

Constructive Dismissal

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An Insight into Constructive Dismissal

Constructive dismissal is a commonly misunderstood concept. This is what it looks like:

- Employer does (or doesn't do) something which is a serious and fundamental element of the employment contract/relationship;
- The employee resigns in response to the employer's breach;
- The employee's resignation is considered to be a "constructive dismissal" – in other words, the employer didn't actually dismiss the employee but by virtue of the employer's conduct the resignation is deemed to be a dismissal.

This situation is covered in the Employment Rights Act 1996, the same piece of legislation which protects against ordinary unfair dismissal.



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The important aspect of constructive dismissal is that the employee has to be entitled to resign without giving notice in response to some heinous act the employer has first committed. They don't actually have to resign without giving notice, and many employees will choose to work their notice so as not to lose out on the pay. This is not without risk for employees as explained below.

Constructive dismissal usually involves the employer having committed a repudiatory breach of the employment contract. This means a fundamental term of the employment, whether it's in the written contract or not, has been breached. For example, it's obvious that a fundamental part of the employment relationship is that the employee is paid for the work they have carried out. In most cases any failure by the employer to pay an employee's salary when due will constitute a repudiatory breach.

The most common situation however involving constructive dismissal is where the implied term of mutual trust and confidence has been breached. This can take many forms, and is often a tricky one for an employee to prove as situations are rarely black and white.

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One common example is where an employer takes steps to alter or reorganise someone's role which effectively results in demoting that employee. This situation can arise unintentionally, for example, you decide to re-organise your management team and introduce a new line of management. The result is that one of your employees used to report to a director, but now reports to a manager who is not a director. That employee could argue that this is effectively a demotion and a fundamental breach of contract.

Other examples of cases where constructive dismissal was proven include where the employer:

- Unilaterally reduced an employee's salary/commission;
- Changed the employee's contractual duties;
- Discriminated against the employee;
- Failed to deal with an employee's grievance;
- Created or enabled an intolerable working environment.

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Another important feature of constructive dismissal is that the employee must make up their mind pretty quickly once a breach has occurred in order to be able to bring this claim. The language used is slightly confusing but if the employer fundamentally breaches the contract, the employee must decide whether to “accept” the repudiation and resign or “affirm” the contract and continue to be employed. The employee can reserve their position for a short period of time whilst they decide what to do. However, prolonged delay by the employee in deciding whether to resign may be evidence that they have in fact “affirmed” the contract, losing them the opportunity to resign and bring a constructive dismissal claim.

Although under the Employment Rights Act 1996, an employee can claim to have been constructively dismissed where they resign on notice, an employee who does so may still be found by an employment tribunal to have affirmed the contract. Much will depend on the facts, the reason for giving notice and how much notice the employee gives. For example, a tribunal is likely to find that the employee has affirmed the contract and lost their right to claim constructive dismissal if they give longer notice than their employment contract requires.

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The Consequences - Compensation

If the employee has less than two years' service then often their only claim would be for breach of contract, which commonly means their notice pay. If the employee resigned with notice, then there is little to no scope for further compensation. All this assumes that the employee does not also have grounds to bring a claim for automatic unfair dismissal, such as whistleblowing, or for discrimination, where further compensation could be awarded. An employee does not need to have two years' service to bring discrimination claims and most claims of automatic unfair dismissal.

If the employee has two years' service or more then they can also argue that their constructive dismissal was unfair. It is highly unusual for a Tribunal to find that there has been a fundamental breach of the contract and not find that the "dismissal" was unfair. In such cases the employee will be able to claim compensation for loss of earnings, limited to the statutory cap. The cap as at April 2019 is £86,444 or one year's salary, whichever is lower. They would also be entitled to a basic award which is based on their age and length of service, subject to a maximum of £15,750 (as at April 2019).

It is important to note that the Employment Tribunal doesn't generally dole out awards simply to punish the employer. In other words, a successful Claimant can only claim for their actual loss of earnings, and anticipated future loss of earnings (as judged by the Tribunal). As soon as the individual starts a new job and covers their lost salary, they have reached the limit of the loss they can claim. Claimants are also under a duty to mitigate their loss, so compensation may be reduced if they have not made reasonable efforts to find alternative work and replace their lost earnings.

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Time Limits

A claim can only be brought once the employee's employment has ended.

The time limit for bringing an unfair dismissal claim is three months less a day from the date dismissal takes effect (i.e. after notice has expired, or the date of immediate termination if notice is paid in lieu).



If you would like more advice regarding constructive dismissal, get in touch for a friendly and informal chat today.

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