

Constructive Dismissal

This note does not purport to be an exhaustive examination of the law relating to redundancy, nor to deal in any way with discrimination. Please consult your lawyer for detailed advice.

Constructive dismissal is not a cause of action in itself. An employee is constructively dismissed where the circumstances of the case justify his resignation. The law then treats him as if he has been dismissed, enabling him to bring claims (such as wrongful or unfair dismissal) against his employer.

The Onus of Proof

In any subsequent proceedings (probably before an Employment Tribunal, although larger breach of contract cases have to be taken in the High or County Court), it would be for the employee to prove the constructive dismissal.

Repudiatory Breach of Contract

To amount to a constructive dismissal, the employee's resignation must be his response to a breach on the part of the employer of a fundamental term of the contract of employment. The employer must be shown to have repudiated the contract, meaning that he has indicated an intention no longer to be bound by its terms. Not every breach of contract is serious enough to be a repudiatory breach.

Sometimes it is a simple matter to identify a repudiatory breach, particularly if the term is one expressly set out in the contract (probably written down) and of a fundamental nature. A unilateral decision of the employer to reduce the employee's wages would clearly be a breach of a term undermining the whole contract and almost certainly would amount to a constructive dismissal.

A breach of a less fundamental term (such as say a failure to carry out a scheduled performance review) would not entitle the employee to resign and claim constructive dismissal; it would not go to the root of the contract.

Implied Terms

Further difficulties are encountered where the breach complained of is not of a term spelt out in a written contract, but of one either implied by law or by custom and practice. In such cases the employee must prove that the term actually exists, before going on to show that the employer has actually breached it and that the breach is of a fundamental kind.

An implied term, the breach of which is commonly alleged in constructive dismissal cases, is that which requires an employer to do nothing to undermine the duty of mutual trust and confidence which the law holds that the employer and employee owe to each other.

It is by no means simple to define any particular act or omission on the part of an employer which would inevitably amount to a breach of the duty of mutual trust and confidence. Not every shortcoming would fall into this category. Mere bad management of employee relations or even being a bad or uncaring employer will not amount to such a breach. Moreover, Tribunals will allow employers to run their businesses as they wish (subject to employees' rights), and a bad business decision will not of itself lead to a finding of constructive dismissal. Indeed, an employee has a duty to carry out his employer's lawful instructions (even though he might consider them misguided) and a failure to do so could lead to disciplinary action legitimately being taken against him.

Recent judicial authority confirmed the duty of trust and confidence in this way: "that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" and this is the test that a Tribunal will apply.

The "Last Straw"

In some cases, an employee may succeed in establishing constructive dismissal where he has resigned in response to a series of small breaches which individually might not amount to a repudiatory breach.

Waiving the Breach

A claimant alleging constructive dismissal must move promptly. If he continues in his position, he may find it difficult later to deny that he has in effect accepted or waived the employer's breach, which could defeat his claim. The period which the employee has within which to act (ie to resign) will depend upon the circumstances of every case.

The employee should always indicate, in writing, that he is resigning as a result of the employer's repudiatory breach, and alleges constructive dismissal. If he omits to do this, he may later be prevented from contending this.

Evidence

As is always the case in Court or Tribunal proceedings, the facts have to be established. Often, where the allegation is that there is a policy (perhaps on the part of the claimant's manager) to force the claimant to resign, there may be no corroborative evidence.

Grievance Procedures

In fixing an award for unfair dismissal, an Employment Tribunal will consider whether the employee has followed the current applicable ACAS Code of Practice, which states that an employee should raise this sort of dispute by way of formal grievance without unreasonable delay. There are other requirements. A tribunal can reduce the employee's award by as much as 25% if it considers that the employee has unreasonably failed to follow the guidance in the Code.

Summary

The employee must:

- Raise a formal grievance
- Identify the term of the contract (be it express or implied) that it is alleged the employer has breached;
- Show that the term is a fundamental one, going to the root of the contract;
- Prove that the employer has breached the term (and thus repudiated the contract);
- Show that the breach has not been waived;
- Resign in response to the breach (and not for any other reason).

Should the employee fail to establish all of these points, his claim might well fail.

Other points to be borne in mind:

- A constructive dismissal need not necessarily be unfair;
- An allegation of constructive dismissal might extend the length of a Tribunal hearing, thus impacting on the eventual costs;
- The onus is on the employee to prove constructive dismissal;
- An employer might behave poorly, but a finding of constructive dismissal will only be made if it is established that he has been guilty of a fundamental breach of a contractual term going to the root of the contract.

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Other Information Leaflets are also available

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