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Constructive dismissal arising from work-related stress: National Health Laboratory Service v Yona & Others

1. Introduction

The issue of whether an employee can claim constructive dismissal due to work-related stress in terms of the *Labour Relations Act* (*LRA*)[1] is central to the discussion of this case note. The *Act* defines dismissal as termination of a contract of employment by an employee with or without notice, because the employer made continued employment intolerable.[2] Consequently, in instances of conventional dismissals, as discussed above, it is up to the employer to prove that the dismissal was procedurally and substantively fair. It is important to note that this obligation only arises after the employee has proven his/her status as an employee,[3] and that s/he was dismissed. Du Toit *et al.* assert that the common denominator of the various forms of dismissal is that the employer ultimately causes all of these forms of dismissal.[4] According to the author, dismissal, by definition, is not initiated by the employee, nor is it "something which merely happens".[5]

However, with constructive dismissal, the burden of proof rests on the employee, who must prove constructive dismissal on a balance of probabilities.[6] Once the employee has discharged the onus of proving that s/he was constructively dismissed, the onus shifts to the employer to prove that the employee's action of resigning was unreasonable.[7] Sec. 188 of the *LRA* provides that a dismissal, which is not automatically unfair, is unfair when the employer fails to prove that the reason for dismissal was fair in relation to the employee's conduct or capacity.

1 *Labour Relations Act* 66/1995 (hereafter *LRA*).
2 Sec. 186(1)(e) of the *LRA*.
3 See *State Information and Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* 2008 29 ILJ 2234 (LAC).
4 Du Toit *et al.* 2015:426.
5 Du Toit *et al.* 2015:426.
6 *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC).
7 Sec. 192 of the *LRA*. See also Vettori 2011:176.

In the case of *National Health Laboratory Service v Yona & Others*,[8] the Labour Appeal Court grappled with the issue of constructive dismissal. Although the court on the merits of the case did not specifically deal with the issue of constructive dismissal arising from work-related stress, a case can be made for such a cause of action. Du Toit *et al*. illustrate how constructive dismissal has been accepted by the Labour Appeal Court to mean actions on the part of the employer, which drive the employee to leave.[9] According to the author, such actions can take a wide variety of forms. Consequently, work-related stress can be one of these factors that can make the continued employment intolerable; hence, the employee decides to resign. According to Hodgins *et al*., work-related stress remains a major scourge of modern-day working life.[10] She acknowledges that there are many people for whom work is still a source of excessive pressure, which, in turn, leads to stress, anxiety and depression.[11]

Against this background, the purpose of this case note is twofold. First, it examines South African jurisprudence on the issue of constructive dismissal arising from work-related stress. Secondly, it considers case law in Australia and the United Kingdom with the view to, among other things, investigate how the courts in these jurisdictions have dealt with the issue of constructive dismissal arising from work-related stress. The aim is to draw some valuable lessons for South Africa in this area of law. Scholars acknowledge that, although no two legal systems are exactly the same, and it is difficult to find a common methodology of comparative legal studies, there is a great deal of convergence in the approaches taken by countries in the study of their laws, and these approaches may not be different from those of other jurisdictions.[12]

2. The facts

The first respondent (Ms Yona) was formerly employed by the appellant (The National Health Laboratory) for a period of 21 years as the Complex Laboratory Manager at the appellant's Port Elizabeth branch. In terms of the appellant's organogram, Ms Yona reported to the Business Unit Manager (Business Manager), a position which, before the dispute arose, was held by Mr Lucwaba. Mr Lucwaba, in turn, reported to the Executive Manager for the coastal region. A number of subordinate junior managers were also employed, one of these being Mr Gamieldien.

It was customary for Ms Yona to act for Mr Lucwaba whenever the latter was not available. At some point during 2009, Mr Lucwaba was promoted to the position of Executive Manager, and his promotion left the position of Business Manager vacant. On or about 4 May 2009, Mr Lucwaba called a

8 *National Health Laboratory Service v Yona & Others* (2015) 36 ILJ 2259 (LAC) (hereafter *National Health Laboratory Service*).
9 Du Toit *et al.* 2015:430.
10 Hodgins *et al.* 2016:99.
11 Hodgins *et al.* 2016:99.
12 Mancuso *et al.* 2015:35.

staff meeting at which he announced that he had appointed Mr Gamieldien to act as Business Manager pending the appointment of a permanent Business Manager. Ms Yona was aggrieved by this development, and felt humiliated. Her reasons were that:

- Mr Gamieldien, who was her junior, would essentially become her senior;
- She did not understand why she had not been appointed to the acting position, especially because she always acted in that position in Mr Lucwaba's absence;
- There was no transparency in the acting appointment process, since Mr Lucwaba did not consult with her prior to appointing Mr Gamieldien; and that
- She was of the opinion that, when applications for the permanent position of Business Manager were considered, Mr Gamieldien would have an advantage over her, given that he had been officially appointed as acting Business Manager.[13]

Consequently, Ms Yona initiated an internal grievance procedure against Mr Lucwaba, in which she complained about the appointment of Mr Gamieldien. A misconduct enquiry presided over by an independent chairperson was held against Mr Lucwaba. The chairperson concluded that Mr Lucwaba should apologise to Ms Yona for not having consulted with her on the issue of the acting appointment of Mr Gamieldien, but endorsed Mr Gamieldien's acting appointment. Mr Lucwaba did not tender any apology to Ms Yona, reportedly saying that he found no reason to do so, since it was his prerogative to appoint Mr Gamieldien as acting Business Manager and he was not obliged to consult with Ms Yona before doing so.[14]

In or about July 2009, the appellant issued an advertisement, inviting applications for permanent appointment to the position of Business Manager. Both Ms Yona and Mr Gamieldien applied for the position. However, they were both unsuccessful and were advised accordingly by way of letters dated 20 August 2009. The successful candidate for the position of business manager was Mr Pascal Karuhige. However, Mr Karuhige declined the post for personal reasons. As a result, the post remained vacant. Mr Lucwaba extended Mr Gamieldien's acting position, in consequence of which Mr Gamieldien continued to be Ms Yona's supervisor. This situation exacerbated Ms Yona's frustration.

Shortly thereafter, Ms Yona fell ill and was continuously absent from work, with effect from 9 November 2009. The initial medical certificate was issued by a general medical practitioner, and the subsequent ones by a specialist psychiatrist. According to all medical certificates, Ms Yona was diagnosed as suffering from severe depression and generalised anxiety

13 *National Health Laboratory Service*:par. 6.
14 *National Health Laboratory Service*:par. 7.

disorder. She remained absent on sick leave for an uninterrupted period of five months until the end of May 2010. She submitted medical certificates to cover her period of indisposition. On 17 February 2010, Mr Abraham (Human Resources Manager at National Health Laboratory Service (NHLS)) addressed a letter to Ms Yona, acknowledging receipt of her faxed medical certificate on 16 February 2010 and stating that she had been absent from the workplace for a significant period of time without following the necessary NHLS conditions of employment policy and procedures. In his letter, he further stated that:

- Ms Yona had failed to notify her supervisor, Mr Gamieldien, about her absence; consequently, her absence would be processed as "absence without leave";
- Ms Yona had exhausted all forms of leave with the NHLS, and that, owing to her lack of communication with the NHLS, the NHLS was unable to determine her future operational obligations with the institution;
- Owing to Ms Yona's lack of communication with the NHLS, the institution was unable to determine the future status of her health, and her presence at work within a reasonable time frame. It was necessary to ensure that the operational requirements attendant on her position as a senior employee would be fulfilled, and this needed to be addressed by the NHLS as a matter of urgency.[15]

Mr Abraham then requested that Ms Yona complete an application for temporary disability and return the completed documents to the Human Resources office no later than 24 February 2010 to enable the NHLS to apply for further medical insurance assistance on her behalf. Ms Yona filled in the application forms for temporary boarding on medical grounds and submitted them to the NHLS for consideration. On 19 April 2010, Mr Abraham addressed another letter to Ms Yona, in which he advised her that the NHLS insurers (Alexander Forbes) had not approved her application for medical insurance assistance. According to Mr Abraham, NHLS had no record of Ms Yona's application for extended sick leave and, as a result, the institution had taken the decision to treat her absence as "unpaid leave".[16] The period between 28 May 2010 and 2 July 2010, which was covered by Ms Yona's final medical certificate, which reflected a diagnosis of severe depression and generalised anxiety disorder, was processed as leave without pay.[17] As a result, Ms Yona's salary for May 2010 amounted to R1,000 due to deductions for leave without pay. She found this situation unbearable and, on 1 June 2010, while on sick leave, she tendered her resignation, in order to access her funds from the provident fund.[18]

15 *National Health Laboratory Service*:par. 11.
16 *National Health Laboratory Service*:par. 12.
17 *National Health Laboratory Service*:par. 13.
18 *National Health Laboratory Service*:par. 13.

3. Proceedings at the CCMA

In light of the treatment endured by Ms Yona, she referred a constructive dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. At the CCMA, the dispute remained unresolved and, on 26 August 2010, the CCMA issued a certificate to that effect. The matter proceeded to arbitration and, at the arbitration hearing, the commissioner stated that an employer may not act in a manner that causes the employment relationship to become intolerable, and that the respondent, through the actions of Mr Abraham, had caused the employment relationship between the applicant and itself to become intolerable.[19]

The commissioner advanced the following reasons for this decision. First, the respondent had failed to communicate with Ms Yona regarding her absence. Secondly, Ms Yona's absence was treated as absence without leave, notwithstanding the fact that she was ill. Thirdly, during cross-examination, the respondent conceded that he was aware that Ms Yona had submitted a medical certificate informing the respondent that she had been booked off ill.

According to the commissioner, Mr Abraham, acting on behalf of the respondent, in his letter dated 19 April 2010, made false statements. This is evident in his letter dated 17 February 2010, in which he alleged that Ms Yona had not maintained communication regarding her absence. He nevertheless knew that Ms Yona had been temporarily boarded on medical grounds.[20] Furthermore, in his letter dated 17 February 2010, Mr Abraham suggested to Ms Yona only that she apply for a temporary disability payout. The commissioner noted that he failed to mention and highlight the respondent's policy on extended sick leave and that she was entitled to apply for it. When questioned about this, Mr Abraham responded that paying Ms Yona for her sick leave would be fruitless expenditure.

The commissioner found that the conduct of the appellant towards Ms Yona was such that it rendered her continued employment intolerable, and that her resignation constituted an unfair dismissal as envisaged in sec. 186(1)(e) of the *LRA*. The commissioner awarded Ms Yona compensation in the amount equivalent to three months' salary, which she earned at the time of her constructive dismissal, namely R102,000.

4. Proceedings at the Labour Court

The appellant was not satisfied with the outcome of the arbitration proceedings, and took the matter for review in terms of sec. 145 of the *LRA*. The appellant's grounds for review are summarised below:

19 *National Health Laboratory Service*:par. 16.
20 *National Health Laboratory Service*:par. 16.

- The commissioner failed to take into account, among others, that Ms Yona was a senior managerial employee and that, by reason of her ability, experience, insight and knowledge, she was able to judge for herself and take necessary steps without the assistance and intervention of Mr Abraham;
- The commissioner lost complete sight of the real issue before him in attributing the anxiety and depression suffered by Ms Yona to the conduct of Mr Abraham. The appellant submitted that the conduct of Mr Abraham had been appropriate, reasonable and sensible in the circumstances. The commissioner's criticism of Mr Abraham was, therefore, unduly harsh;
- The commissioner misconstrued the appellant's sick-leave policy as automatically allowing for six months' paid sick leave, subject to approval by a committee or a panel of individuals, whereas the extended sick-leave application was, in fact, subject to the approval of the appellant's chief executive officer (CEO).

The Labour Court held that:

> A reading of the record and the award proves that the commissioner expressed in very strong language, the unacceptable way in which Abraham, as a human resource manager, failed to assist the first respondent when her health condition called for his assistance … The commissioner's decision is consistent with the definition of constructive dismissal as interpreted by our courts … Viewed through the constitutional standard the applicant acted unfairly in making the applicant's and the first respondent's employment relationship intolerable. Abraham's failure to assist the first respondent when, by virtue of his position he could, at a time she was ill and heading for not having a salary, destroyed the relationship of confidence and trust between the applicant and the first respondent … it violated her right to fair treatment at [the] workplace … [S]he was forced to resign to access money in her provident fund.[21]

Accordingly, the court found that the commissioner's decision fell within the bounds of reasonableness and the court had no basis to interfere with it. As a result, the court dismissed the review application with costs.

5. Proceedings at the Labour Appeal Court (LAC)

Aggrieved by the decision of the Labour Court, the appellant appealed the decision of the Labour Court based on the following grounds:

- The Labour Court failed to take into account and/or ignored the fact that Ms Yona herself testified that she was a senior managerial employee who had knowledge of the appellant's extended sick-leave policy and that she should have made an application for such benefits without the assistance and intervention of Mr Abraham;

21 *National Health Laboratory Service*:par. 20.

- The commissioner was wrong in his interpretation of the appellant's extended sick-leave policy in that it was not a committee that decided on the extended sick leave, but the appellant's CEO;
- The sole cause of Ms Yona's anxiety and depression was the fact that she did not want anyone other than herself to act in the position of Business Manager;
- At the arbitration hearing, the appellant was represented by a lay representative who required the assistance of the commissioner from the outset in respect of clearly outlining the terms and conditions of the appellant's extended sick-leave policy. This was apparent from Mr Abraham's evidence in chief compared with his (Mr Abraham's) re-examination, whereas the commissioner had provided such assistance to Ms Yona, who was legally represented. This resulted in the commissioner unreasonably and unjustifiably criticising Mr Abraham.

Ms Yona's legal representative submitted that there could be little doubt that, considered objectively, Ms Yona had good cause to be aggrieved about the acting appointment of her subordinate, Mr Gamieldien, without prior consultation with her and without an indication as to why her subordinate was appointed instead of her. Counsel further submitted that matters worsened considerably for Ms Yona when Mr Abraham openly announced the outcome of the applications for the position of Business Manager in the manner in which he did, which was bound to humiliate her.

The LAC held that, based on the facts and circumstances of this case, Ms Yona's resignation was neither voluntary nor intended to terminate her employment relationship with the appellant. Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant (through Mr Abraham) towards her. The court further held that whether Mr Abraham intended to repudiate the appellant's employment contract with Ms Yona by his conduct was immaterial. The appellant's unfair conduct towards Ms Yona rendered her continued employment with the appellant intolerable.

6. Comments

The LAC in *National Health Laboratory Service* must be commended for interpreting the scope and content of sec. 186(1)(e) of the *LRA* properly. This section provides that "a constructive dismissal occurs when an employee terminates his/her contract of employment with or without notice, because the employer made continued employment intolerable for the employee". In *Eagleton v You Asked Services (Pty) Ltd*,[22] in terms of sec. 192(1) of the *LRA*, the onus rests on the employee to prove, on a balance of probabilities, that s/he was dismissed from his/her employment. There are certain critical issues that need to be determined in cases involving claims for constructive dismissal. Dekker notes that constructive dismissal as a

22 *Eagleton v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC):par. 22.

form of dismissal serves a very important purpose in our labour relations.[23] It allows an employee, who has been a victim of intolerable conduct in the workplace, to resign and still have recourse against an employer.[24] Nkosi asserts that, without the remedy of constructive dismissal, an employee will have no recourse against the employer, as the employment relationship would have been terminated at his/her instance and not at the instance of the employer.[25]

Basson AC held that, in order to prove a claim for constructive dismissal, the employee must satisfy the Court that the following three requirements are present:

- The employee has terminated the contract of employment (the employee has resigned);
- Continued employment has become intolerable for the employee;
- The employer has made continued employment intolerable, and
- The employee needs to prove that s/he had no reasonable alternative other than to terminate the contract.

In order to show that his/her continued employment was intolerable, the employee must allege and prove facts that show that this was objectively the case.[26] The enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employee and employer. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to examine the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.[27]

In *Beukes v Crystal – Pier Trading CC T/A Bothaville Abattoir*,[28] the court made it clear that the test for establishing whether the employee's resignation amounted to constructive dismissal was that the employee did not believe the employer will ever reform or abandon the pattern of creating an unbearable environment. The court further stated that the employee's perception should be tested against the actual reason for the

23 Dekker 2012:346. See also Nkosi 2015:233.
24 See also *Daymon Worldwide SA Inc v CCMA* (2009) 30 ILJ 575 (LC).
25 Nkosi 2015:233. See also *Coetzee v A & D Tyre Manufacturing Tech (Pty) Ltd* 2009 JOL 23550 (MEIBC).
26 *Smithkline Beecham (Pty) Ltd v CCMA and Others* (2000) 21 ILJ 988 (LC):par. 38; *Mafomane v Rustenburg Platinum Mines Ltd* (2003) 10 BLLR 999(LC):par. 49; *Van Greunen v Johannesburg Fresh Produce Market* (Pty) Ltd (2010) 7 BLLR 785 (LC).
27 *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2011) ZALCCT 21, which relied upon the LAC's reasoning on jurisdiction in *SA Rugby Players Association and Others* (2008) 29 ILJ 2218 (LAC).
28 *Beukes v Crystal – Pier Trading CC T/A Bothaville Abattoir* (2009) JOL 23285 (CCMA).

resignation. Ulterior motive for resigning to acquire alternative employment or pension money would not constitute constructive dismissal. The enquiry should be whether the employer without reasonable and proper cause conducted itself in a manner calculated to destroy or seriously damage the employment relationship.

In *Strategic Liquor Services v Mvumbi NO & others*,[29] the Constitutional Court stated that the test for constructive dismissal does not require that the employee has no choice but to resign, but only that the employer should have made continued employment intolerable. According to Grogan, the test for establishing whether a constructive dismissal has taken place is, therefore, partly subjective and partly objective.[30] For example, regard must be had to the perceptions of the employee at the time of the termination of the contract, as well as to the circumstances in which the termination took place.[31]

It is common cause that Ms Yona terminated her contract of employment, due to the unfair treatment by the respondent. According to medical certificates, Ms Yona was diagnosed as suffering from severe depression and generalised anxiety disorder as a result of the unfair conduct of the National Health Laboratory Service. In these circumstances, stress can be a reaction to pressure, which can lead to mental and physical ill health.[32] Ms Yona remained absent on sick leave for an uninterrupted period of five months up to the end of May 2010. She submitted medical certificates to cover her period of indisposition.

The crux of incapacity in the employment context is that it is neither the fault of the employee nor that of the employer. However, the employer is required to follow a proper procedure to allow the employee an opportunity to reverse the incapacity. In the case of incapacity due to injury or illness, an opportunity for healing must be given so that the person may return to work.[33]

According to Van Niekerk A *et al*., the appropriate employer response to incapacity in the form of illness or injury can be deduced from the following.[34] First, the employer must establish the nature of the employee's condition, the likely prognosis and the extent to which the employee is incapable of doing the work for which s/he was employed. The second consideration is the probable duration of the employee's absence from work. In the case of permanent incapacity, the employer's obligations are directed at securing alternative employment or adapting the employee's

29 *Strategic Liquor Services v Mvumbi NO & others* (2010) 2 92 SA (CC):par. 4.
30 See Van Niekerk *et al.* 2014:231.
31 Grogan 2005:159.
32 Chadder & Duncan 2014:80.
33 Gon 2015.
34 Van Niekerk *et al.* 2014:295.

duties or work circumstances, where possible, to accommodate any disability on the part of the employee.[35]

The LAC in *National Health Laboratory Service* highlighted the notion of constructive dismissal juxtaposed with incapacity arising from work-related stress. In particular, the court made it clear that the circumstances behind Ms Yona's resignation related to the unfair conduct on the part of the appellant's employee (Mr Abraham) towards her. The court held that the appellant's unfair conduct towards Ms Yona rendered her continued employment with the appellant intolerable. Ms Yona submitted a medical report from her doctor, and, notwithstanding the medical certificates, the employer through the acts of Mr Abraham continued to treat her unfairly.

In *Murray v Minister of Defence*,[36] the Supreme Court of Appeal emphasised that "… the law and the constitution impose obligation of fairness towards the employee by the employer when he makes decisions affecting the employee in his work …".[37] Cameron JA went on to discuss that, in South African law, constructive dismissal represents a victory of substance over form.[38] This means that, when an employee resigns as a result of the employer's conduct, the employer remains responsible for the consequences.[39] This means that there is an implied term that is read into any contract of employment in terms of which an employer would not without reasonable and proper cause conduct itself in such a manner that is likely to destroy or damage the relationship between an employer and employee.[40] This obligation has both a formal procedural and substantive dimension, and it is now encapsulated in the constitutional right to fair treatment.[41] In *New Way Motor & Diesel Engineering v Marsland*,[42] the company treated Mr Marsland distinctively after he came back to work having endured a mental meltdown to such an extent that he ultimately surrendered and moved toward the Labour Court on the premise that he was helpfully rejected and that his expulsion was consequently uncalled for in light of the fact that he had been oppressed in view of his condition. The Labour Court found to support him.

The employer appealed and the matter ended up in the Labour Appeal Court. The LAC defined depression as a form of mental illness and held that, even where this condition is not considered to be a form of disability, the discrimination suffered by Mr Marsland was unquestionably as a

35 Van Niekerk *et al.* 2014:295.
36 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA).
37 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA):par. 11.
38 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA):par. 8.
39 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA):par. 8.
40 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA):par. 8.
41 *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA):par. 11. See also *SAMSA v McKenzie* (2010) ZASCA 2:par. 42; Cabrelli 2009:404-410.
42 *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC).

result of his "mental health problem".[43] The conduct of the company had clearly constituted an egregious attack on the dignity of the employee and accordingly fell within the automatically unfair dismissal grounds set out in the *LRA*.[44] The LAC upheld the Labour Court's decision and confirmed that Mr Marsland was entitled to 24 months' compensation. From this case, it is clear that an employee must not be treated differently than before the diagnosis as any sense of alienation or exclusion may add to the mental struggles of the employee. Where appropriate, the employee should be accommodated to enable him/her to perform the essential requirements of the job.

Commenting on this decision of the LAC, Rangata and Lehutjo illustrate that dismissal of employees suffering from depression can amount to dismissal in terms of sec. 186(e) read with sec. 817(1)(d) and/or (f).[45] The authors opine that dismissal of an employee suffering from depression should be an act of last resort and should be considered only if the employee is unable to function effectively as a result of the illness.[46] In light of this ruling, Ms Yona was treated unfairly, for the following reasons. First, the LAC in its decision concluded that, based on the facts and circumstances of this case, Ms Yona's resignation was neither voluntary nor intended to terminate her employment relationship with the appellant. Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant (through Mr Abraham) towards her. Secondly, the court further held that whether Mr Abraham intended to repudiate the appellant's employment contract with Ms Yona by his conduct was immaterial. Suffice it to hold that the appellant's unfair conduct towards Ms Yona rendered her continued employment with the appellant intolerable.[47]

An incapacity enquiry was not conducted in *National Health Laboratory Service* to assess whether Ms Yona was capable of performing her duties; instead, Ms Yona terminated her contract of employment, due to intolerable treatment she endured from her employer. With reference to *Jooste v Transnet Ltd t/a SA Airways*,[48] the court in *National Health Laboratory Service* held that the first test was whether there was no other motive for the resignation, in other words, whether the employee would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct. It went on to state that, when any employee resigns and claims constructive dismissal, s/he is, in fact, stating that in the intolerable situation created by the employer, s/he can no longer continue to work, and has construed that the employer's

43 *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC):par. 24.
44 *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC):par. 25.
45 Rangata & Lehutjo 2015:12.
46 Rangata & Lehutjo 2015:12.
47 See *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (JA 15/2007) [2009]:paras. 17-18.
48 *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC).

behaviour amounts to a repudiation of the employment contract. In view of the employer's repudiation, the employee terminates the contract.[49]

In *Pretoria Society for the Care of the Retarded v Loots*,[50] Nicholson JA held that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.[51] It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to examine the employer's conduct as a whole, and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

In *Van Der Riet v Leisurenet Ltd t/a Health & Racquet Club*,[52] the employee resigned after being effectively demoted as a result of a restructuring exercise. The employer's failure to consult with the employee on the possibility of the demotion was considered unfair, and provided a sufficient basis for a claim of constructive dismissal. The conduct of Mr Abraham (employer) had rendered the working environment intolerable for Ms Yona by,[53] among others, not being considered for appointment as a Business Manager, and her junior and subordinate, Mr Gamieldien, being appointed ahead of her to act as Business Manager, although Ms Yona had previously acted in that position whenever Mr Lucwaba was not available.

The court further submitted that the appellant, through its Human Resources Manager, Mr Abraham, failed dismally to accord fair and compassionate treatment to Ms Yona at a time of desperate need, when she was suffering from a severe work-related mental illness and impecuniosity resultant from her denial by Mr Abraham of extended sick-leave benefits.[54]

It was found that Mr Abraham, during his evidence, revealed that the reason Ms Yona was not asked to apply for extended sick leave was that granting her the extended sick leave would have entailed what he described as 'fruitless expenditure'.[55] In *Coetzer v The Citizen Newspaper*,[56] and *Kruger v CCMA & Another*,[57] the court reiterated that constructive dismissal is to be determined objectively and that resignation must be the last resort. In *Beets v University of Port Elizabeth*,[58] it was found that the constructive dismissal takes place only if the employee resigned because

49 *National Health Laboratory Service*:par. 28.
50 *Pretoria Society for the Care of the Retarded v Loots* (1997) 6 BLLR 721 (LAC) (hereafter *Pretoria Society for the Care of the Retarded v Loots*). See also *Marsland v The New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC).
51 *Pretoria Society for the Care of the Retarded v Loots*:par. A.
52 *Van Der Riet v Leisurenet Ltd t/a Health & Racquet Club* (1998) 5 BLLR 471.
53 *National Health Laboratory Service*:par. 17.
54 *National Health Laboratory Service*:par. 41.
55 *National Health Laboratory Service*:par. 42.
56 *Coetzer v The Citizen Newspaper* (2003) 24 IU 622 (CCMA) at 640:par. E.
57 *Kruger v CCMA & Another* (2002) 23 ILJ 2069 (LC).
58 *Beets v University of Port Elizabeth* (2000) 8 BALR 871 (CCMA).

of the employer's *harsh*, *antagonistic* and *hostile conduct*. In another instance, it was held that the resignation must be tendered, because the prospect of continued employment is intolerable.

Vettori notes that the concept of constructive dismissal was imported into South African law from English law in the 1980s. According to her, English case law has, and may continue to have, a substantial influence on the development and interpretation of the law relating to constructive dismissal in South Africa.[59] Consequently, the question relating to whether an employee who has been constructively dismissed due to work-related stress has received considerable attention in other jurisdictions. Therefore, it is important to take heed of developments that have occurred abroad in terms of remedies available to employees who are constructively dismissed due to work-related stress. Hodgins defines work-related stress as the "harmful, physical and emotional responses that occur when job requirements do not match the worker's capabilities, resources, and needs".[60]

In the English case of *Walker v Northumberland County Council*,[61] an employee was awarded damages for psychiatric injury caused by pressure of work. The plaintiff was a social worker employed by the defendant council. He suffered two nervous breakdowns as a result of overwork and stress brought on by the nature of the tasks in which he was engaged, and was eventually dismissed by the defendants on the grounds of permanent ill health. The plaintiff sued the defendants for damages in negligence, alleging that they were in breach of their duty as his employer to provide him with a safe system of work.

Justice Colman found that the defendants had indeed breached their duty of care, and awarded damages to the plaintiff. In order to succeed in an action for negligence, the plaintiff must show that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the defendant's breach of duty caused the plaintiff to suffer damage. In addition, the plaintiff must establish that it was reasonably foreseeable that the defendant's breach of duty would cause harm of the kind, which the plaintiff has, in fact, sustained.

In *Koehler v Cerebos (Australia) Ltd*,[62] the High Court confirmed that an employer would not be held liable for psychiatric injury sustained by an employee in the workplace, unless such injury is reasonably foreseeable. The High Court emphasised that there must be some evidence of psychiatric injury observable by, or known to the employer such as the employee's external distress or prolonged absences from work. It is submitted that, in *National Health Laboratory Service,* the medical reports submitted

59 Vettori 2011:173.
60 Hodgins *et al.* 2016:100.
61 *Walker v Northumberland County Council* (1995) IRLR 35 (QBD).
62 *Koehler v Cerebos (Australia) Ltd* (2005) 214 ALR 355. For further reading on *Koehler v Cerebos (Australia) Ltd* (2005) 214 ALR, see also Geraghty *et al.* 2007:68-174; Handford 2015:150-179.

by Ms Yona provide ample evidence to suggest that her illness (severe depression and generalised anxiety disorder) and treatment thereof was the direct cause that lead to her resignation.[63]

In a case where a claim for constructive dismissal succeeds, compensation is awarded to the employee, the purpose being to return the claimant to the financial position s/he would have been in had the dismissal not occurred. The rationale for this is that, in cases of constructive dismissal, the trust relationship between the parties is broken and the employee does not want to return to work for fear that the same type of relationship will still be in place.[64] The *LRA*, in sec. 194, limits the amount of compensation payable to the claimant by providing that:

- The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
- The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
- The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration.

It is submitted that the compensation awarded to Ms Yona, which was equivalent to three months' salary as at the time of her constructive dismissal, namely R102,000, is insufficient. In cases of this nature, where a medical practitioner or psychiatrist has diagnosed an employee with a psychological disorder, such an illness may have dire consequences for the employee. It is unfortunate that Ms Yona only claimed for constructive dismissal and not a psychological illness or incapacity. In my respectful view, she could have considered the option of claiming for psychological illness or incapacity. Potgieter *et al.* show that the court, in awarding compensation arising from psychiatric injury sustained in the course of

63 *National Health Laboratory Service*:paras 10, 13, 32, 33, 41. The case of *Hammond v Compensation Commissioner & another* (2005) 26 ILJ 45 (T) involved an appeal against a decision not to grant compensation to a police officer who claimed that his work had cast him into a clinical depression. The court held that the applicant had failed to prove a causal connection between his work and his condition and dismissed the appeal.

64 Taylor 2006:356. In some cases on constructive dismissal, the courts are prepared to grant an employee reinstatement as a competent remedy. See *Western Cape Education Department v Julian John Gordon & Others* (2013) 34 ILJ 2960 (LC).

employment, can explore the issue of concurrence of, and relationship between certain claims for compensation.[65]

In other jurisdictions, for example in Australia, the employer owed a general duty of care to employees not to cause them psychiatric injury.[66] In *New South Wales v Seedsman*,[67] Mason P held that, provided the breach of duty and foreseeability of psychiatric harm could be established,[68] a claim for pure psychiatric illness could succeed if brought by a person who could establish a duty of care independently based on breach of the employer's duty of care. It has been held that, where it is reasonably foreseeable to an employer that an employee may suffer some form of psychiatric injury because of stressful work conditions, the employer is under a duty of care not to cause the employee psychiatric injury by reason of the volume or character of the work the employee is required to perform.[69]

This position is also comparable to legislation in the United Kingdom, which recognises the duty of the employer to protect employees in the workplace. According to Van Jaarsveld, in the United Kingdom, the duty of care is translated into an implied term in a contract of employment, and if this is broken, it can be viewed as a repudiatory breach of contract based on the implied duty of care.[70] In a number of cases of workplace stress claims, the Court of Appeal ruled in favour of employees. For instance, in *Moore v Welwyn Components Ltd*,[71] the plaintiff retired due to ill health caused by a colleague's sustained bullying, for which the lower court held his employer liable. The court rejected arguments that the employee's vulnerable mental state was caused by factors apart from work. The Court of Appeal declined to reduce his compensation, as the claimant established that, but for the bullying, he would have returned to employment and would have been unlikely to cease work early due to future occupational stress.

In *Melville v The Home Office*,[72] a prison officer retired after a stress-related illness following a prisoner's suicide. The appeals court ruled that the officer's employer had foreseen the risk, but had failed to implement a system designed to deal with that risk. The recent case of *Hatton v Sutherland*[73] provides clarity on an employer's liability for stress-related claims. In *casu*, the appeals court set down general principles in relation to

65 See Potgieter *et al.* 2012:333-340.
66 *New South Wales v Seedsman* (2000) NSWCA 119. See also Van Jaarsveld 2005:626.
67 *New South Wales v Seedsman* (2000) NSWCA at 169. See also *The Council of the Shire of Wyong v Shirt* (1980) 146 CLR at 47.
68 For further reading on the duty of care in respect of psychiatric injury, see *Tame v New South Wales, Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449.
69 Per Wilkie K, *French v Sussex County Council* (2005) PIQR P18 at 29.
70 Van Jaarsveld 2005:632.
71 *Moore v Welwyn Components Ltd* (2004) EWCA Civ 06.
72 *Melville v The Home Office* (2005) IRLR 293.
73 *Hatton v Sutherland* (2002) 2 ALL ER 1.

claims for psychiatric injury arising out of stress at work. The starting point is that the ordinary principles of employer's liability apply, and the threshold of liability is whether this kind of harm to a particular employee was reasonably foreseeable, that is, determined by what the employer knows or ought reasonably to have known. Furthermore, the claimant must show a recognisable psychiatric condition. In *Hartman v South Essex Mental Health and Community Care NHS Trust*,[74] the Court of Appeal confirmed the established principles that were set out in *Hatton v Sutherland*:

- If an employer does not act on information that an employee is depressed at work, it may be liable for the psychiatric injury suffered;
- Employers can generally take information they are given by employees about their health at face value, unless there is cause to question the information provided;
- Employers are only required to do what is reasonable in the circumstances in order to avoid stress in the workplace, bearing in mind the gravity of the possible harm, the costs involved and the size and scope of the employer's business;
- If an employer has an occupational health system or counselling service available to its staff, this does not in itself indicate that the employer has foreseen psychiatric injury, but rather makes it less likely that the employer will be in breach of its duty if such injury does occur;
- If an employer wants to argue that an employee's depressive illness has been caused by factors other than work, and that damages should, therefore, be apportioned, the employer must provide evidence to show that the injury did, in fact, have other causes.

7. Conclusion

In light of the above, the LAC decision in *National Health Laboratory Service* must be commended for clarifying contentious issues of law relating to constructive dismissal. Although the LAC did not specifically deal with the issue of constructive dismissal arising from work-related stress, it is submitted that there is a close correlation between constructive dismissal and dismissal arising from work-related stress/illness. As discussed earlier, Du Toit *et al.* note that constructive dismissal can take a wide variety of forms. Consequently, work-related stress can be one of these factors that can make the continued employment intolerable; hence, the employee decides to resign. From the preceding discussion, it is apparent that occupational stress that causes harm does not only give rise to liability; there must be a breach of duty causing or contributing to the harm suffered. That being said, it is clear that "the victim of stress in the

74 *Hartman v South Essex Mental Health and Community Care NHS Trust* (2005) EWCA Civ 6.

workplace faces no easy task of intending to claim compensation from an employer for psychiatric injury".[75]

Finally, from this perspective, I cannot criticise the LAC judgement, other than the fact that the LAC had to decide on these factors in terms of the *LRA* and not the claim arising from the *Compensation for Occupational Injuries and Diseases Act*, or a claim arising from delict. The courts are obliged to prepare their judgements on the precedents and the arguments presented to them by counsel. As a result, it is submitted that there exists a possibility that Ms Yona was ill-advised to claim for constructive dismissal and not exploring the possibility of claiming for psychological illness or incapacity.

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