in employment.

2.3 Proving constructive dismissal

2.3.1 Burden of proof

In claims for constructive dismissal, the duty to prove that there was a dismissal is on the employee. He or she must prove constructive dismissal on a balance of probabilities.[79] This is opposed to the conventional dismissal placing the burden on

74 See Bosch 36.
75 See Section 193(1)(a)-(c) of the LRA.
76 See Section 23(1) of the Constitution of the Republic of South Africa,1996 (Constitution).
77 See *Biggar v City of Johannesburg, Emergency Management Services* (2011) 32 ILJ 1665 (LC) para 20 (*Biggar*); See also Raligilia 74.
78 See Raligilia and Bokaba, KM 714.
79 See *Jooste*.

the employer to establish that the dismissal was for a fair reason and the procedure followed in dismissing the employee was fair.[80]

Proving constructive dismissal on balance of probabilities entails that the employee must adduce more evidence which shows that the employer created an intolerable employment relationship. Failure to do so in circumstances where the employer adduces its own evidence contrary to the employee`s version, which is more believable than that of the employee, will result in the employee being unsuccessful in the claim. What is required is for the employee to prove that his or her version of events is more probable than his or her employer`s.

A textbook example of a case where this onus was discharged by the employee is the case of *Mbongwe v SA Express Airways.*[81] In this case the employee terminated her employment and claimed constructive dismissal. This was consequent to her excessive workload which she brought to the knowledge of her employer and suggested that another person be employed to help her. However, her suggestion fell on deaf ears as the employer did not do anything to help her in the circumstances. Consequently, her workload was not reduced which led to her developing health problems. Eventually, she had to decide between keeping her work as well as letting her health deteriorate further.

In answering the question whether or not her resignation amounted to constructive dismissal in terms of section 186(1)(e) of the LRA, the Commissioner first took into account the formulated test for constructive dismissal.[82] The test was formulated 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…"

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80 See Section 188 of the LRA.
81 2009 3 BALR 286(CCMA) (*Mbongwe*).
82 See *Loots* para 72.

The Commissioner also held that the circumstances under which constructive dismissals may occur are diverse thus any employer`s conduct that pushes the employee to resign could amount to constructive dismissal. The Commissioner further held that the employee was under the legitimate impression that the employer would not change the situation, which was intolerable for her, and that the employer was unsuccessful in addressing her concerns. Smit[83] avers that the onus will be satisfied when:

- The employee claiming constructive dismissal was under the legitimate impression that employer acted in a way that rendered the relationship of employment intolerable and would go on with such a behaviour.
- The employee in question had a genuine belief that the work situation has become unbearable and that she could not fulfil her most significant role, that is, to work.
- There is no evidence presented by the employer that the applicant had an ulterior reason for resigning except for the intolerable employment conditions.
- The employer was unable or failed to address the employee`s situation which was intolerable in a satisfactory manner where it was within his or her control.

The burden of proof will be satisfied when the conduct of the employer when considered holistically with its impact is such that when judged reasonably and sensibly, the employee could not be anticipated to endure it.[84] Accordingly, this burden of proof was discharged, and she was found to be constructively dismissed. After the employee has discharged his or her onus, the employer must also establish that he or she did not do anything wrong, that is, the dismissal was fair.[85]

2.3.2 The elements of constructive dismissal to be established

In satisfying the onus of proof on balance of probabilities, the employee ought to establish the following:

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83 See Smit 41.
84 See Smit 42.
85 See Smit 44.

2.3.2.1 That he or she has resigned

The employee claiming constructive dismissal must be the one who terminated the employment contract due to intolerability with or without notice, as opposed to the conventional dismissal where the employer terminates it.[86] There is no need for the employee to formally resign by tendering a resignation letter.[87]

2.3.2.2 That the employer caused his or her working conditions to be intolerable

The employee must prove that his or her employer was responsible for creating an intolerable working environment. That is, the intolerable conditions which the employee complained of ought to have been of the employer's making.[88] He or she ought to establish that the employer did something or failed to do something which caused intolerability and thus he or she was forced to resign.[89] In circumstances where the employer fails to take all the necessary steps to guard against a situation which the employee complains of which was caused by another employee, such an employer will be vicariously liable.[90] Whether or not the employer intended to repudiate the employment contract by his conduct is immaterial.[91]

2.3.2.3 That it was the employer`s conduct that rendered continued employment intolerable for the employee

The employee ought to prove that it was in fact the conduct of the employer that construed continual employment not tolerable for him or her. The test is partly objective and partly subjective, and thus requires a due consideration of both the employee`s state of mind and circumstances which led to the resignation.[92] The employer ought to be culpably accountable in some way for the intolerable conditions,

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86 See Kubjana, KL and Manamela, ME ` To Order or Not to Order Reinstatement as A Remedy for Constructive Dismissal' (2019) 40(2) *Obiter* 327 (Kubjana and Manamela).

87 See Kubjana and Manamela 327; See also Flanagan, G ` Constructive Dismissal –An Objective Test' (2018) <https://ceosa.org.za/constructive-dismissal-an - objective-test/> accessed 20 October 2022.

88 See *Chabeli v CCMA* (2010) 31 *ILJ* 1343 (LC) para 19 (*Chabeli*).

89 See Kubjana and Manamela 327.

90 See *Media24 Ltd & another v Grobler* (2005) 26 *ILJ* 1007 (SCA)(*Grobler*);See also *Ntsabo v Real Security CC* (2003) *ILJ* 2341 (LC)(*Ntsabo*).

91 See *Mahlangu* para 19.

92 See Grogan, J, Dismissal, Discrimination & Unfair Labour Practices (2nd Ed., (Juta Cape Town 2008) 199 (Grogan Dismissal); See also *Smithkline* para 38.

that is, the conduct ought to have been short of 'reasonable and proper cause'.[93] The courts are not supposed to fragment the complaints of the employee, that is, ponder them one by one in isolation and conclude that each was neither crucial to the resignation of the employee nor rendered his position intolerable.[94]

2.3.2.4 The employee ought to use each viable remedy prior to resigning

The employee cannot merely claim constructive dismissal without exhausting all the internal grievance procedures aimed at creating healthy working relationships.[95] He or she must prove that there was indeed intolerable conduct caused by the employer that left him or her with no other reasonable option but to resign.[96] He or she does not need to have resigned as a measure of last resort, for so long he or she can prove that that continued employment was intolerable.[97] An employee ought to be more robust and vigorous in circumstances where available options are still extant.[98] However, in circumstances where using such a grievance procedure would prove to be futile or a sham or not an option, it will be reasonable to resign.[99]

2.4 Circumstances which constitute constructive dismissal

An employer can cause intolerability of employment for the employee, thus the breakdown of the trust relationship, which entitles the employee to resign and claim constructive dismissal in the following circumstances which are not exhaustive:

2.4.1 Bullying in the workplace

Constructive dismissal emerges from the employer`s conduct, that is, an act or omission.[100] Accordingly, as soon as an employer acts in a certain way which may be intolerable for an employee or fails to do something about an intolerable situation

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93 See *Murray* para 13.
94 See *Murray* para 66.
95 See *Lubbe* para 8 where an employee was unsuccessful in a claim for constructive dismissal because of his failure to use the internal grievance procedure in the workplace prior to his resignation to lodge a complaint.
96 See Kubjana and Manamela 329.
97 See *Mvumbi* para 4.
98 See *Asara.*
99 See *Centre for Autism Research* para 48; See also *LM Wulfsohn Motors v Dispute Resolution Centre* (2008) 29 ILJ 356 (LC) para 12 (*L M Wulfsohn Motors*).
100 See Grogan, J, *Workplace Law* (12th Ed., JUTA 2017) 153.

which creates intolerability in the workplace, he or she entitles an employee to resign and claim unfair constructive dismissal.

2.4.1.1 Harassment

It is worth noting that employees are protected against unfair discrimination on prohibited grounds such as sex or gender, with harassment considered as unfair discrimination.[101] Bullying is considered as type of harassment, and the legislator appear to support this notion as was seen in the case of *Mkhize and Dube Transport.*[102] The Commissioner held that case law developments in South Africa show that bullying is to be treated as a form of harassment by the judiciary.[103] Bullying at work is strongly linked to depression, as some employees start to develop depression owed to it, and others becoming simple targets for bullies as they grapple with depression.[104] Bullying at work is defined as:

> Repeated actions and practices that are directed against one or more workers; that are unwanted by the worker(s), that may be carried out deliberately or unconsciously, but cause humiliation, offence, and distress; and that may interfere with work performance and/or cause an unpleasant working environment.[105]

The Workplace Bullying Institute also defines bullying as:

> The abusive conduct that is threatening, humiliating, or intimidating, or work interference – sabotage – which prevents work from getting done, or verbal abuse.[106]

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101 See Sections 6(1) and 6(3) of the Employment Equity Act 55 of 1998(`EEA') which provides as follows:
Section 6(1) provides that "No person may discriminate directly or indirectly against an employee on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary grounds."
Section 6(3) provides that "Harassment of an employee is unfair discrimination and is prohibited on any one, or more prohibited grounds of unfair discrimination listed in subsection 1."

102 (2019) 40 ILJ 929 (CCMA) (*Mkhize*).

103 See *Mkhize.*

104 See Smit, DM, `The Double Punch of Workplace Bullying/Harassment Leading to Depression: Legal and Other Measures to Help South African Employers Ward Off a Fatal Blow' (2021) 25(1) *Law Democracy & Development* 33 (Smit DM).

105 See Einarsen, S, Hoel, H, Zapf, D, Cooper, C. *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice* (2nd Ed., New York: CRC Press 2010) 9.

106 See Workplace Bullying Institute, `The Healthy Workplace Bill' <https://healthyworkplacebill.org/ > accessed 17 October 2022.

It is apparent from the definitions of bullying in the workplace that the conduct of bullying may be intentional or not but is characterised by humiliation, verbal abuse of an employee and capable of creating an intolerable workplace, amongst others. The consequences of bullying when it comes to an employee may be physical glitches like somatic or musculoskeletal disorders, and to mental health problems, encompasses of anxiety, depression, psychological distress, and even suicidal ideation.[107] Bullying may be in the form of demeaning statements; denying vital information or, setting an employee up for failure; taking key responsibilities away from an employee to effectively demote him/her; deliberately assigning the victim to do "donkey work" or menial tasks; setting unreasonable targets or unreasonable deadlines, amongst others.[108]

The *Centre for Autism Research* case was concerned with the review and setting aside of an arbitration award made by the CCMA Commissioner to the effect that the applicant (employer) had to compensate her two employees who were found to be constructively dismissed.[109] The employees, that is, third and fourth respondents respectively, were special needs teachers[110] and had resigned due to the intolerable working environment at the hands of their employer. The third respondent was a homosexual man and was constantly demeaned by his employer by being called a 'screaming queen' which negatively impacted on his human dignity, and was demeaning, insolent, humiliating and made him not want to be at work.[111]

On one occasion, when they were attending a work conference with the fourth respondent, their employer shouted at them for smoking in front of all those who were present which was embarrassing and humiliating.[112] Moreover, their employer instructed them not to close the door when sleeping in the hotel

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107 See Conco, DN, Baldwin-Ragaven, L, Christofides, NJ, Libhaber, E, Rispel, LC, White, JA, Kramer, B, `Experiences of Workplace Bullying Among Academics in A Health Sciences Faculty At A South African University' (2021) 111(4) *South African Medical Journal* 315.

108 See Smit DM 32.

109 See *Centre for Autism Research* para 1.

110 See *Centre for Autism Research* para 3.

111 See *Centre for Autism Research* para 5.

112 See *Centre for Autism Research* para 7.

rooms as the rooms linked up to one another.[113] The third respondent when coming out of the shower felt attacked and that he had unwanted attention from his employer, when she said she wanted to see his "little bum".[114] Due to the intolerability subjected by his employer, the third respondent eventually resigned.[115]

The fourth respondent also had her fair share of defamatory conduct from her employer which caused intolerability of continued employment. Her employer would just go to her classroom and inappropriately address her in front of the learners. She once called her a goblin for not wearing make-up and said that her face needed make-up.[116] She also called one therapist to come look at her face to confirm her perceptions in front of the learners and other employees and was told that she looked sick.[117]

In essence, personal comments were passed due to her appearance which created an intolerable employment relationship. This led her to have a low self-esteem, feel stupid and lost her confidence, hence after one employee left the workplace who offered her extra-support to help deal with the intolerability, she sought the help of a psychologist.[118]

On another occasion when she was elected to attend a work conference in Botswana, her employer went with her. Although she thought that each one of them would sleep in separate single beds, when they arrived at the hotel, her employer asked for a double bed.[119] This meant that they had to share a bed, and this made the employee uncomfortable and anxious. The intolerability worsened when her employer showered with the shower curtains open, although she knew that there was no way the employee would not see her naked body.[120] The third respondent had to

113 See *Centre for Autism Research* para 7.
114 See *Centre for Autism Research* para 7.
115 See *Centre for Autism Research* para 10.
116 See *Centre for Autism Research* para 12.
117 See *Centre for Autism Research* para 12.
118 See *Centre for Autism Research* para 13.
119 See *Centre for Autism Research* para 14.
120 See *Centre for Autism Research* para 14.

make a quick plan to avoid watching her employer`s naked body until she was done showering.[121]

The employer made the workplace so intolerable to such an extent that the third respondent resorted to keeping her in a good mood because of her bad moods to survive such a place of work.[122] The employer made it a habit to make threats about deducting money from the employees 'salaries in case they did something she did not like.[123] The intolerability in the workplace was too much that it existed until the last day she handed in her resignation letter.[124] The Labour Court held that employer`s conduct made continued employment objectively intolerable for the employees and that the constructive dismissal was indeed unfair:

> What the evidence discloses is a workplace operated by a narcissistic personality whose offensive and unwelcome conduct had the effect of creating a toxic working environment in which discrimination, degradation and demeaning behaviour became the norm. I have no hesitation in finding that the nature and extent of the workplace bullying suffered by the third and fourth respondents were such that for the purposes of s 186(1)(e) of the LRA, their continued employment was rendered intolerable.[125]

In essence, the Court found that the employer rendered the continued employment of the two employees intolerable, and that the Commissioner's decision that they were unfairly constructively dismissed and thus entitled to compensation was correct.[126] Accordingly, the review application and the setting aside of his decision was dismissed.[127]

According to Rycroft the relationship of trust and confidence between the parties to an employment contract can be seriously damaged when an employee is humiliated in public, as humiliation or demeaning acts lies at the heart of dignity.[128] The Labour Appeal Court in *Loots* held that:

> The appellant (employer) had rendered the working environment intolerable for the respondent by, inter alia, throwing the book at her, finding her guilty of matters for which she could not be held responsible, humiliating her by publishing

121 See *Centre for Autism Research* para 14.
122 See *Centre for Autism Research* para 15.
123 See *Centre for Autism Research* para 16.
124 See *Centre for Autism Research* para 22.
125 See *Centre for Autism Research* para 45.
126 See *Centre for Autism Research* para 51.
127 See *Centre for Autism Research* para 51.
128 See Rycroft 1441.

> the news of her final written warning to the parents of inmates, and depriving her of keys.[129]

It is worth noting that it is possible that the conduct of swearing from the employer may lead to constructive dismissal.[130]

2.4.1.2 Making it impossible for an employee to do his or her work

When an employer subject an employee to excessive workloads, thereby making it impossible to do his or her work, such is considered as bullying.[131]

2.4.1.3 Unfairly taking disciplinary action

An employer bullies an employee when he or she opts to abuse the disciplinary procedure by using the formal disciplinary processes unnecessarily as disputes can easily be resolved through simple mediatory mechanisms.[132] It is in this regard that, an employee finds such conduct from the employer to be both malevolent and penal and consequently resigns, claiming constructive dismissal.[133]

2.4.1.4 Sexual harassment

An employee can claim sexual harassment either as a form of unfair discrimination or as a self-standing misconduct emerging form the employer or other employees with the employer`s knowledge. Sexual harassment refers to the:

> Persistent, unwanted sexual advances, verbal abuse, and/or demands for sexual favours, often as a condition of continued employment, which creates an environment that is hostile or intimidating.[134]

The real question in sexual harassment cases is whether there had been unwelcome advances of a sexual nature, and if there were, then sexual harassment occurred.[135] Consequently, an employer who sexually harass an employee may be

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129 See *Loots.*

130 See *L M Wulfsohn Motors* para 13.

131 See Botha, D ` Employees Perceptions and Experiences of Bullying in The Workplace' (2019) 16 *Journal of Contemporary Management* 4.

132 See Rycroft 1442.

133 See Rycroft 1442.

134 See 360 Training, `Effects of Sexual Harassment in The Workplace' <https://www.360training.com/blog/effects-of-workplace-sexual-harassment/> accessed 17 October 2022.

135 See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 *ILJ* 116 (LAC) paras 8- 9.

found guilty of creating an intolerable working environment in the same way as the one who failed to take the necessary steps which may eradicate such intolerability. The resignation of an employee due to unwanted sexual harassment from her supervisor which had been reported to the manager and not all reasonable steps were taken to do away with it, was found to be constructive dismissal.[136] Smit submits that sexual harassment in the workplace has the potential to cause stress-induced illnesses in employees.[137]

2.4.1.5 Ordering an employee to perform unlawful acts

The employer`s conduct of exerting pressure on an employee to do activities which were fraudulent was held to be calculated or likely to destroy or seriously damage the relationship of employment.[138] Such can also be considered a form of bullying in the workplace.[139]

2.4.2 Stress associated with employment

The stress that comes with being an employee is considered as one of the many factors which can create an intolerable working environment.[140] Thus entitles an employee to resign and successfully claim constructive dismissal.[141] In *Yona*, the stress associated with employment was held to constitute an intolerable relationship of employment.

2.5 Circumstances which do not constitute constructive dismissal

It is worth noting that in circumstances where all the elements of constructive dismissal as discussed above are unsatisfied, an employee will not succeed in a claim for constructive dismissal.

2.5.1 Offensive words

136 See *Ntsabo v Real Security CC* (2003) *ILJ* 2341 (LC)(*Ntsabo*).

137 See Smit 33; See also *Media 24 Ltd v Grobler* 2005 26 *ILJ* 1007 (SCA) where the employee found continued employment intolerable because of the stress caused by being sexually harassed by her supervisor. The SCA held the employer liable for failing to exercise its common law duty to care.

138 See *Bonthuys and Central District Municipality* (2007) 28 *ILJ* 951 (CCMA).

139 See Rycroft 1444.

140 See Tshoose 122.

141 See Smit 33.

2.5.1.1. Solid Doors

In *Solid Doors* case, the employer told the employee to `f**k off' and he took the matter to the Labour Appeal Court claiming dismissal, which held that he was not constructively dismissed. The court correctly reasoned that all the requirements of constructive dismissal ought to be present.[142] Satisfying one or two will lead to an unsuccessful claim of constructive dismissal as was seen in the *Solid Doors* case. Although, it can be argued that indeed the employer may have caused intolerability by his usage of words, the fact remains that the employer did not dismiss him. This goes back to the position held by the courts that an employee will be faced with difficult working conditions throughout the course of employment, which may include being irritated and frustrated amongst others.[143]

Although, being told to `f**k off' by the employer may create unhappiness at work for a reasonable person, it is inadequate to prove constructive dismissal.[144] The situation would have given birth to a different outcome, had the employee resigned owed to the intolerability that the employer subjected him to, and then claimed constructive dismissal.

2.5.1.2 Miladys (A Division of Mr Price Group Ltd) v Naidoo & others[145]

The case of *Miladys* is another typical case of conduct from the employer which the courts may not view as capable of giving birth to intolerability. The LAC in *Miladys* held that swearing by the employer is not adequate to cause intolerability. It further held that the following factors have an impact on whether or not certain conduct will constitute intolerability:

The maturity, together with the work experience of an employee

This factor will be relevant for purposes of weighing whether or not, the verbally abused employee was supposed to have been capable of handling the situation amicably.

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142 See *Solid Doors* para 28.

143 See *Jordaan* 2336*;* See also *Old Mutual Group Schemes v Dreyer* (1999) 20 *ILJ* 2030 (LAC) 2036. See also *Asara.*

144 See for e.g. *Jordaan*.

145 (2002) 23 ILJ 1234 (LAC)(*Miladys*).

Abuse related to work issues

This factor is material for purposes of identifying whether the abuse was called for or justified in relation to work or it was not because of personal issues extant between the parties. Once it has been demonstrated that the former is true, that is, the abuse is not personal but associated with the employment relationship, then a great probability exists that a court will find that the situation was not intolerable.[146]

2.6 Conclusion

It is clear from the above discussion that an employer who acts in a certain way in contravention of the employment contract breaches the duty of mutual trust and confidence. Consequently, he or she passes the test for constructive dismissal as discussed in the *Loots* case. Accordingly, an employee can succeed in a claim for constructive dismissal in the circumstances. The employees who experience workplace bullying could rely on the provisions of section 186(2) of the LRA which forbids unfair labour practices by employers.[147]

Even though there are no judgments relating to remedies for workplace bullying, the victims may claim damages for delict against their employers in accordance with the common law based on the negligence or vicarious liability of employers.[148] After proving that constructive dismissal has occurred, an aggrieved employee has remedies which will be discussed in the next chapter which focuses on intolerability within the ambits of section 193(2)(b of the LRA.

146 See *Miladys* para 33.

147 See Calitz, K ` Bullying in the Workplace: The Plight of South African Employees' (2022) 25 *PER / PELJ* 17(Calitz).

148 See Calitz 18.

CHAPTER 3

INTOLERABILITY WITHIN THE AMBIT OF SECTION 193(2)(b) OF THE LRA

3.1 Introduction

This chapter examines intolerability of continued employment within the context of section 193(2)(b) of the LRA. Le Roux avers that on account of the principles set out in cases of constructive dismissal, very strong evidence of the intolerability ought to be indispensable.[149] Furthermore, it must not be instantly held that the situation the employee grumbles of constitutes intolerability.[150] Since the employer`s perceptions concerning possibilities of continual employment can indicate badly on such, unless they are buttressed by solid evidence, they must be treated prudently.[151]

Employees usually face dismissal in the place of work owed to acts like misconduct, which result in intolerability as well as the breakdown of the relationship of trust. Okpaluba and Maloka submit that the concepts "breakdown of trust relationship" as well as "intolerability" suggest two diverse ways of saying one thing, that is, of saying that the employee has ceased to be welcome at the place of work.[152]

3.2 The overlap between intolerability and breakdown of the trust relationship

Intolerability usually tackles issues of the relationship of trust between the employer as well as employee.[153] The intolerability of the continual employment relationship within section 193(2)(b) can be caused by misconduct which includes, amongst others, dishonesty, or breach of trust.[154] Nevertheless, the onus is on the

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149 See Le Roux, R 'Reinstatement: When Does A Continuing Employment Relationship Become Intolerable' (2008) *Obiter* 74 (Le Roux).

150 See Le Roux 74.

151 See Le Roux 74.

152 See Okpaluba, C and Maloka, T 'The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (1)' (2021) 35(1) *Speculum Juris* 150 (Okpaluba and Maloka).

153 See for e.g. *Potgieter v Tubatse Ferrochrome* (2014) 35 ILJ 2419 (LAC) para 37 (*Potgieter*).

154 See for e.g. Israelstam , I ` Intolerable Employment Relationship Essential To Justify Dismissal' < Intolerable employment relationship essential to justify dismissal | Labour Guide > Accessed 18 November 2022 (Israelstam).

employer to establish that the harm is serious to the extent of being capable of resulting in the intolerability of continued employment.

Rycroft submits that different employers may not find the same act which was intolerable for one employer to be intolerable for them as well.[155] Hence assessing intolerability requires a subjective approach, but the Courts or arbitrators have the final say in this regard.[156] The same test must be used for the employee as well as employer to check whether a continued relationship of employment is intolerable. The test is the same used in constructive dismissal cases and was set out in the *Loots* case.[157] Intolerability for an employer can manifest itself in various forms of employee`s misconduct.

Discussion of intolerability within the ambit of section 193(2)(b) cannot take place without close analysis of the pervasive breakdown of the relationship of trust. Trust forms the heart of a relationship of employment, thus, in its absence, there can be no relationship of employment.[158] When an employer does not trust its employee, it reveals one symptom indicative of the intolerability of continued employment.[159] Trust is lost when an employee commits a transgression, after a relationship of trust has been established, by so doing, he or she forces the employer`s hand to have a different attitude towards him or her.[160]

Nevertheless, more is required for the employer to find that there is an irretrievable breakdown of trust, losing trust in an employee on its own cannot suffice.[161] Put simply, something more is essential for a claim of intolerability, an employee must at least be found guilty of a transgression against his or her employer. It can only be fair that before facing a sanction of joblessness, employees ought to have transgressed against the employer which led to the loss of trust *albeit* they may be compensated.[162]

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155 See Rycroft on Intolerable Employment Relationship 2273.
156 See Rycroft on Intolerable Employment Relationship 2273.
157 See for e.g. *Loots* para 72.
158 See *Fijen* paras 26E-F.
159 See Rycroft on Intolerable Employment Relationship 2274.
160 Rycroft on Intolerable Employment Relationship 2275.
161 *New Clicks SA (Pty) Ltd v CCMA* (2008) 29 *ILJ* 1972 (LC) para 20 (*New Clicks SA*).
162 *New Clicks SA* para 20.

It has been said the intolerability of continued employment ought to be consequent to the employee`s misconduct that resulted in his or her dismissal, and the employer has an obligation to bring forward evidence of such misconduct.[163]

3.2.1 Woolworths (Pty) Ltd v CCMA[164]

In *Woolworths* case the employee had told his manager that he was ill and thus he would not be able to tender his services on that specific day.[165] However, he went on to watch a rugby match on the same day he claimed to be ill.[166] He was also fully aware that he would be entitled to sick leave benefits, but this did not stop him. After subjecting him to a disciplinary enquiry on a charge of gross misconduct, he was found guilty and dismissed.[167] He then referred the matter claiming to have been dismissed unfairly to the CCMA where it was held that his dismissal was for a substantively unfair and the procedure followed in dismissing him was also not fair.[168]

The Commissioner held that the relationship of trust had not broken down due to the employee`s conduct, hence he ordered that he be reinstated.[169] His reasoning was that the employee did not hide the fact that he went to attend a rugby match, and that no evidence was found to the effect that the employee was given warnings in the past.[170] Aggrieved by the findings, the employer filed a review application before the LC. However, the judge also agreed with the findings of the Commissioner regarding the substantive fairness of the dismissal but disagreed regarding procedural fairness.[171] This still had the same effect on the employer, that is, he would still have to reinstate the employee. Accordingly, he appealed to the LAC.

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163 See Okpaluba, C and Maloka, T 'The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (2)' (2021) 36(1) *Speculum Juris* 111 (Okpaluba and Maloka part 2).

164 (2022) 43 *ILJ* 839 (LAC) (*Woolworths*).

165 *Woolworths* para 1.

166 *Woolworths* para 1.

167 *Woolworths* paras 3-4.

168 *Woolworths* para 4.

169 *Woolworths* para 5.

170 *Woolworths* para 5.

171 *Woolworths* para 6.

The judge disagreed with the findings of the CCMA and LC. He found that the employee had indeed acted dishonestly when he did not report for duty because he was too ill to perform his duties but managed to travel to support his local rugby team, whilst aware that he would receive sick leave benefits.[172] The Court held that his behaviour was one capable of damaging the relationship of trust between both parties to an employment contract.[173] Accordingly, it held that a breach of trust had occurred due to the employee`s dishonesty when he lied about being sick and later on went on to watch a rugby match whilst fully aware that he would be paid for it.[174] The Judge held that due to his initial unreliability as an employee, that is, he had been disciplined for absenteeism and late coming in the past, and the dishonest conduct, the trust relationship had broken down.[175]

3.2.2 Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v CCMA[176]

In *Bakenrug Meat* case, the employee had been facing dismissal after she was found guilty dishonesty for failing to tell her employer that she also ran a comparable business which marketed dried meat products like her employer and was unable to attend to her job in the employer`s employ.[177] She approached the CCMA claiming unfair dismissal which found that her dismissal was for a fair reason as she acted in a dishonest manner and her conduct was not called for.[178]

She then applied for review to the LC, as she was aggrieved by the decision. The Judge found in her favour and held that her dismissal was substantively unfair, he found that the Commissioner came to a conclusion that could not reasonably have been made by a decision-maker.[179] He reasoned that there existed no connection

172 *Woolworths* para 11.
173 *Woolworths* para 13.
174 *Woolworths* para 14.
175 *Woolworths* paras 14-16.
176 (2022) 43 *ILJ* 1272 (LAC) (*Bakenrug Meat*).
177 *Bakenrug Meat* para 1.
178 *Bakenrug Meat* para 4.
179 *Bakenrug Meat* para 7.

between her duties in the employer`s employ and the operating of the side-line business.[180]

Nevertheless, on appeal, the Judge reached a different conclusion. He held that the employee did not reveal a significant fact that she was operating "a side-line business" selling meat products, although they may have differed to the meat products sold by her employer.[181] He also held that the fact that she was still able to perform in terms of her contract was immaterial.[182] He further held that her failure to reveal such relevant facts suggested that she contravened her duty of acting in good faith to her employer.[183] He held that the Commissioner`s conclusion that "employees act in bad faith if conflict of interest may arise even though no real competition actually results" was well fortified.[184] He further held that the Commissioner`s decision was one of a reasonable decision- maker, when he held that the employee had conducted herself in a dishonest and unacceptable way.[185]

3.3 Statutory remedies for unfair dismissal

Section 193 (2) of the LRA provides that the LC or the arbitrator must require the employer to reinstate or re-employ the employee unless:

> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.
>
> (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.
>
> (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems

180 *Bakenrug Meat* para 7.
181 *Bakenrug Meat* para 15.
182 *Bakenrug Meat* para 15.
183 *Bakenrug Meat* para 15.
184 *Bakenrug Meat* para 16.
185 *Bakenrug Meat* para 17.

reasonable, which may include ordering reinstatement, re-employment or compensation.[186]

As already indicated, the focus is on "non-reinstatable conditions" in terms of section 193(2)(b) of the LRA.

3.4 The meaning of reinstatement

The term reinstatement is not defined in the LRA, however, courts have shed light in relation to its meaning in the case law discussed below.

3.4.1 Equity Aviation Services (Pty) Ltd v CCMA[187]

In *Equity Aviation* the CC held that in disputes relating to unfair dismissals, reinstatement is considered the primary statutory remedy.[188] Reinstatement is in accordance with section 193(1)(a) of the LRA. A CCMA Commissioner or Judge of the LC who decides the unfair dismissal dispute for the first time must decide whether reinstatement is to be retrospective. Moreover, he or she must determine whether the reinstatement order will be effective from the date of the decision to reinstate or from an earlier date but before the date of dismissal.[189]

Notably, reinstatement can only be fixed at a date after the employee was unfairly dismissed.[190] Except if the Commissioner has ordered that the reinstatement will operate *ex post facto,* when an employee is reinstated at the CCMA, he or she will only return to his or her job from the date the award was made.[191]

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186 Section 193 of the LRA.

187 (2008) 29 *ILJ* 2507 (CC) (*Equity Aviation*).

188 In *Equity Aviation Service* Nkabinde J at para 36 explained the word 'reinstate' as follows:

> The ordinary meaning of the word 'reinstate' is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.

189 *Equity Aviation* paras 36 and 65.

190 *Equity Aviation* para 36.

191 *Equity Aviation* para 36.

As soon as a LC or Commissioner decides that reinstatement must be granted as the suitable remedy in cases of unfair dismissal, then such an employee must also be considered to have been dismissed unfairly.[192] Granting reinstatement does not amount to a violation of the right to fair labour practices.[193] Rather, reinstatement is largely linked to fairness as well as job security, with the latter being the primary purpose of the LRA.[194]

It must be noted however, that once reinstatement is granted, the other remedies, that is, re-employment or compensation can no longer be granted, and vice versa.[195] Put differently, although reinstatement is the first remedy to be considered, the remedies are substitutes of one another. Reinstatement cannot be granted only if the non-reinstatable conditions in section 193(2) are pertinent, in those circumstances, compensation can then be granted.[196] At all material times an employee facing an unfair dismissal ought to be granted the primary remedy except if that is not his or her wish.[197]

3.4.2 Booi v Amathole District Municipality[198]

The case of *Booi* was concerned with an employee who had been unfairly dismissed for misconduct, *albeit* he was cleared of the charges against him, he was not reinstated.[199] The question the Court had to answer related to whether a LC or arbitrator had a right to consider in line with section 193(2)(b) of the LRA, whether a continued relationship of employment relationship would be unbearable, when contemplating reinstatement.[200] The apex court answered this question in the affirmative. It held that section 193(2) necessitates a Court to determine the intolerability of the relationship of employment before ordering that the unfairly dismissed employee be reinstated.[201]

192 *Equity Aviation* para 39.
193 *Equity Aviation* para 39.
194 *Equity Aviation* para 39.
195 *Equity Aviation* para 42.
196 *Equity Aviation* para 44.
197 *Equity Aviation* para 53.
198 (2022) 43 *ILJ* 91 (CC)(*Booi*).
199 *Booi* para 2.
200 *Booi* para 2.
201 *Booi* para 36.

Accordingly, it relied on various court jurisprudence to say that an arbitrator commits a reviewable irregularity when he or she fails to contemplate section 193(2) as well as to judge whether reinstatement may be unsuitable.[202] It went on to say that the fact that the charges levelled against the employee were unsubstantiated did not entail that the examination regarding intolerability of continued employment could not be embarked upon.[203] Nevertheless, the LC would still be required to consider the intolerability of continued employment even if there was no evidence of intolerability.[204]

It emphasised that intolerability lies at the hands of the LC or arbitrator to establish, when judging whether to grant reinstatement, as opposed to the pleadings of the parties in question.[205] That is, it is for the LC or arbitrator to show that there is intolerability of continued employment and not for the employer and employee. What is only required from them is to state facts relating to intolerability, but the LC or arbitrator will have the final say.

It held that the acceptable interpretation to section 193(2)(b) of the LRA is as follows:

> …where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a)-(d) exist, in which case compensation may be ordered depending on the nature of the dismissal.[206]

The remedy of reinstatement is not paramount because of a mere coincidence but the result of a legislative policy choice.[207] It held further that the language, setting and objective of section 193(2)(b) order that intolerability is a high threshold.[208] The phrase "intolerable" refers to a level of unendurability, and ought to necessitate a lot

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202 *Booi* para 36. See also *Moodley v Department of National Treasury* (2017) 38 *ILJ* 1098 (LAC) para 33.
203 *Booi* para 36.
204 *Booi* para 37.
205 *Booi* para 37.
206 *Equity* para 33. See also *Booi* para 38.
207 *Booi* para 39.
208 *Booi* para 40.

more than the insinuation of a difficult, fraught, or even sour employment relationship.[209]

The high threshold of intolerability implement the objective of the order of reinstatement in section 193(2), which is to offer protection to employees who are dismissed without fair reasons, by the restoration of the contract of employment and placing them in the *status quo* they would have been in if they were not unfairly dismissed.[210] The LC or arbitrator must not easily reach the conclusion of the intolerability of continued employment, and the employer is obliged to furnish reasons which carry some weight, sustained by concrete evidence, to prove intolerability.[211]

The CC also highlighted the fact that there exists a difference between intolerability and incompatibility, with the result that the latter may call for different remedies from those of the former.[212] Where it is found that the employee facing unfair dismissal is not guilty of the charges against him, the burden of proof to establish intolerability is intensified.[213] The Court has stressed that more is needed to meet the high threshold of intolerability, accordingly, it will be insufficient when an employer merely repeat exactly the similar evidence which was unaccepted for lack of sufficiency to justify dismissal.[214] It also held that if the employee`s behaviour did not warrant his or her dismissal, it becomes hard to comprehend the reason for furnishing a condition to thwart his or her reinstatement.[215]

The Court has noted that in circumstances where an arbitrator complying with section 193(2) has reflected on the evidence only to find that it does not prove intolerability, thus granted reinstatement, then the high threshold by section 193(2)(b) orders that his or her decision must not instantly be inhibited by a Court reviewing the

209 *Booi* para 40.
210 *Booi* para 40.
211 *Booi* para 40.
212 *Booi* para 41.
213 *Booi* para 42.
214 *Booi* para 42.
215 *Booi* para 42.

matter.[216] Accordingly, it set aside the order of the LC and ordered the reinstatement of the employee retrospectively.[217]

In essence this decision shows that an employee whose employment contract was terminated unfairly, due to an alleged misconduct, must be reinstated provided that he is cleared of the charges which led to the dismissal. This is in line with the section 23(1) of the Constitution, fairness as well as job security.[218]

3.5 Unravelling a misnomer: reinstatement in the context of constructive dismissal

3.5.1 WC Education Department v The GPSSBC[219]

The case of *WC Education Department* is a typical example of a case where a constructively dismissed employee was reinstated. Mr. Gordon had been ill for the longest time and thus could not render his services to the employer in a satisfactory manner. Owed to this he applied for ill health retirement and temporary incapacity leave.[220] However, these could not be processed for many years owed to the conduct of the senior employees of the employer.[221] For our purpose, that is, the employer.

During his absence from work backed up by medical certificates, he was getting his monthly salary, for a period of two years. Owed to the employer`s failure to process his applications, he was forced to return to work or be considered as having absconded. When he returned to work, he was told that monthly deductions of R12 000.00 would be deducted from his salary to make up for the money he was paid during the two-year period.[222] This would not leave him with financial stability, thus the employment relationship became intolerable for him and he resigned. He then

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216 *Booi* para 43.
217 *Booi* paras 53 and 55.
218 See also *Solidarity obo Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority* (2021) 42 *ILJ* 852 (LAC); *Department of Agriculture, Forestry and Fisheries v Teto* (2020) 41 *ILJ* 2086 (LAC); *NUMSA obo Motloba v Johnson Controls Automotive SA (Pty) Ltd* (2017) 38 *ILJ* 1626 (LAC).
219 (2014) 35 *ILJ* 3360 (LAC) (*WC Education Department*).
220 *WC Education Department* para 3.
221 *WC Education Department* para 7.
222 *WC Education Department* para 8.

approached the CCMA claiming constructive dismissal.[223] The matter also went to the LC,[224] and the LAC.

The LAC held that reinstatement was a reasonable remedy in circumstances where there was no available contradictory evidence to refute the employee`s version.[225] It is not all the time that granting the remedy of reinstatement is unsuitable with section 193(2)(b) of the LRA.[226] The stage at which intolerability occurred is of significance and as a result, when an employee claims constructive dismissal and desires to be reinstated he or she must prove specific aspects. Firstly, that when he or she resigned, he or she had a sincere opinion that the employer had made intolerability of continued employment.[227] Secondly, he or she ought to show that the conditions which caused intolerability and thus led to the resignation no longer prevail.[228]

An employee must not be refused reinstatement because of his or her resignation owed to an intolerable relationship of employment caused by the behaviour of the employer.[229] The LAC agreed with the Court *a quo* that he had proven his constructive dismissal.[230] Moreover, it held that the employer failed to prove that dismissal was substantively fair. Accordingly, it concurred that Commissioner`s decision regarding the substantive fairness of the dismissal was of a reasonable decision-maker.

Since section 193(2)(b) of the LRA put prominence on the circumstances surrounding the dismissal, reinstatement may be granted if those are no longer extant after the dismissal.[231] If an employee left his or her workplace due to harassment, for

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223 *WC Education Department* para 12. The arbitrator held that that Mr. Gordon was unfairly constructively dismissed and ordered his reinstatement.

224 See for e.g. *WC Education Department* para 12 where the employer referred the matter to the LC due to being aggrieved by the arbitration award, however, the LC concurred with the award.

225 *WC Education Department* paras 33-34.

226 *WC Education Department* para 34. See also Kubjana and Manamela 335.

227 *WC Education Department* para 34.

228 *WC Education Department* para 34.

229 *WC Education Department* para 34.

230 *WC Education Department* para 35.

231 See Kubjana and Manamela 334.

example, then if it can be established that the employer took all the necessary measures to do away with such, then he or she can safely return to the workplace.

The LC or an arbitrator is under a legal obligation to consider all the relevant non-reinstatable conditions to check whether a specific case is one where reinstatement must not be ordered.[232] Accordingly, the LC or tribunal ought to establish whether or not the exception to reinstatement in terms of section 193(2)(b) of the LRA is pertinent.[233] Furthermore, they must not swiftly agree employer`s opinion in this regard.[234]

3.5.2 PE v Dr Beyers Naude Local Municipality[235]

In *Dr Beyers* the employee had been subjected to intolerability of continued employment by her employer and resigned, instead of pursuing a claim of unfair constructive dismissal in terms of the LRA, she opted to claim for delict.[236] She had been sexually assaulted by her immediate superior at work when he kissed her on the mouth without her consent.[237] However, due to the assault and the Post Traumatic Stress Disorder (PTSD) it caused and the way in which the employer handled it, she was forced to resign.[238] Although she did not accept it, after she had resigned, the employer had made her an offer of employment which had effect of retrospective reinstatement aimed at putting her in the position she would have been in but for the resignation.[239]

The employer only instructed the perpetrator not to come where the employee was working and not to have any contact with her, however, he failed to adhere to such instructions which further worsened the situation for the complainant to the extent that she would even lock her office upon realisation that he had come to her workplace.[240] Although she complained about this, the employer failed to do anything about it, the employee was not suspended and was not subjected to any disciplinary

232 See for e.g. *SARS v CCMA* (2017) 38 *ILJ* 97 (CC) para 44 (*SARS*).
233 See. Le Roux 71.
234 See Le Roux 71.
235 (2022) 43 *ILJ* 1545 (ECG) (*Dr Beyers*).
236 *Dr Beyers* para 3.
237 *Dr Beyers* para 10-11.
238 *Dr Beyers* para 12.
239 *Dr Beyers* paras 16-17.
240 *Dr Beyers* para 26.

enquiry.[241] The employer had breached its duty to a safe and healthy working environment when it failed to take steps against an employee who had sexually assaulted another and still remained in the place of work.[242] The circumstances surrounding her resignation are well captured as follows:

> E[…] was thereafter left to fend for herself. The Municipality took no steps to support or empower her. She was offered no counselling or any other assistance. There was no communication to E[…]'s co-employees affirming support for her and condemning the conduct of Jack and no communication recording that conduct of the nature was unacceptable and in future would attract the sanction of dismissal. Rather, if anything, the message was that victims of sexual assault who were brave enough to come forward would not receive redress. The unrepentant perpetrator, Jack, was allowed to roam free in the workplace with unfettered access to E[…]. Although she no longer reported to Jack, he still exercised a degree of control over her. E[…] stated that on one occasion when she applied for leave after the assault, the Municipality took the stance that it was Jack who had the authority to approve her leave. She also said that Jack requested a meeting with her but she refused to accede to this request.[243]

The employer`s failure to protect her had devastating repercussions for her well-being, both emotionally as well as psychologically then the intolerability of continual employment kicked in.[244]

The judgement suggests that reinstatement is not a suitable remedy in constructive dismissal cases relating to sexual assault, more especially if the perpetrator is still in the employer`s employ.[245] An employee can opt not to accept the offer to be reinstated in the workplace where the relationship of trust and confidence was no longer extant.[246] After calculating the amount to be given to the employee for her damages, she was entitled to R3,998,955.02 with interests after 14 days of the order, which was to be paid by her employer.[247] That is, due to its failure to do all that was necessary to protect the employee after she was sexually harassed, the employer was held vicariously liable for its employee`s unacceptable behaviour. In this case, the prevalent non-reinstatable condition that was extant was according to section 193(2)(b) of the LRA.

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241 *Dr Beyers* para 27.
242 *Dr Beyers* paras 38-39.
243 *Dr Beyers* para 41.
244 *Dr Beyers* para 44.
245 *Dr Beyers* 75-76.
246 *Dr Beyers* paras 84-85.
247 *Dr Beyers* para 157.

3.6 Developments on "non-reinstatable conditions"

3.6.1 Can a known racist be reinstated?

In *SARS* the employee who was white had referred to his African superior, as a kaffir[248] following a squabble, he was then subjected to a disciplinary enquiry faced with the following charges:

> 2.1 '*Ek kan nie verstaan hoe kaffirs dink nie'* [direct translation: "I cannot understand how kaffirs think."] (Charge 1)
>
> 2.2 'A kaffir must not tell me what to do' (Charge 2)
>
> 2.3 By so doing he used the racist remarks 'kaffir' or alternatively he used derogatory and abusive language towards his Team Leader Mr Mboweni. (Charge 3).[249]

During the enquiry the Chairperson and Mr Moodley, who was employed and was representing SARS negotiated a favourable sanction after the employee had pleaded guilty.[250] Accordingly, the sanction was imposed on the employee following a discussion with him and his representatives. He was given a final written warning, punitive suspension for ten days, and was dictated to undergo counselling.[251]

As soon as the SARS Commissioner received the report on the decision reached in the disciplinary enquiry, he altered it from a final written warning to a dismissal.[252] He did so without giving the employee the chance to challenge the suitability of the

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248 See for e.g. *Rustenburg Platinum v SAEWA obo Bester* 2018 (5) SA 78 (CC); *Solidarity obo Pio v Department of Public Works: Roads and Transport, North West* [2017] ZALCJHB 50; *Biggar v City of Johannesburg, Emergency Management Services* (2011) 32 *ILJ* 1665 (LC); *TSI Holdings (Pty) Ltd v NUMSA* [2006] 7 BLLR631 (LAC); *Lebowa Platinum Mines Ltd v Hill* (1998) 19 *ILJ* 112 (LAC). See also Maloka, T 'A Critical Appraisal of Dismissals at The Behest of a Third Party: The Impact Of The Constitutional Labour Rights' (2021) 42(1) *Obiter* 108-109; Khumalo, B 'Racism in the Workplace' (2018) 30 *South African Mercantile Law Journal* 393; Botha, M 'Managing Racism in the Workplace' (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 671; Raligilia, KH 'A Reflection On The Duty Of Mutual Trust And Confidence: Off-Duty Misconduct In The Case Of *Biggar v City of Johannesburg* Revisited' (2014) *SAJLR* 70; Thabane, T and Rycroft, A 'Racism In The Workplace' (2005) *Industrial Law Journal* 43.

249 *SARS* para 15.

250 *SARS* para 16.

251 *SARS* para 16.

252 *SARS* para 17.

elevated and fatal penalty.[253] Accordingly, the employee contested the fairness of his dismissal and approached CCMA.[254] The issues before the CCMA were whether his dismissal was done without following a fair procedure and without a fair reason and whether SARS Commissioner was allowed to convert a penalty of a final written warning, as well as punitive suspension to dismissal.[255]

The arbitrator held that it was impermissible in law for the Commissioner to replace the penalty inflicted by the Chairperson and that the replaced penalty of dismissal was not fair.[256] She then made an order which restored the *status quo* extant before the Commissioner intervened.[257] Aggrieved by this, SARS challenged the award in the LC as well as LAC unsuccessfully.[258]

The CC held that in circumstances where the word kaffir is used it amounts to harmful contempt for human dignity and where hatred based on race is emitted by an employee against his co-workers at work, that generally deems the relationship of employment intolerable.[259] Accordingly, in those circumstances an employer need not prove the breakdown of the relationship of trust and prove intolerability of continued employment.[260] It summarised its findings as follows:

> By ordering SARS to reinstate Mr Kruger the Arbitrator acted unreasonably. She also does not appear to have been mindful of the fact that in terms of section 193(2) of the LRA, reinstatement would not follow as a matter of course. It would in fact not be an option "if circumstances surrounding the dismissal [were] such that a continued employment relationship would be intolerable". No reasonable arbitrator could have ordered reinstatement. That reinstatement part of her award is thus unreasonable and should be reviewed and set aside.[261]

This judgement suggests that racism in the workplace will not be taken lightly by the Courts given the historical background of our country. That is, it is considered as a serious misconduct which has no place in our democratic society. Accordingly, it can result in the intolerability of continued employment to such an extent that

253 *SARS* para 17.
254 *SARS* para 17.
255 *SARS* para 17.
256 *SARS* paras 20-21.
257 *SARS* para 21.
258 *SARS* para 23.
259 *SARS* para 46.
260 *SARS* para 46.
261 See for e.g. *SARS* para 49.

reinstatement must not be ordered according to section 193(2)(b) of the LRA. Although, in many misconducts committed in the workplace, the employer is usually required to prove the intolerability, in racism cases, doing so would prove to be insensitive. This is so as intolerability manifestly flows from the employee`s misconduct. It must be noted that the use of very strong derogatory language such as kaffir will not always be sufficient to refuse the remedy of reinstatement. However, such an employee can walk away with some compensation as reinstatement can never be granted.

3.7 The effect of post-dismissal misconduct on the intolerability of continued employment relationship

3.7.1 Glencore Holdings (*Pty*) *Ltd v Sibeko*[262]

In *Glencore Holdings* the employee had been dismissed for committing a misconduct by failing to adhere to reasonable instruction, of insubordination as well as of dishonesty.[263] He then approached the CCMA claiming unfair dismissal and indicated that he wished to be reinstated.[264] The arbitrator found that the employer was unsuccessful in proving that the employee had committed the misconduct in question. Accordingly, he found that the employee had been dismissed unfairly but denied him reinstatement as the primary remedy for unfairly dismissed employees. He reasoned that there was an irretrievably breakdown of the relationship of trust in the employment relationship caused by the employee`s unruly conduct during the arbitration proceedings. He did not contemplate section 193(2) of the LRA in reaching his decision which constituted an abuse of his power.

Aggrieved by the arbitrator`s findings, the employee approached the LC for review, which found that his dismissal was indeed not fair and reinstated him. Now the employer was aggrieved and lodged an appeal in the LAC, however, it upheld the Court *a quo*`s findings. The Court had found that the ambit of section 193(2)(b) of the LRA, was restricted to events up to the point where an employee was dismissed

262 [2018] 1 BLLR 1 (LAC)(*Glencore Holdings*).
263 *Glencore Holdings* para 2.
264 *Glencore Holdings* para 3

but not afterwards, like arbitration proceedings.[265] However, it also found that the ambit of section 193(2)(c) of the LRA was not restricted to events before or after the dismissal, accordingly, allowed for a flexible assessment of all the relevant circumstances.[266] The judge emphasised the following:

> …He concluded that Sibeko's conduct, even if deserving of reproach could not be construed to inhibit his reinstatement as a dozer driver, and thus his reinstatement was not, as imagined by the arbitrator, "impracticable" in the sense meant in (c). This conclusion is unquestionably correct because the role performed by Sibeko as a dozer driver did not embrace a dimension that a display of bad manners in the arbitration proceedings would render a reinstatement inappropriate. The true issue is not that Sibeko was justified in his outbursts, or that there is a degree of mitigation in the given circumstances for his poor manners, but rather that the functional role performed by a dozer driver within the employer's organisation, including the functional rapport or lack therefore with his superiors, was not adversely impacted by such conduct, within the meaning of (c).[267]

This judgment suggests that an employee can be reinstated if he or she commits a misconduct after dismissal in line with section 193(2)(b) of the LRA. The section is only concerned with the employee`s misconduct before he or she was dismissed. Accordingly, if he or she committed a misconduct before dismissal, such can be an appropriate factor in deciding whether reinstatement is suitable. An employer lacks jurisdiction to discipline someone who is no longer in its employ. As soon as the employee is dismissed, he or she cannot be held accountable for any misconduct. In short, post-dismissal misconduct is not part of the circumstances surrounding dismissal, hence it cannot be said that intolerability of continued employment is extant owed to it.

However, if an employee commits a misconduct after dismissal, he or she may not be reinstated if such is connected to the operational requirements of the employer. That is, if an employee lies during proceedings which occur post-dismissal, whilst his or her job requires an honest person, he or she may not be reinstated due to impracticability in within the ambit of section 193(2)(c) of the LRA.[268]

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265 *Glencore Holdings* para 9.
266 *Glencore Holdings* para 10.
267 *Glencore Holdings* para 11.
268 *Glencore Holdings* para 10.

3.7.2 Msunduzi Municipality v Hoskins[269]

In *Msunduzi Municipality,* the employee had been charged with grave insubordination, impudence, as well as misconduct. He was charged as follows:[270]

- For gross insubordination as he challenged the Municipal Manager`s authority by declining to adhere to his directive to recuse himself from and stopping to speak for his colleagues in disciplinary processes initiated by the municipality;
- Three charges of serious wrongful conduct for not acting *bona fide*, not acting in the municipality`s best interest and bringing the municipality into disrepute; and
- For serious impudence by being impolite, discourteous, sarcastic, vicious, contemptuous and provoking to the Municipal Manager.

His guilt was proven on all the charges which led to his dismissal.[271] The LAC upheld the decision of the arbitrator that his dismissal was fair and made no order of reinstatement. It held as follows:[272]

- His behaviour constituted a challenge to the municipal manager`s authority and he was not remorseful for such behaviour.
- Section 193(2)(b) was pertinent and the trust relationship between him and the Municipal Manager had irretrievably been breached.
- Moreover, it would not be practicable to restore the relationship of employment.

Once there is impracticability of the restoration of the relationship of employment, this suggests that section 193(2)(c) of the LRA automatically comes into the picture for the purposes of reinstatement. However, it would not be possible to grant him the remedies of unfair dismissal as his dismissal was fair. Even if his dismissal was found to be unfair, the prospects of an order of reinstatement being granted would be slim considering the provisions of sections 193(1) and 2(3) of the

269 (2017) 38 *ILJ* 582 (LAC)(*Msunduzi Municipality).*
270 *Msunduzi Municipality* para 11.
271 *Msunduzi Municipality* para 11.
272 *Msunduzi Municipality* para 29.

LRA. Due to his misconduct, two non-reinstatable conditions take a centre stage, that is according to section 193(2)(b)-(c) of the LRA.

3.8 Conclusion

As established above, the employee lacks the remedy of reinstatement in circumstances where there is an irretrievable breakdown of the trust relationship in the employment relationship.[273] The employer must identify through evidence, the factors which would result in intolerability of continued employment. Accordingly, a Commissioner abuses his or her power when he or she willy-nilly decide on which evidence he or she believes would constitute continued employment intolerable.[274]

The mitigating factors in determining whether reinstatement is appropriate in constructive dismissal will include amongst others, the fact that the circumstances surrounding dismissal such that a continued employment will be intolerable, are no longer extant. In conventional dismissal these will incorporate along with others, the fact that the employee is a first-time offender, the years of service, remorse, as well as post-dismissal misconduct. The next chapter will provide a summary of all the preceding chapters and provide recommendations to preserve the relationship of trust.

273 See *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) para 217. See also Okpaluba and Maloka 149.

274 See for *Mosiane v CCMA and Others* [2019] ZALCJHB para 23.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.1 Overview

The study has revealed that both the employee as well the employer can, for diverse reasons, find that the employment relationship has broken down and become intolerable.[275] The first instance occurs in the case of constructive dismissal and the second comes in the form of the conventional dismissal in terms of section 186(1)(a) of the LRA. Accordingly, all the parties in the employment relationship must keep their end of the bargain, by ensuring that they avoid everything which may lead to the breakdown of trust or intolerability.

4.2 Summary of chapters

Chapter one of the study has established the link between constructive dismissal and intolerability. In both cases of constructive dismissals and conventional dismissals, the intention to cause intolerability is not required. Moreover, it has shown that proving intolerability is not a child`s play.

Chapter two has shown that the breakdown of trust and intolerability cannot be separated, since once a party breaches the duty of mutual trust and confidence, intolerability immediately comes into the equation. In short, without the former, the latter will not materialize. Both parties must ascertain that their employment relationship is functional. This entails that their relationship must afford enough on all of them so that:[276]

- The interests of the employer concerning productivity, profitability as well as acquiescence with legal as well as fair instructions are satisfied.
- The interests of the employee in relation to decent remuneration, a safe as well as a healthy working environment, civil and reasonable treatment are also satisfied.

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275 See Rycroft on Intolerable Employment Relationship 2271.

276 See Rycroft on Intolerable Employment Relationship 2273.

Chapter three has shown that the trust relationship plays a major role in the employment relationship as its absence can lead to intolerability of continued employment. It has established the heavy onus on the employer to prove intolerability of continued employment. Moreover, it has demonstrated that although reinstatement is the primary statutory remedy for unfairly dismissed employees, when the exceptions in section 193(2) are extant, it cannot be ordered.

This chapter summarises all that has been discussed in the preceding chapters and provides recommendations on how to preserve the trust relationship.

4.3 Conclusions

Many employees have claimed to be constructively dismissed, but the Courts or arbitrators found otherwise due to the subjective elements present.[277] Employers have also dismissed employees due to issues regarding continued employment to be intolerable, nevertheless, the courts have found otherwise.[278] Depending on which party complains of intolerability, there is a need for a subjective assessment of intolerability as it is recognised by the Courts.[279] On one hand, in cases of constructive dismissals, the employees must make this subjective assessment.[280] On another, the employer bears the primary duty to make the subjective assessment in conventional dismissals.[281]

An employee claiming constructive dismissal must ascertain that all the requirements are satisfied to guarantee success. The one who alleges must prove, accordingly, the party that alleges intolerability must prove it. Parties must be cautious of wasting the court`s time in bringing frivolous claims, not backed up by strong evidence. In a conventional dismissal, the employer ought to prove that the employee has committed a certain misconduct and that such has resulted in continued relationship of employment intolerable.

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277 See for e.g. *Solid Doors; Miladys;* See also *Daymon*; See also Rycroft on Intolerable Employment Relationship 2273.

278 See Rycroft on Intolerable Employment Relationship 2273.

279 See *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2007 (1) SA (SCA) para 45 (*Rustenburg Platinum Mines*).

280 See Rycroft on Intolerable Employment Relationship 2273.

281 *Rustenburg Platinum Mines* para 45.

The fact that the employee`s misconduct is manifest or obvious, does not preclude the employer from proving it, however, it may prove it using a procedure which is less formal. The requirement that the employer must prove that there was intolerability does not equate to a justification of an unfair dismissal. Rather, it is necessary for the employer to convince the Court or arbitrator that reinstatement should not be ordered because of the existence of the non-reinstatable condition in section 193(2)(b) of the LRA.

It has also been established that fairness and job security take a centre stage in determining whether or not to grant the remedy of reinstatement to an unfairly dismissed employee. It is in this regard that arbitrators try by all means to ensure job security. However, in doing so they must only require proof of intolerability and not abuse their powers by spelling it out.

The study has also demonstrated that there are subjective as well as objective elements surrounding the concept of intolerability. This suggest that what the angry employee or employer considers intolerable may not be seen in similar fashion by an arbitrator who is not emotionally attached to the situation.

It is worth noting that not all misconducts can result in continued employment relationship impractical, although they may have certain effects on the relationship. This may be in instances where the employee has never committed any misconduct in the past and has a clean record, amongst others.

Although reinstatement is the primary remedy for an unfairly dismissed employer, irrespective of whether it is constructive dismissal or the conventional dismissal, at times it may not be ordered. This is the case where there is mutual agreement from both the employee and employer that the employment relationship has irretrievably broken down.[282] Accordingly, compensation becomes suitable in the circumstances.[283]

When an employee eventually resigns from the workplace in the same way that Mr Gordon did in *WC Education Department* case, he suffers financial loss, amongst

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282 See *Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 *ILJ* 2702 (LC) para 79 (*Uys*).

283 *Uys* para 80.

others. In order to cure this, he must be reinstated if that is his wish, as this will put him in the position that he was in before dismissal. Moreover, the court ought to consider whether or not there exists any reason which may justify the order of reinstatement not being granted.

In circumstances where it is established that the employee did nothing to breach the trust relationship between him and his employer, albeit the employer breached it, there is a safe assumption that although the employment relationship was intolerable, prospects of reconciliation exist. A typical example of this was seen in *WC Education Department* case where Mr. Gordon even approached the employer to ask for his job back and considered himself a friend of the employer. This showed that in the event he was reinstated he would work well and have no problems with the employer.

An employee`s misconduct after he or she was dismissed will be a relevant factor in establishing whether reinstatement is appropriate. However, it would not do justice to merely deny an employee reinstatement because of what he or she did after dismissal. What is more relevant to consider is the employee`s behaviour in relation to the employer up until he or she was dismissed.

The study has also established that, the law strikes a fair balance between the interests of the employers and employees in determining the intolerability of continued employment relationship. This is so because both are given the platform to prove intolerability of continued employment.

4.4 Recommendations

Employees who find continued employment intolerable because of the employer`s conduct must before resigning, attempt to talk to such an employer in an attempt to resolve the issue. If this is impractical because of the employer`s attitude, and after exhausting other alternatives, they can then resign. However, they must ensure that their claims are not frivolous, so as to waste the Court`s time. Moreover, they must keep it at the back of their minds that intolerability is a high threshold. Accordingly, mere unhappiness in the workplace will not hold water in Court or arbitration proceedings.

Before considering resignation in the name of intolerability, they must ensure that there are prospects of success in claiming constructive dismissal. They must ensure that all the requirements of constructive dismissal are satisfied.

Employers must then be careful not to mistreat employees, hoping that they will eventually resign. Employers must take care not to cause psychological problems such as depression or work stress for their employees. They must strive to keep healthy relations. At the same time, employees must be careful not to breach the trust relationship in the workplace and thus cause intolerability of continued employment. That is, they must act in the furtherance of their employers` interests. They must avoid wrongdoing as it can lead to their dismissals.

When confronted with such wrongdoing, an employer must try to be objective, and if they wish to dismiss such an employee, they must ensure that they also follow a fair procedure in dismissing him or her. However, if employees eventually challenge such dismissal they must provide strong evidence of intolerability of continued employment owed to the employee`s conduct.

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