

Sheffield Law Centre. Employment law factsheet No 12

Constructive Unfair dismissal.

This factsheet is designed to help employees decide whether they might succeed in a claim for constructive unfair dismissal and to give advice on steps they can take before or at the time of resignation that may help strengthen any claim they later make.

What does constructive unfair dismissal mean?

In simple language the term constructive dismissal is used to describe the situation where an employee resigns because the employer has acted so badly (in legal jargon, that the employer has broken a fundamental term of the contract of employment) towards the employee that the employee no longer feels able to work for the employer. As with most unfair dismissal claims, an employee normally needs to have been employed by the same employer for a continuous period of at least one year in order to qualify to bring a claim in the employment tribunal.

How do I go about showing that I have a claim for constructive unfair dismissal?

The easiest way to demonstrate what you need to show is to break down the different things that an employee has to prove to succeed in a claim.

1. The first thing to show is that the employer has broken (breached) a fundamental (i.e. major) term of the contract. It may be sufficient to show that the employer intends, in the near future, to breach the contract (the legal jargon for this is an *anticipatory breach*).
2. Secondly, the employee has to demonstrate that s/he resigned principally because of the breach of contract by the employer.
3. Thirdly, the employee has to show that s/he did not delay too long after the breach of contract before leaving. If an employee waits too long before leaving a tribunal might decide that, because of the delay in leaving, the employee has given up his or her right to complain about the employer's breach of contract.
4. Finally, the employee has to show that, as regards the reasons why the employer acted as they did in breaching the contract of employment the employer was not acting reasonably in those circumstances.

This factsheet will now go into greater detail about each of the above four things that the employee will need to prove if they are going to win their case.

1. Breach of a fundamental term of the contract.

It is important to bear in mind that a contract of employment does not have to be written down. A contract of employment is simply an agreement that, in return for being paid, an employee will work for an employer. As well as this basic agreement there will be a number of other terms of the contract that will have been agreed.

Examples of these might be terms relating to sick pay, holiday pay, break times, pension arrangements, etc.

Often, nothing will be written down and everything that has been agreed will have been done verbally. This verbal agreement is still a legally binding contract of employment.

To confuse matters further there are certain terms which are implied into a contract of employment. There are two categories of implied terms, those implied in law and those implied in fact.

The courts have stated that there are certain terms which apply to all contracts of employment whether they have been specifically agreed or not. Examples of these terms, which are described as being *implied in law* into the contract of employment, include:

- the employer's duty to provide a safe working environment
- the employer's duty not to act in a way calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the employee and the employer
- the employer's duty to promptly and adequately address an employee's grievance.

There are also instances where, in a specific factual situation, a court will be prepared to accept that the parties to a contract have impliedly agreed a term of the contract. These are called *terms implied in fact*. An example of such a term would cover arrangements between the parties which have arisen through custom and practice in a particular work place or possibly even in a particular industry.

Having seen what a contract of employment is, the employee needs to identify the term of the contract which s/he says the employer has broken. Having identified the term of the contract the employee then needs to show that the term is a fundamental term. i.e. a major term of the contract. Examples of breaches of terms which are normally considered to be fundamental are:-

- reductions in pay or fringe benefits
- significantly changing working hours
- changing the place of work
- the employer failing to provide the employee with the support and assistance sufficient to enable the employee to do their job

Sometimes there won't be a single breach of contract that the employee can point to and say there has been a breach of a fundamental term of the contract. However, if there are a series of trivial or minor breaches an employee may be able to argue that, looked at altogether, the series of minor breaches constitute a fundamental breach. Where the employee has had enough and resigns in response to a minor breach, a tribunal may look at the whole series of breaches and find that the last breach was 'the straw that broke the camel's back'. This is referred to, in legal terms, as the '*last straw doctrine*'.

2. The employee must resign in response to the breach of contract.

The employee must show that the principal reason s/he has resigned is because of the breach of contract. If the employee resigns for a reason other than the breach of contract s/he will not be able to claim constructive dismissal. If there is more than one reason for leaving, for example, there's been a fundamental breach of contract and the employee has got another job elsewhere, the employee will probably still be able to claim constructive dismissal. The tribunal will consider whether, in the absence of the breach, the employee would have changed jobs anyway and if so is likely to find that the breach was not the reason for the resignation.

An employee stands a better chance of succeeding in a claim for constructive dismissal if they make it clear to the employer at the time they resign what the reason is for their resignation. It will be helpful to the employee's case if, at the time of the resignation, or as soon as possible after it, they write a letter (keeping a photocopy) to the employer stating the reason they have left. This can be done in the form of a grievance (please see below under the heading 'your obligation to use the grievance procedure')

If you are relying on the '*last straw doctrine*' above, your resignation must be in response to the last breach of contract that was the last straw for you.

Giving notice of resignation.

Normally, where an employee is resigning, they must give their employer notice that they intend to resign. The period of notice they must give depends on what has been agreed with the employer. If there is a written contract the period of notice required will normally be specified in there. Where there has been no agreement on the amount of notice to give, the law says the employee must give one week's notice.

However, where the employee is resigning in response to a fundamental breach of contract by the employer (i.e. a constructive dismissal situation) they have a choice. They can give notice of resignation if they want to but are not obliged to do so. They can leave immediately.

3. Has the employee resigned promptly?

If the employee delays too long in resigning, there is a danger that the tribunal will find s/he has accepted the breach / or variation of contract by the employer. If the tribunal decides the employee has accepted the breach of contract the claim for constructive dismissal will fail. There is no precise time limit within which the employee is given for deciding whether to resign or not. Generally the employee should be thinking in terms of resigning within a few days, possibly up to a month, after the breach if they are to succeed in their claim.

There are a couple of things an employee can do which will give them longer to decide.

- a) Write a letter to the employer (keeping a copy) stating that they do not accept the breach of contract and, although they are continuing to work, are working under protest and that they do not waive their right to resign and claim constructive dismissal. However, this tactic cannot be used indefinitely. It may be combined with the second tactic of using the grievance procedure.
- b) The employee may use the grievance procedure to register their protest against the breach of contract. This involves writing a letter setting out the grievance and sending it to the employer. The employer should then hold a meeting with the employee to discuss the grievance. The employee has the right to be accompanied at this meeting by either a work colleague or trade union representative. The employer may look at the situation again and reverse the breach of contract. If they do not do so, the employee has the right of appeal, but may also have to decide whether to resign. If the employee wants to buy time to look for another job before leaving it may be worth using the grievance procedure first.

4. Are the actions of the employer unreasonable?

Just because there has been a fundamental breach of contract it doesn't follow automatically that the dismissal will be unfair (although often it will). For example, if the employer has had to introduce a new shift pattern involving changing the employees' hours of work and has consulted with the workforce properly before introducing the changes a tribunal might find that this was a genuine business need and it was fair for the employer to act in this way.

5. Your obligation to use the grievance procedure

Once you have resigned, new regulations state that you need to submit a grievance in writing setting out the grounds of your complaint. Your employer is under an obligation to then arrange a meeting with you without unreasonable delay to discuss your grievance further. This meeting should be arranged at a mutually convenient time. You have the right to be accompanied at this meeting by either a trade union representative or work colleague. Your employer should take your complaint seriously, and investigate further if necessary. He/she should then give a response to your grievance in writing. If you are unhappy with the outcome of the grievance, you have the right to appeal. Alternatively, if **both** parties agree, you can put your grievance in writing and request that the employer responds in writing. This does away with the need for a meeting. This wholly written procedure is called the modified grievance procedure but can only be used where the grievance is raised after the employment has terminated.

NB: If you do not put in a grievance, you will almost certainly find yourself barred from taking a claim to an employment tribunal

There are exceptional circumstances where it may not be necessary to submit a grievance. These are:

you have grounds for believing that starting or continuing with the procedure would result in a significant threat to any person (including yourself) or to any property;

- you have been subject to harassment and have reasonable grounds to believe that starting or continuing with the grievance procedure would result in you being subjected to further harassment;
- it is not practicable to commence the procedure or comply with a substantial requirement within a reasonable period.

If you are not sure whether these exceptions apply to you, please seek advice from Sheffield Law Centre, an advice centre or Citizen's Advice Bureau.

If either party fails to fully complete the grievance procedure a tribunal has power to increase or reduce any compensation it awards to a successful employee by a percentage of between 10% – 50%. The effect of this is that it is normally advisable for an employee to attend any meeting arranged by an employer. There may be unforeseen circumstances which prevent a party (the employee, the employer or an employee's chosen work companion or trade union representative) to attend a meeting. Examples of unforeseen circumstances could be illness or a car breaking down preventing attendance at the meeting. Where this happens an employer is under a duty to re-arrange a meeting. If unforeseen circumstances prevent the second meeting taking place then both parties will be treated as having complied with the procedure.

Once 28 days have passed since the grievance letter was sent to the employer you can submit a claim to employment tribunal. You can do this even if the grievance procedure has not been completed.

Time limits.

The normal time limit to claim unfair dismissal is 3 months. However, because it is mandatory to raise a grievance before a claim for constructive unfair dismissal can be submitted, the law now extends the time limit for claiming constructive unfair dismissal by an additional 3 months. So, if the resignation takes effect on 6/3/08 the time limit, by which point the tribunal must receive your application, is 5/9/08. If the time limit falls on a weekend, you should treat the last working day before the weekend as the time limit.

General points.

Constructive dismissal claims are difficult for an employee to win.

Sometimes things happen in the heat of the moment and an employee has acted before they've had time to think things through properly. If an employee does have some time to decide what to do they should think if there are ways, other than resignation, to resolve any problems first. Alternatives might be negotiating with the employer, using the grievance procedure or simply refusing to agree to a variation of the contract. An employee will need to bear in mind that if they resign they will be without a job. If the claim for constructive unfair dismissal does not succeed they will not get compensation. They may be disqualified from Job Seekers Allowance unless they can convince the job centre they had 'good cause' for leaving their job.

Any loan protection policies they may have may not pay out (or may only pay out if their claim for constructive unfair dismissal succeeds). The employer probably won't give a reference and it may be more difficult to get another job.

Employees should think carefully before they decide to resign in order to claim constructive dismissal and should try and seek advice and talk it over with their union or an employment law adviser before making the decision.

You can contact the Law Centre for help by phoning 0114 2731888 between 10am-4pm. If you have already spoken to a caseworker at the Law Centre, you should phone on the number the caseworker gave you. When you phone remember to have any documents with you that you might want to refer to.

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