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RESIGNATION: FACTS AND FALLACIES

What is the effect of a resignation by an employee: can the employer reject it? What if the employee gives 'short' or no notice? When does a resignation amount to a 'constructive' dismissal? Is it a constructive dismissal if an employee, who is given the option to resign rather than face disciplinary or incapacity proceedings, decides to resign? And, can an employer continue with a disciplinary hearing despite an employee having resigned?

The mechanics of resignation

In law, resignation constitutes a so-called 'unilateral' act: it is a clear indication by the employee that he or she wants to end the employment contract. Provided the employee gives proper notice (i.e. as provided for in the contract - or the BCEA if the contract is silent on notice periods) the employer has no right to veto the employee's decision and therefore its acceptance or rejection of the resignation is of no legal consequence. Its only option is to try and persuade the employee to stay, or otherwise make peace with the fact that the employee is leaving.

The one choice the employer does have in this situation is to either request the employee to work out their notice period, or pay the employee in lieu of notice. In the former case the contract ends at the end of the notice period: the employee remains subject to their normal terms and conditions of employment and may be disciplined (and even get dismissed) during the notice period where such action is justified. On the other hand, if the employer decides to pay the employee in lieu of notice, the contract comes to an end immediately when the employee is relieved of his/her duties. No action can be taken against the employee after that date.

However, things change if the employee who has already given notice wants to withdraw it: this can only be done with the employer's consent. In this case the employer therefore has a choice.

If, however, the employee leaves without giving notice or proper notice, the law regards the employee's action as a breach of the employment contract. This gives the employer a choice which has to be exercised as soon as possible; the employee must also be notified of the employer's decision. The employer's choices are, first, to reject the employee's breach and hold the employee to the contract, i.e. demand that he/she gives proper notice and offer to work out the notice period. While it is unlikely that the employee will do so, this choice leaves the employer with the option to continue with any disciplinary processes that were pending on the date the employee left its service. It simply has to send the disciplinary notice to the employee with an indication that the hearing will go ahead in the employee's absence if he/she fails to attend. The hearing should be held as soon as possible but in any event before the date the notice period, if it had been given properly, would have expired. For example, if the employee leaves without notice on 2 September and was subject to a 4 week notice period, the hearing should be held before the expiry of the four week period. The reason for the termination of the contract will then not be reflected as 'resignation' but 'dismissal'. Of course the employee may then decide to challenge the dismissal at the

CCMA or bargaining council, but provided the employer has its ducks in a row, there should be no difficulty to meet the challenge.

The other choice is for the employer to 'accept the breach' by informing the employee that he/she is in breach and making plain the employer's decision to end the contract with immediate effect. In this case the reason for termination of the contract is resignation, not dismissal. The contract comes to an immediate end once the employer has informed the employee of its decision, which means that the employer is no longer able to institute or continue with disciplinary proceedings against the employee. While at first blush this would seem to make life simpler for the employer, it would be bad practice to let employees who face serious misconduct allegations to escape punishment in this way, i.e. by resigning before or during disciplinary proceedings. It will encourage others to do the same, might fly in the face of good corporate governance principles and also create problems of inconsistent treatment down the line in future.

However, employers must be careful when employees suddenly resign or threaten to do so. It may be that the situation triggering the employee's decision amounts to a 'constructive' dismissal, i.e. a situation where the employee leaves because the employment relationship had become 'intolerable' as a result of the employer's conduct. If the employee can prove that this is indeed so, the resignation is 'construed as' a dismissal. The employer will then have to prove that the dismissal was 'fair', both substantively and procedurally. Failing that, a compensation order is likely to result.

It is certainly not easy for employees to prove a constructive dismissal: it must be shown that the employer engaged in conduct 'calculated to drive the employee away'. The employee must also show that before resigning, they made reasonable attempts to resolve the problem internally, but to no avail. They must also show that there were no reasonable alternatives to dismissal available to them. However, when faced with a disgruntled employee who threatens to resign, the best policy is to sit the employee down, find out what is bothering them and try and resolve the problem as soon as possible. This will either lead to a resolution of the problem, or at least help to strengthen the employer's case at arbitration by showing that it was not unsympathetic to the employee's case.

Finally, will it amount to a constructive dismissal if an employee who is given a choice between resignations and, for example, undergoing a performance management process, decides to resign? In the recent case of *Hickman v Tsatsimpe NO & others*¹ the Labour Court confirmed that an employee cannot complain of constructive dismissal if he/she was given a reasonable alternative to disciplinary or other action. In this case Hickman decided to resign rather than face a disciplinary hearing. The court held that, provided the allegations against were not trumped up, he could have taken his chances in the hearing instead of resigning. In other words, he had an alternative to resignation available to him. Having been given the alternative of the hearing, he couldn't afterwards complain that he was 'forced' to resign because his work life had become 'intolerable'.

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