

Constructive Dismissal

This advice note summarises the law in England and Wales relating to the circumstances in which an employee can claim he has been constructively dismissed.

Introduction

A constructive dismissal occurs where the employer does not expressly dismiss the employee, but the employee resigns and can show that they were entitled to do so by virtue of the employer's conduct. The conduct must be such that the employee could not fairly be expected to tolerate it any longer.

What is needed to establish a constructive dismissal?

The following elements are needed to establish a constructive dismissal:

- There must be a repudiatory breach (see below);
- The employee must resign in response to the breach (the breach does not have to be the only cause of the employee's resignation, however, the employee must show that their loss was caused by the employer's repudiatory conduct and if the employee did not leave by reason of the employer's breach, they will not be able to establish the necessary causation);
- The employee must not delay too long in accepting the breach.

Repudiatory breach

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employer is in repudiatory breach.

The breach may consist of a one-off act or a continuing course of conduct extending over a period, culminating in a "last straw".

What constitutes a repudiatory breach?

The test to determine whether or not there has been a repudiatory breach is objective and is a question of fact and degree. However, neither the circumstances inducing a fundamental breach nor the circumstances that led the employee to accept such repudiation are normally seen to be relevant.

Below are examples of potential breaches:

- Salary: If an employer unilaterally reduces an employee's pay, even for good reason and to a small extent;
- Duties: Changing the employee's contractual duties, whether by removing some duties or requiring the employee to perform new ones, is likely to constitute a repudiatory breach;
- Discrimination;
- Failure to address a grievance;
- Inept handling of disciplinary matters;

- Excessive workload: Causing damage to the employee's health and that damage was reasonably foreseeable;
- Intolerable working environment: May constitute a breach of the implied term of trust and confidence.

'Last straw'

Often the final incident in the chain is in itself insubstantial, but is nonetheless sufficient to render the whole series of incidents as a breach of the implied term.

The Tribunal will look to see if the final incident is sufficient a trigger to revive the earlier ones.

- The final straw must contribute something to the breach, however, it is not necessary to characterise the final straw as unreasonable or blameworthy conduct in isolation;
- The act does not have to be of the same character as earlier acts complained of;
- An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of their trust and confidence in the employer;
- The test of whether the employee's trust and confidence has been undermined is objective.

Anticipatory breaches

It is enough for the employer to demonstrate an intention not to be bound by the contract in the future.

If the employer withdraws the anticipatory breach before the employee "accepts" it (see below), then there is no repudiatory breach.

Implied terms

A breach of an implied contractual term will serve as a basis for a constructive dismissal, provided that the breach in question is repudiatory.

Examples of this are:

- Breach of the implied term of trust and confidence;
- The employer fails to take reasonably practicable steps to provide a safe system of work;
- Where the employer fails to investigate complaints relating to health and safety, promptly and reasonably.

Reason for leaving

There is no requirement that an employee must state their reason for leaving at the time. However, where no reason is communicated to the employer at the time, the tribunal might more readily conclude that the repudiatory conduct was not the reason for the employee leaving.

Acceptance of breach

- The contract is not terminated until the employee accepts the breach;
- The date on which the acceptance takes place will be of key importance for the purposes of determining whether the claim was lodged in time.

The general principle is that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end.

If the employee continues for any length of time without leaving, s/he may be regarded as having elected to affirm the contract and will lose his or right to be treated as discharged.

Delay

Delay by itself does not constitute affirmation. However, if prolonged, it may be evidence of an implied affirmation.

An employee may continue to work “under protest”, making it clear that they are reserving their rights or are only continuing so as to allow the employer a chance to remedy the breach - such further performance will not prejudice their right subsequently to accept the repudiation and claim constructive dismissal.

Much will depend on the circumstances.

Notice

An employee may resign with or without notice; however, it is not common for employees who are claiming constructive dismissal to actually serve out their notice.

Where they do, the constructive dismissal occurs on the date when the notice expires.

Cure

Unlike an anticipatory breach an employer cannot “cure” an actual breach by attempting to make good or undo what has been done.

Damages for wrongful dismissal

If an employee successfully proves that he has been constructively dismissed then, s/he will be able to claim damages for a wrongful dismissal.

Is the constructive dismissal unfair?

An employee who has been employed for two years (or one year if the employment commenced before 6 April 2012) may be able to claim that the dismissal was unfair. However, there is no rule that a constructive dismissal is necessarily an unfair dismissal. A Tribunal will look at the employer’s conduct and decide whether it acted fairly. It is likely to be difficult for an employer to show that it acted reasonably in circumstances where it has committed a repudiatory breach of the employment contract. Any claim for unfair constructive dismissal must be presented to the employment tribunal within three months of the date on which the dismissal took effect.

Grievances and constructive dismissal

Failure to submit a grievance before bringing a claim for constructive dismissal will not bar an employee from bringing a claim, but it may affect the level of any compensation awarded. The safest option would be for the employee to submit a grievance before bringing a claim.

If you would like further advice on this topic or more specific information please contact Nick Jones on 0117 904 5912 or njones@lyonsdavidson.co.uk

The purpose of this general advice note is to provide a general summary of information around a specific topic. It should not, however, be taken as legal advice and should not be relied on as such. We recommend that you always obtain specific legal advice in respect of a particular issue or matter. Please contact our employment team if you have a question about anything related to the subject matter of this note.

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