



Constructive Dismissal

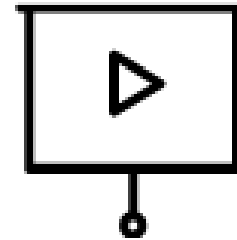
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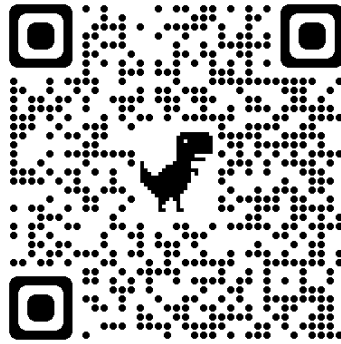


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Introduction & Connect with Us



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1. Open the Camera on your mobile device.
2. Tap the LinkedIn link
3. Connect with Jackie and Grace

What we will talk about today

1. Constructive Dismissal Overview.
2. Bringing a Constructive Dismissal Claim.
3. Case Studies
4. Tips to reduce exposure to Constructive Dismissal Claims.
5. Questions

Did they jump or were they pushed - What is constructive dismissal?

Constructive dismissal is where employer commits a repudiatory breach of the employment contract, and in response to which the employee is entitled to resign and to treat this as a dismissal.

Employee must show:

1. Employer was in repudiatory breach of their contract.
2. Employee accepted breach.
3. They did not delay too long before resigning in response to their employer's breach.

1. What is a repudiatory breach?

A breach so serious that it goes to the *root* of the contract:

- Express or implied term
- Actual or anticipatory
- One-off act
- Course of conduct over a period of time until “*last straw*”

Express Terms

Terms expressly agreed between the parties, usually in writing e.g. the employment contract or employee handbook / correspondence or can be oral.

Examples:

- Reducing an employee's pay or not paying them a bonus
- Removing contractual benefits, such as a company car.
- Changing working hours, place of work or working conditions
- A change in the nature of a job or demotion

Implied Terms

- Term not expressly agreed by parties but implied by common law or statute
- “business efficacy” - underlying terms to make the contract work effectively
- “custom and practice”
- “Trust and confidence” **“the employer must not without reasonable cause conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”**

Examples

- Failure to provide safe system of work
- Failure to address grievance
- Change to job and status

“Root of the contract”

- Singh v Metroline West Limited 2022 EAT 80

Facts: S went off sick the day after he was invited to a disciplinary hearing. S was paid only SSP rather than company sick pay as his employer believed he was trying to avoid a disciplinary. S claimed constructive dismissal

Tribunal Held: MWL had breached his contract. They had contractual right to investigate absence to determine whether genuine and then withhold sick pay but did not do so. However the breach was not fundamental as their intention was to encourage D to engage in the disciplinary process which was integral to the employment relationship.

Employment Appeal Tribunal (EAT) held:

To establish fundamental breach the employer must demonstrate an intention to no longer comply with the contract *so serious* that it goes to the root of the contract. MWL had deliberately breached S's contract and he had suffered financially.

2. Acceptance

- Employer's repudiatory breach does not bring the contract to an end automatically
- Contract not terminated until breach accepted by employee
- No need to expressly communicate acceptance of repudiatory breach to employer
- Acceptance must be unequivocal and unambiguous



Communicating acceptance

Chemcem Scotland V Ure 2020 8 WLUK 347

Employment Appeal Tribunal (EAT) Held:

- Employee's failure to return to work following maternity leave was sufficient to communicate her resignation.
- Failure to turn up for work would not normally constitute acceptance of a repudiatory breach, however the repudiatory conduct was during maternity leave and it was evident the employer did not want her to return to work.

3. The employee must resign in response to breach

Employee must show that they resigned in response to the repudiatory breach.

NB The breach does not have to be the only cause of the employee's resignation.

No requirement to state their reason for leaving at the time, but must be clear that breach "played a part" in their leaving.

Resignation should be without undue delay

- If employee continues working for any length of time, they could lose their right to treat the contract as breached as they have chosen to "affirm" the contract.
- If, however, the employee continues to work but at the same time reserves their rights, or continues so as to give employer a chance to remedy the breach e.g. raising a grievance this should not prejudice their right to bring a claim.
- **NB** The employee can resign "with or without notice."

How long is too long?

Dixon and others v London general transport services ltd
EAT/1265/98

Facts: Employees “*worked under protest*” in response to unilateral breach of contract and resigned a year later

Held: Constructive dismissal claim failed – delay fatal as employees had affirmed contract

NB succeeded in claim for unlawful deduction from wages as did not accept the contractual change

Bringing a claim

- Employee should normally have 2 years continuous service.
- Bring the claim within 3 months less 1 day from the date of dismissal
- Refer the case to ACAS for early conciliation before bringing a claim

To succeed in claim Employee must prove:

1. They have been constructively dismissed; and
2. The dismissal was unfair “ **Whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee”**

Compensation

- **Basic award:** employee's age x length of service x capped weekly pay (£ 571) current maximum £17,130
- **Compensatory award:** maximum amount currently £93,878 or 52 weeks gross salary - whichever is the lower.
- **Damages for breach of contract.**

NB Failure to follow the ACAS Code and raise a grievance could mean that any award is discounted by up to 25%

Case Study One

A is a long serving Sales VP. You doubt her commitment to the business. You think she's overpaid. You don't want to go through a performance process with her as that would be disruptive to the business. You call her to a meeting to have an "off the record" protected conversation. You tell her that things have not been working out and offer her a settlement to leave the company on amicable terms or she will be put on a PIP.

A walks out and does not return. She texts you "This is the last straw. It's a done deal. You have been trying to get me out for some time. No bonus at Christmas. No office – open plan working with the masses! No designated parking space! Side lined! Underlings promoted!"

This is a really busy time for the company. You discover that A has joined a competitor despite the post termination restrictions in her employment contract.

A brings a claim to the Employment Tribunal.

Case Study One - Questions to consider

- What claims could A bring?
- Has A's contract been breached?
- Should A have raised a grievance?
- Is there anything you could have done to avoid/ diffuse the situation?
- Do you think A would succeed in her claim?
- Can your company bring any claims?

Case study One - Pointers

- Follow a fair process when changing terms and conditions consult and engage with employees to obtain agreement.
- Review performance management and promotion policies
- Clearly record agreement to any contractual changes so there is no argument later
- NB Don't forget implied term of trust and confidence!
- Encourage use of grievance process to internalise complaints
- Protected conversations are a useful tool but manage carefully
NB If there is a repudiatory breach of contract then the restrictive covenants in the contract are potentially void

Case study 2:

B works in Advertising. It's a pressurised environment, pitches, deadlines and long hours. There's a lot of swearing. The team's manager is demanding and sarcastic. She sends B emails late at night and early in the morning. B has raised this with others manager several times but they say its just her management style.

B forgets to put a meeting in his manager's diary. She loses it with him. B goes on sick leave. He resigns. In his resignation letter he says he is not cut out for this. B serves his 3 months' notice on sick leave. His company sick pay expires on his last day. He doesn't bring a grievance.

B brings a claim in the Employment Tribunal

Case Study Two - Questions to consider

- What claims could B bring?
- Has B's contract been breached?
- Should B have raised a grievance?
- Is there anything you could have done to avoid/ diffuse the situation?
- Do you think B would succeed in his claim?

Case study 2 - pointers

- Employers have a duty to provide a safe place of work this extends to employee relations, working hours and workload
- They are vicariously liable for what their employees do.
- Make sure you have appropriate policies in place to manage employee welfare to include anti-bullying and harassment and grievance procedures
- Induct and train managers and employees on policies
- Monitor working hours and risk assess working arrangements to avoid stress claims
- Encourage transparency and open working culture
- Take concerns seriously and deal with them promptly – informal grievance / early mediation
- If concerns left to fester claims can arise!

Tips to reduce exposure to Constructive Dismissal claims:

- You may not be able to cure breach but you can try and avoid/ diffuse it!
- Have comprehensive up to date policies in handbook, accessible to all.
- Train managers on the procedures and the reality , softer skills of dealing with people.
- Ensure changes affecting your employee are made for legitimate business reasons.
- Communication and transparency. Talk with employees prior to implementing a significant changes/ incentivise / contextualise.
- If you need to make unilateral and substantial changes, provide employee with reasonable notice of changes and clearly document.
- Be proactive! Encourage use of grievance process to try and resolve disputes internally.
- Act reasonably, openly and fairly towards your employees.

Any questions?



What's coming up?

Webinars

17th November – Positive Discrimination

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