

Fact Sheet – Constructive dismissal: when you are forced to resign

1 What is constructive dismissal?

A constructive dismissal occurs when the conduct of an employer causes an employee to resign.

The employer may expressly ask the employee to resign, or the employer's conduct may leave the employee feeling that he or she has no other choice but to resign.

This conduct generally involves an employer engaging in a serious breach of the employment contract or indicating that it no longer wishes to perform its side of the employment contract.

2 Constructive dismissal as part of a claim process

Constructive dismissal is not a claim on its own. Constructive dismissal is an argument that is typically made in the context of a dismissal-based claim where the employer is arguing (or is likely to argue) that a dismissal did not occur. The most common dismissal-based claims are unfair dismissal, unlawful termination and general protections (adverse action) claims.

For more information about lodging these types of claims, see ELC Fact Sheets – “Unfair dismissal for state system employees”, “Unlawful termination for state system employees”, “Unfair dismissal for national system employees”, and “General protections for national system employees”.

2.1 Unfair dismissal and unlawful termination

To make a claim for unfair dismissal, unlawful termination or general protections (involving a dismissal), an employee must prove, amongst other things, that the termination of their employment was at the initiative of his or her employer. An employee's termination may be at the initiative of the employer, even though the employee resigned.

2.2 Notice

If an employee can prove that he or she was constructively dismissed, he or she is entitled to leave the employment without giving any required notice.

2.3 Breach of contract

Where an employee can prove that he or she was constructively dismissed, that employee may be entitled to pursue a claim for breach of his or her employment contract on the grounds of serious breach by his or her employer.

3 Types of constructive dismissal

3.1 Forced resignation

Forced resignation occurs where an employer expressly insists that an employee resigns. In this case the employee can argue that his or her resignation was not voluntary.

It is irrelevant that the employer's insistence on the employee's resignation was based on good intentions, for example to save the employee from embarrassment or to make it easier for him or her to find future employment. However there will be no constructive dismissal where an employee, without pressure from the employer, decides to "jump before they are pushed".

The distinction between a voluntary resignation and a forced resignation causes difficulties in practice when a tribunal is faced with different versions of events from an employer and employee. Clear notes of any meetings or verbal communications about the departure that were made at the time of the meetings are useful.

3.2 Legitimate reason for resignation

Constructive dismissal may occur where an employee has chosen to resign due to the unacceptable conduct of the employer. Such conduct may be an unauthorised variation to employment conditions, such as a pay-cut, demotion, change of working hours and relocation. It may also be unacceptable personal treatment of the employee (such as harassment by a fellow worker) that the employer has unreasonably failed to prevent or punish.

It is irrelevant whether the employer intended or anticipated that the employee would quit their job. Whether an employer's conduct constitutes a legitimate reason for termination can be very difficult to prove. Clear notes outlining the circumstances of the resignation are useful.

4 Elements

Not every employee who leaves his or her employment because of his or her employer's conduct will be able to successfully argue that a constructive dismissal occurred. The employee must prove that the action of the employer was the principal contributing factor which led to termination of the employment relationship. The employee must show that something the employer did, or failed to do, left him or her with *no* other option but to resign.

The conduct must involve a significant breach of the employment contract by the employer. The employee must leave or resign soon after the relevant conduct occurs or he or she will be taken to have affirmed the employment contract.

5 Examples

Whether a principal contributing factor in the termination of the employment was an act or failure to act on the part of the former employer always depends on the individual circumstances of the case. Some examples include:

- where an employee resigns because he or she is told to resign or he or she will be sacked;
- where an employee is subjected to ongoing sexual harassment or discrimination;
- where an employee is subjected to systematic humiliation, verbal abuse or put-downs and adequate proof of this treatment is available;
- where there is a serious and ongoing failure to provide a safe and healthy workplace, the employee has notified the employer of the problem and there is no improvement;
- where an employer actively campaigns to force an employee out of work by acting in such a way as to make it impossible for the employee to continue to do his or her job and adequate proof of this treatment is available; and
- where an employee has been demoted and the demotion involves a significant reduction of the remuneration or duties of the employee.

6 Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

Web www.elcwa.org.au

Western Australian Industrial Relations Commission

Tel 08 9420 4444

Web www.wairc.wa.gov.au

From outside Perth Metropolitan (FREECALL 1800 624 263)

Fair Work Commission

Address Level 16

111 St George's Terrace, Perth 6000

Tel 1300 799 675

Web www.fwc.gov.au

Email perth@fwc.gov.au

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