

Constructive dismissal

Making sense of the issues surrounding it



Overview

Most of us appreciate that a dismissal has taken place when an employer terminates an employee's contract. However, a resignation will also be treated as a dismissal if an employee is forced into resigning by the employer's fundamental breach of contract.

This is what is known as 'constructive dismissal' and you may be able to bring a claim for unfair dismissal because of it.

What is constructive dismissal?

To claim constructive dismissal you must show:

- That your employer broke your contract in a fundamental way
- That you resigned as a result of your employer's breach of contract
- That you did not act in a way in which could be taken as confirming the contract despite the breach (e.g. by delaying before resigning).

If you succeed in a claim for constructive unfair dismissal, you will usually be entitled to a basic award, of up to £400 per week (as of 1st February 2011) for each year of employment multiplied by 0.5, 1 or 1.5 depending on your age (though not where a statutory redundancy payment has been paid) and a compensatory award based on your losses up to a maximum of £68,400 (as of 1st February 2011). A Tribunal will assess the compensatory award with a view to covering the time during which you are unemployed as far as it is just and equitable for it to do so. This will take into account the efforts you have made to find another job and there is a duty to take reasonable steps to minimise ('mitigate') your losses.

In most cases, it will be necessary to have 1 year's continuous service with your employer before you can bring a claim for constructive unfair dismissal. There are some limited exceptions to this, for example where the dismissal is for maternity reasons or because you have blown the whistle.

Behaviour that amounts to breach of contract

What types of behaviour will amount to a fundamental breach of contract? No list can be exhaustive, but some of the more common types of behaviour include:

- A deliberate breach of a term in your contract of employment such as a pay cut
- Withdrawal of other benefits provided to you, e.g. a company car
- An important and significant change in your duties e.g. if you are a sales manager and you have most of your sales activities removed
- Suspending you where there is no contractual right to do so or where there is no justification for doing so
- A serious failure to provide you with a safe working environment
- A deliberate failure to provide you with a reasonable opportunity to obtain redress for a grievance
- Imposing a disciplinary punishment which is grossly out of proportion to the offence that you have committed.

Many constructive dismissal claims rely upon a breach not of any express term of the contract, but of the implied term of trust and confidence. To establish such a breach you would have to show that your employer has without good reason acted in a way which was likely to destroy the relationship of trust and confidence between the employer and employee.

Ultimately each case depends on its own facts, but there are many types of behaviour which have been found to breach trust and confidence including using obscene language; false criticism; giving an employee an unjustified warning with the intention of disheartening him/her causing him/her to resign and disciplining an employee in front of subordinates in a way which is humiliating.

However, it is important to note that not every instance of bad treatment or unreasonable behaviour amounts to a breach of trust and confidence, and employers who act in good faith but in error are less likely to destroy trust and confidence than those who act in bad faith.

Resigning in response to a fundamental breach

It is important you clearly communicate your belief that your employer has breached your contract as soon as possible; not doing so could mean that you will be taken to have accepted the breach and you will lose your right to claim constructive dismissal.

On the other hand, however, you must be very careful not to pre-empt the situation and leave before any breach has occurred. Your resignation must be in response to your employer's breach of contract.

However, it is possible that your employer's past conduct makes a final incident sufficient reason to resign (the 'last straw' argument). For example, if your employer has subjected you to a course of bad behaviour, you can rely on this series of acts as a whole amounting to a fundamental breach of contract. This is true even if the last event in that series which finally prompts your resignation is not sufficient to amount to a breach of contract taken on its own.

If you decide to resign, it is important that you clearly state to your employer that you feel that you have no choice but to leave.

You do not have to give the exact reason why you feel you have to leave, but it makes sense to do so – otherwise your employer could claim that he or she was not aware of why you left. The wording of the resignation letter can be crucial in a constructive dismissal claim.

Raising a grievance

Although from April 2009 you will not be prevented from bringing a claim in the Employment Tribunal if you have not first raised your complaints as a written grievance with your employer, it is still good practice to do so and is required by the ACAS Code of Practice on Discipline and Grievance Procedures.

If you unreasonably fail to comply with the ACAS Code, either by not raising a grievance or, for example, failing to attend a meeting, the Tribunal may reduce any compensation awarded to you in respect of your case by up to 25%.

Once you have raised your grievance, in most cases your employer will invite you to a meeting. It is very important that you take all reasonable steps to attend this meeting unless both sides agree to deal with it without a meeting.

After your grievance meeting

After the meeting your employer must inform you of his or her decision and notify you of your right of appeal. If you wish to appeal, you must inform your employer and a further meeting must take place. Again, you must take all reasonable steps to attend this meeting. After the appeal meeting, your employer must inform you of his or her final decision.

Please see our factsheet 'Grievances', part of the Employment Law series, for further information.

Time limits

You must present your complaint of constructive dismissal to an Employment Tribunal within three months less one day of the date of the termination of your employment. This may include any claim you may wish to present for breach of contract or wrongful dismissal in respect of your notice period depending on the value of such claims (compensation for breach of contract claims is capped at £25,000 in the Employment Tribunal - so such claims that are higher than £25,000 in value may need to be pursued in the County/High Court and different time limits would apply to this. You should seek legal advice).

Please note that the time limit for bringing a claim will not normally be affected by compliance with the ACAS Code. However if your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or Tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

This factsheet sets out only basic information relating to constructive dismissal. If you need specific advice then please contact the Employment Team at Russell Jones & Walker on 0800 916 9015.

You can get more information from our 'Unfair Dismissal' factsheet which can be downloaded from our website at www.rjw.co.uk.

Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:



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