Constructive Dismissal

GUIDE

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Law Centre NI

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Overview & Introduction

This Guide is intended to help people understand the key elements to a claim of Constructive Dismissal.

This guide is not meant to be a substitute for representation or expert advice. Sources of free help and you are able to contact our Specialist Employment Advice Team should you require advice.

Law Centre NI's employment hub advises on employment law and provides a representation service for employees and workers.

Our employment team offers free, specialist and confidential employment advice. You can contact our advice line on 028 9024 4401, Monday-Friday 9.30am-1.00pm.

This guide has been prepared by the Employment Advice Team at Law Centre NI.

What is Constructive Dismissal?

- 12 months continuous service
- The right not to be unfairly dismissed by their employer.
- The right unfairly includes where an employee *"terminates the contract under which they are employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
- Employee can resign and claim compensation against their employer - known as constructive dismissal.
- Automatic unfair dismissal does not require a qualifying period of 12 months service.

The test is from ***Western Excavating v Sharp [1978] ICR 221***:

"*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 employee is entitled to treat himself as discharged from any further performance.*

If he does so, then he terminates the contract by reason of the employer's conduct."

The Four Conditions

There are four conditions to consider when looking at a claim of constructive dismissal.

- A breach of contract by the employer.
- That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify their leaving.
- They must leave in response to the breach and not for some other, unconnected reason.
- They must not delay too long in terminating the contract in response to the employer's breach, otherwise they may be deemed to have waived the breach and agreed to vary the contract.

  As per **Harvey on Industrial Relations and Employment Law, Div DI 3 para 403**.

As long as the four conditions are in place, an employee's resignation is regarded as constructive dismissal for the purposes of an unfair dismissal claim.

The resignation can be with or without notice.

What is a Fundamental Breach?

According to ***Woods v WM Car Services Peterborough Limited [1981] ICR 666***:

"It is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.

The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

So if an employee wishes to rely on his employer's conduct to claim constructive dismissal, the conduct must be something so serious as to amount to a *"fundamental"* breach of contract.

Where the employer breaches the implied term of trust and confidence the authorities say that the breach is said to be *"inevitably"* fundamental as per ***Morrow v Safeway Stores PLC (2002) IRLR 9***.

In *Morrow* the employee was bullied and harassed for a period of months by a manager. She had been put under persistent pressure by the manager.

She resigned following a public confrontation when she received a dressing down in front of work colleagues and at least one customer and in which the manager said:

"if you cannot do the job that I pay you for I will get someone who can."

Decision: The employer had undermined the trust and confidence required if the employment relationship was to continue; the conduct itself amounted to a repudiatory breach entitling the employee to resign.

The Final Straw Principle

Often the employer's conduct does not relate to a one off event but may be represented in a series of acts.

For example, in one case an employee relied on lack of consultation, demotion, loss of office space and reduction in salary [per ***Lewis v Motorworld Garages Ltd (1986) ICR 157***] to claim constructive dismissal.

In ***Garner v Grange Furnishing (1977) IRLR 206***, it was recognised that a repudiatory breach of contract might consist of a series of small incidents over a period of time which taken individually may not amount to a breach of contract in themselves but will do form a breach of contract when taken together in context.

Each act may amount to a repeated breach of the contract of employment in a minor way, but when taken together amount to a fundamental and significant breach.

This is known as the *"final straw"* doctrine.

An entirely innocuous act on the part of the employer cannot be a final straw. Even if the employee genuinely but mistakenly interprets the employer's act as destructive of trust and confidence, it will not constitute a final straw, as per ***GAB Robins (UK) Ltd v Triggs [2007] IRLR 857***.

"Although the last straw may be relatively insignificant, it must not be utterly trivial"- ***London Borough of Waltham Forest v Omilaju (2005) IRLR 35***.

What acts or behaviours might constitute a fundamental breach?

A fundamental breach of contract must be serious enough to justify resignation. ACAS gives some examples of what this conduct might include:

- Regularly not being paid the agreed amount without good reason.
- Being bullied or discriminated against.
- Raising a grievance that the employer refuses to look into.
- Making unreasonable changes to working patterns or place of work without agreement.

Other examples could include:

- Rudeness or unpleasantness
- Breaches of health and safety
- Unfair disciplinary sanction
- Serious verbal abuse
- A false allegation of serious misconduct

The Implied Duty of Trust & Confidence

Where breach of an express term of the contract is hard to identify, an employee can rely on a breach of an implied term.

The term most often relied upon is the implied duty to maintain trust and confidence:

"The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee." As referenced in ***Malik v Bank of Credit & Commerce International SA (in compulsory liquidation) [1998]***

Just because an employer is aggressive, confrontational, unpleasant or disrespectful may not be enough to justify a claim of constructive dismissal.

Case Example

Horkulak v Cantor Fitzgerald International [2004] ICR 697

The employer unsuccessfully defended a case by a senior manager who was awarded almost £1m plus interest and costs. He resigned alleging that he had been the victim of a vicious and premeditated campaign of bullying, harassment and intimidation by his immediate superior, Cantor Fitzgerald's Chief Executive.

This individual was described by the Judge as a *"dictatorial manager"*. The issue was that the workplace culture involved the use of foul and abusive language (admitted by the defence as communication which *"might be regarded as extreme in polite conversation…"*).

The Court reflected that *"its prevalence raises a question as to how far regular use can sanitise it so as to remove its power to offend."*

The Judge considered how far the prevalence of such language is capable of undermining the employer and employee relationship:

"The law has developed so as to recognise an employment contract as engaging obligations in connection with the self esteem and dignity of the employee.....Far from having a discussion and giving advice (the CEO) uttered intemperate, summary views in foul and abusive language. His solution seems to have been to frighten the claimant into performing according to the standards he required and to make it plain that any contrary view which questioned his authority would not be tolerated."

Breaches of Health & Safety

A failure by the employer to observe health and safety standards could justify a claim for constructive dismissal.

Case Example

In one such case, an employee regarded himself as constructively dismissed because, having raised concerns over the ropes being used to secure pallets on his lorry, the employer failed to respond and expected him to continue working.

As per ***Teasdale v John Walker t/a Blaydon Packaging (unreported)***.

Unfair Disciplinary Proceedings

Case Example

One example of subjecting an employee to unfair disciplinary proceedings relates to an accountant disciplined for *"insubordination"* for not following an instruction to include in annual accounts figures for expenses incurred which were in fact uncosted estimates.

These estimates were routinely much higher than actual records would suggest, as per ***Stuart Harris Associates Ltd v Goburdhun [2023] EAT 145***. The employee, Ms Goburdhun, resigned claiming constructive dismissal.

The tribunal concluded that the employer, a firm of accountants, was dishonest or incompetent in adopting this practice and that to follow it was a breach of the implied term of trust and confidence.

That breach was compounded by disciplining the employee for refusing to follow that practice and then giving her a final written warning for that refusal.

Serious Verbal Abuse

Case Example

Case example. In one case, Mr Cedron, an employee of a night club, was subjected to expletive ridden foul abuse by his manager and the final comment:

"If you leave me now, don't bother to collect your money, papers or anything else. I'll make sure you don't get a job anywhere in London."

The Court said that the employer's use of foul language was conduct amounting to a repudiation of the contract thus entitling the employee to resign and treat himself as having been dismissed. As per ***Palmanor v Cedron [1978] IRLR 303***.

Health & Safety Cases

Case Example

In one case, the employer had breached the implied duty to provide a safe work environment, by failing, despite requests, to provide manual handling training, over a period of many months during which the employee was required to carry out such tasks, and repeatedly requested training. As per ***Flatman v Essex County Council UKEAT/0097/20***.

Other examples of a breach of the implied term of trust and confidence:

- In one case the employer was insisting upon an employee working hours which he is not contractually obliged to work.

  As per ***Derby City Council v Marshall [1979] IRLR 261***.

- Another example is making a false accusation of serious misconduct, such as dishonesty. In ***Robinson v Crompton Parkinson Ltd [1978] IRLR 61***, MR Robinson was accused if theft, prosecuted but later acquitted. He gave the employers an opportunity to apologise for their actions when no apology was forthcoming, he resigned.

- The Court in Robinson said that the employer's conduct in falsely accusing the employee of dishonesty and calling in the police, constituted a breach of confidence and trust. This amounted to a repudiation of the contract of employment, entitling the employee to treat himself as dismissed.

- A unilateral reduction in the basic rate of pay, even for good reasons and to a relatively small extent, is a material breach of a fundamental element in the contract of employment. As per ***Industrial Rubber Products v Gillon [1977] IRLR 389***.

Performance Review / Disciplinary Action

A manager may feel that an employee is falling behind their expected standards or failing to work effectively in their role and this may lead to confrontation.

A dispute might arise over disciplinary action or closer supervision of the employee than they feel is merited, but this is rarely enough to justify a later claim of constructive dismissal.

Sometimes an employee might resign in the course of disciplinary action against them, but as long as the employer is acting reasonably, a tribunal is not going to second guess such action, nor will it impose its own version of what it feels the employer should have done. As per ***Iceland Frozen Foods v Jones (1982) IRLR 439***.

An employer is entitled to later defend any claim for constructive dismissal on the basis that the disciplinary action was for a potentially fair reason, such as conduct or capability.

In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***, a nurse claimed that from the outset of her employment she was the subject of complaints about her performance which were not justified. She claimed she had been bullied by colleagues. She was required to undergo a capability process, despite her objections and following allegations of a verbal and physical altercation with a colleague (one of those alleged to have been bullying her), both were given final written warnings. Ms Kaur had been on sick leave since the altercation with the colleague and she was due to give birth after having appealed against the disciplinary sanction.

When a decision was finally reached, her internal appeal was dismissed. She resigned the next day claiming that the appeal decision was the *"last straw"*, and that the dismissal of her appeal formed part of this cumulative treatment amounting to a fundamental breach.

Ms Kaur had her tribunal case struck out on the basis that she had no reasonable prospects of success. She ultimately lost in the Court of Appeal which held that the employer had acted properly in going ahead with disciplinary proceedings and imposing the warning, so that that issue could not be a final straw.

Repudiatory Breaches

"Conduct is repudiatory if, viewed objectively, it evinces an intention to no longer be bound by the contract."

As per ***Lewis v Motorworld Garages Ltd (1985) IRLR 465 CA***

Anticipatory Breaches

"The breach of contract at issue can be actual or what is known as an *"anticipatory"* breach.

An anticipatory breach is where the employer indicates clearly that they aren't going to perform a contractual requirement, for example, the payment of a salary bonus. The employee can "accept" this conduct as a breach of contract and use this to justify their resignation.

The *"unilateral imposition by an employer of a reduction in the agreed remuneration of an employee constitutes a fundamental and repudiatory breach of the contract of employment which, if accepted by the employee, would terminate the contract forthwith".* Included prosecuted but later acquitted. He gave the employers an opportunity to apologise for their actions but when no apology was forthcoming, he resigned.

Resigning in Response to the Breach

After establishing that the employer has been responsible for a fundamental breach of contract, the timing of any resignation becomes of vital importance.

An employee *"must not delay too long in resigning" in response to their employer's breach or they will be "regarded as having elected to affirm the contract.'*

As per ***Western Excavating [1977] EWCA Civ 2***.

Affirmation

The reason for this is that the employee can be seen to have *"waived"* the breach if they do not act promptly and will be taken to have affirmed the contract by continuing in employment.

Delay from the date of the breach until the time the employee finds out about it, cannot prevent a claim for constructive dismissal as long as the employee acts promptly once they become aware of the breach:

"Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation."

As per ***WE Cox Toner (International) Ltd v Crook [1981] IRLR 443***.

A lot will depend on the circumstances of the case. As the standard textbook, **Harvey on Employment Law, Div D1, para 525** states:

"Where the employee is faced with giving up his or her job and being unemployed or waiving the breach, it is not surprising that the courts are sometimes reluctant to conclude that they have lost the right to treat themselves as discharged by the employer merely by working at the job for a further period."

If an employer says that they can no longer afford an agreed level of pay and the employee decides to continue in employment on lower pay, as this is a breach of contract, the right to resign and claim constructive dismissal will be lost. The employee cannot pocket the breach for a rainy day.

However, in some limited circumstances where the employee is unable to find alternative work and is reliant on their current employment, they may be able to continue in work for a short period without having affirmed the contract.

In another case involving ***Cantor Fitzgerald***, an employee resigned in response to the use of obscene language in the workplace.

Cantor Fitzgerald tried to claim that the employee had waived any breach.

Again "machismo" management conduct was an issue per McCombe J and the language was:

"reminiscent of the quick fire exchanges in American office scenes so familiar from the cinema, using language, that years ago, would have been wholly unacceptable but which now is, perhaps regrettably, commonplace in many places of work as the machismo image of Hollywood is imported into real life."

Interestingly, the Court said that on single encounter with the foul-mouthed CEO may have been enough:

"Even by the robust standards of this trade, the language and comments of [the CEO] on this occasion may well, on their own, have crossed the threshold of conduct repudiatory of the employment contract..."

McCombe J dismissed the employer's claim that the employees had affirmed the contract, stating that:

"Each employee was clearly indicating his discontent in the employment and was giving clear signs of an intention to leave."

The Court explained:

"Affirmation is essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'. I do not consider that anything like this occurred…"

The following examples illustrate how the Court interprets the issue of affirmation:

- A *'whistle blower'*, Mr El-Hoshi, who was employed as an assistant branch manager, was punished by being made to work in the kitchen, which was undeniably a demotion. He went off work sick.

- In correspondence he made it plain that he did not accept his change in role. He received sick pay for some weeks and later commenced proceedings within three months of the demotion. The Court said that he had not affirmed the contract. It said that receiving sick pay did not mean that the employee had accepted the '*new regime'*.

- In a case where there is a dispute, staying away from work will mean the parties do not have to work together. In addition, affirmation of the existence of a contract does not mean acceptance of the new regime demanded by management. As per ***El-Hoshi v Pizza Express Restaurants [UKEAT/0857/03]***.

- A supervisor, Mr Bashir, was suspended following a workplace dispute. He was offered a non-supervisory job in a different department on a lower pay grade. Following this, he went off on sick leave for three months. As per ***Bashir v. Brillo Manufacturing Co Ltd [1979] IRLR 295***.

- His solicitor made it clear to the employer that he did not accept the alternative role. The Court said that the reference to an employee continuing for any length of time without leaving, refers to a situation where he acutally does the job for a period of time without leaving, or where he does some other act which can be said to affirm the contract as varied.

- The employee in this case was still entitled to say that at the end of the period of sick leave, he accepted the repudiation of his contract, and he could therefore claim constructive dismissal. However, it is suggested that this case is relatively unique and that employees should not rely on being able to claim constructive dismissal after a lengthy period of sick leave.

- Although Ms Mari had complained about her employer's treatment before going on sick leave, she was found to have affirmed the contract on her resignation after over 18 months as per ***Mari v Reuters Ltd (UKEAT/0539/13/MC)***.

  Richardson J stated that

  ".....the significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely.

  At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract.

  At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights."

  The Court took into account that the period of delay between breach and resignation was very substantial and concluded that she had affirmed the contract.

Resignation for Some Other Unconnected Reason

If the employee is leaving their employment because they have been poached by another employer or have seen another better job opportunity, they cannot claim constructive dismissal. That is because the reason they are is leaving is not because of a breach of contract, but for an *'unconnected reason'*.

In one example, Mr Walker failed to get on with his immediate superior and, following a series of incidents in which he was given a formal warning of dismissal, he was not consulted about the appointment of a subordinate or pay increases received by his subordinates (when his own had been withheld). He resigned.

When asked why he had done so, he told his employer that it was to take '*a better job'*. The reason why he had taken the other job was because he was unhappy with the way his superior was carrying out his duties.

Dismissing his claim for constructive dismissal, the Court found that the employer had not repudiated the contract of employment. Moreover, Mr Walker had not, on resigning, asserted that his reason for leaving was the employer's conduct. As per ***Walker v Josiah Wedgment & Sons Ltd [1978] IRLR 105***.

An employee may be able to claim constructive dismissal, however, if the breach relied on was at least a substantial part behind their resignation.

Post Termination Contractual Obligations

If an employee resigns and can persuade the Court that they were justified in doing so, they can be released from any contractual obligations (such as non-competition clauses or restrictions on working for a competitor).

This is because the employer has breached the contract of employment and, as a result, the employee is free from any legal requirements or obligations in the contract.

In one case, the employees were brokers employed by, our old friend, ***Cantor Fitzgerald***. They were offered, as part of an improved salary package *a tax free loan of £60,000* aimed at retaining their services.

However, the company was wrong about this: the taxman said that there was a tax liability, and that each employee was required to pay £8,000. The company declined to resolve the issue. Two weeks later the employees handed in a joint written notice of termination of employment.

When Cantor Fitzgerald sought an injunction to prevent its former employees working for a competitor, the employees successfully relied on the employer's breach of contract.

The Court held that where an employer unilaterally reduces an employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined.

The refusal to pay was deliberate and motivated by a desire improperly to pressurise the employees into harder work. That decision wholly undermined the contract of employment and meant the employees were able to escape their contractual obligations.

Conclusion

Going back to the case which acted as the starting gun for constructive dismissal claims, ***Western Excavating***, one of the Judges hearing that case said:

"Sensible persons will have no difficulty in recognising conduct by an employer which under law brings a contract of employment to an end".

That is easier said than done.

As will have been seen, the bar is high for an employee to overcome to successfully claim constructive dismissal. In a case called ***Tullet Prebon v BGC Brokers LP (2010) IRLR 648*** the High Court cautioned about taking this principle too far:

"In considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in the employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough".

Often in practice you will confront a scenario of the employee who has had a disagreement in work following which they have taken a considerable amount of sick leave.

At some point they will move from full pay to half pay and to no pay. At that point they may be so disgruntled that they may be seeking a way of pursuing a claim for constructive dismissal, but the problem with this is that whatever acts complained of which caused the sick leave are now in the distant past, and as constructive dismissal requires a resignation at the time in response to the breach, the reality for such an employee is that they have no realistic route to compensation as by the failure to act in the interim they have been deemed to have waived the breach and affirmed the contract.

CONTACT INFORMATION

028 9024 4401

MONDAY TO FRIDAY
09:00 - 13:00

LAW CENTRE NI
SPECIALIST EMPLOYMENT TEAM