

Constructive Dismissal

There are two kinds of constructive dismissal: unfair constructive dismissal and wrongful constructive dismissal.

The former is a statutory constructive dismissal arising from a breach of contract by the employer (that breach being a statutory right not to be unfairly dismissed), contrary to the fairness of employment legislation whereas the latter is a common-law constructive dismissal, again, arising from a breach of contract by the employer.

Although these definitions may appear complicated, a claim to an employment tribunal for unfair constructive dismissal is made under the statutory fairness of employment legislation which means that, unless the dismissal comes within a range of dismissals which the law deems to be automatically unfair and for which no minimum period of employment is required, the employee in question needs to have been continuously employed by the employer for one year or more.

In contrast, a claim for wrongful constructive dismissal is a common-law claim that can be made to either a County Court or to an employment tribunal and, if made to the latter, can only be made to an employment tribunal if the claim is outstanding on the termination of the employee's employment. For example, a claim of this kind might be made by an employee who has been continuously employed by the employer for less than one year and who cannot, for this reason, make a claim for unfair constructive dismissal so he or she is limited to making a claim for a sum owed to her or him for the contractual or statutory notice period (whichever is longer) and/or any other sum due under the contract.

A constructive dismissal, of either kind, occurs when the employer commits a fundamental breach of contract that presents the employee with the choice of either (i) ignoring the employer's breach in which case the contract of employment that exists between the employer and the employee continues or (ii) accepting the employer's breach by terminating the contract of employment with or without notice and making a claim for constructive dismissal. In such a situation, the key issue in fact and law is that the employer's breach of contract must be a fundamental breach. A breach of this kind is one in which it could be said that the employer, without just cause, has by its conduct destroyed or seriously damaged the trust and confidence of the employment relationship.

A constructive dismissal may be an actual breach of contract that occurs immediately or it may be an anticipatory breach of contract which means that the employer has indicated by words or conduct that it does not intend to honour future contractual obligations.

A constructive dismissal can occur as a result of a series of acts or omissions by the employer which, taken individually, do not amount to constructive dismissal but, taken cumulatively, do. And the final act or omission in the series on the employer's part that leads to the employee terminating the contract of employment is often referred to as 'the final straw.'

A failure or refusal by the employer to deal with an employee's grievance under the statutory grievance procedure by initiating and completing the pre-06th April 2009 regime or by following the new regime under the ACAS Code of Practice on Disciplinary and Grievance Procedures may constitute a fundamental breach that presents the employee with the unavoidable option of having to choose whether to ignore the employer's breach, thereby allowing the contract to subsist or by terminating the contract and regarding herself or himself as having been constructively dismissed.

The Employment Rights Act 1996, s.95(1)(c), is the statutory provision that states that an employee is entitled to terminate the contract of employment, with or without notice, in circumstances whereby she or he is entitled to terminate it without notice by reason of the employer's conduct. In Bishop v Financial Times (2003) ALL ER (D) 359, HH Judge Burke said: 'A constructive dismissal claim requires a fundamental breach of the contract of employment; but it is not a claim for breach of contract; it is a claim for breach of a statutory right;...'

The leading case for constructive dismissal is Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27, CA, wherein the Court of Appeal said that the test for constructive dismissal is to be decided by the contract test being: 'Did the employer's conduct amount to a breach of contract that entitled the employee to resign?'

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