

Comprehensive Guide to Unfair Dismissal: Constructive Dismissal

**Written By:
Akiri Heath-Adams
Attorney-at-law
Heath-Adams & Co.**

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Constructive dismissal occurs when an employer has, by his/her own act or inadvertence, failed to comply with the contract of employment in some major respect or has unilaterally and substantially altered the terms of employment or expressed an intention to do so, and the employee leaves in response to the breach of contract.

If the employee delays in leaving, this may amount to waiver of the breach and affirmation of the contract, though this will depend on the facts of the case, and a realistic approach must be taken, so that it may be reasonable for the employee to work for a period under protest, especially if trying to resolve matters without leaving or seeking other work before leaving.

(Halsbury's Laws of England (5th Edition, 2009) Vol. 40, para 720)

Although a constructive dismissal necessarily entails a repudiatory breach of contract by an employer, this does not mean that the dismissal is automatically unfair.

The tribunal may find that the dismissal was for a potentially fair reason and that the employer acted reasonably in the circumstances; a unilateral cut in pay could, for example, be justified by external cuts in the funding received by the employer (**Kent County Council v Gilham [1985] ICR 227**).

Another such example: if an employer demotes an employee, without having the contractual authority to do so, this will amount to a constructive dismissal, but if the demotion was brought about by a well-founded suspicion of dishonesty, the dismissal may be fair (**Hilton v Shinner Ltd [2001] IRLR 727**).

Even if it is unfair, compensation may still be reduced for contributory conduct. An employer faced with a constructive dismissal claim should be prepared to fight it on two fronts: (a) he may argue that there was no dismissal, or (b) in the alternative, if there was a dismissal, "it was fair because...". A failure to adopt this course may result in a finding that there was a (constructive) dismissal, and, if no reason for the dismissal is advanced, it must therefore be unfair (**Derby City Council v Marshall [1979] ICR 731**).

The test is therefore: Whether there has been a repudiatory breach by the employer entitling the employee to leave. And did the employee leave due to the employer's breach?

This is essentially a question of fact for a tribunal in the circumstances of the individual case

Only those cases where the employer's conduct amounts to a significant breach, going to the root of the contract, can be regarded as being authoritative. There must be a fundamental breach of contract by the employer, not merely a failure to act reasonably. Thus, if the employer tries to impose a unilateral change in employment terms, such as a change in job, a significant change in hours, a lowering of earnings, significant change in location of employment, a demotion, then provided there is no contractual right to do so, such conduct will entitle an employee to resign.

Claridge v Daler Rowney Ltd [2008] ICR 1267- Unreasonable conduct by an employer does not, by itself, constitute constructive dismissal. The conduct must be such as to amount to a breach of contract, i.e. conduct which fundamentally undermines the employment relationship.

TD 253 of 2015 Banking Insurance And General Workers Union v ANSA McAl Limited

HH Ramrekersingh in Trade Dispute 197 of 2002 stated: “one word of caution, though, not every breach is a fundamental breach; the breach must go to the root of the contract. De minimis non curat lex – the law is not concerned with trivial things. Moreover, there must be a direct causal relationship between the decision to leave and the repudiatory breach by the employer.”

In Trade Dispute 200 of 2005, the Court stated that: “While there may be no correct format of a letter relating to the notice of constructive dismissal by a worker the letter in this matter surely cannot qualify as such. While the expressions “constructive dismissal” need not be mentioned in the letter, the intent must be obvious from a reading thereof.”

This Worker tendered a letter of resignation purportedly on the grounds of unfair treatment and constructive dismissal, but did not particularise the instances of unfair treatment or the unilateral variation of his terms and conditions that gave rise to his decision. The Company is therefore not made aware of the Worker’s complaint and thus is not given an opportunity to correct or remedy the breach if indeed such existed.

The classic test which this Court has applied over the years when adjudicating upon a claim for constructive dismissal is that which was enunciated by Lord Denning in Western Excavating (ECC) Ltd v Sharp (1978) QB 761 as follows:

“ If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all and alternatively he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be significantly serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Over the years this Court has developed its own distinct jurisprudence applicable to local conditions and circumstances so that in addition to the basic principles of *Western Excavating* the Court has emphasized three main elements:

- (i) The immediacy of the resignation;
- (ii) The contents of the resignation letter;
- (iii) The requirement that the employer must be afforded the opportunity to remedy any breaches (if they exist) prior to resignation.

These three elements are inextricably connected.

In the instant matter the Worker has failed to satisfy these three critical elements by giving contractual notice of resignation and working out the notice period. The letter of resignation says nothing about his reason for resigning and as such the Company is not given an opportunity to remedy any breaches (if they exist).

TD 222 Of 2014 Communication Workers' Union v Servisair Trinidad And Tobago Limited

Halsbury's Law of England (Volume 39 (2009) 5th Edition) states, inter alia, that among the types of breach of contract by the employer that may support a finding of constructive dismissal are:-

- (a) A failure to pay wages or a unilateral decision to cut pay;
- (b) Demotion or other change in status;
- (c) A change of job content not permitted or envisaged by the contract;
- (d) Undermining a senior employee's position;
- (e) Change of the place of work, or breach of a mobility clause, whether express or implied;
- (f) Unilateral change of hours;
- (g) Failure to ensure the employee's safety;
- (h) Breach of the term of trust and respect;
- (i) Failure to follow a contractually binding disciplinary procedure;
- (j) Imposition of a disciplinary measure in a disproportionate manner;
- (k) Failure to provide a reasonably suitable working environment; and,
- (l) Failure to deal with grievances properly and timeously

Employer's Breach of an Implied Term

A constructive dismissal situation arises when the employer, without reasonable and proper cause, conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which must exist between the parties (**Malik v BCCI SA [1997] 3 All ER 1**).

A breach by the employer of the duty to maintain mutual trust and confidence, which is part of the reciprocal duty of cooperation, will be regarded as sufficient. Conduct falling into the category has included:

- subjecting the employee to abusive and insulting language;
- refusing to investigate a justified complaint relating to health and safety;
- making an unsubstantiated allegation of theft against the employee;
- issuing a final written warning in respect of a relatively minor incident;
- insisting without good cause that the employee should undergo a psychiatric examination;
- 'arbitrarily, capriciously and inequitably' singling out an employee for an inferior pay rise to that received by other employees;
- unjustifiably demoting the employee for a minor disciplinary offence;
- denying the employee access to the company's premises by changing the locks, and telling customers that the employee no longer worked for the company;
- failing to support the employee, who was a supervisor, in his relations with shop-floor workers;
- failing reasonably and promptly to afford a reasonable opportunity to obtain redress of grievances;

- apparent bias in an internal grievance appeal panel;
- instructing the employee to change her place of work in the absence of a term authorising this;
- allowing an employee to be subjected to sexual harassment;
- giving the employee an instruction which amounted to discrimination on racial grounds;
- writing a misleading reference for a prospective employer;
- failing to inform an employee on maternity leave about a vacancy for which she would have applied had she known about it;
- rejection of a request for flexible, including part-time, working;
- a serious breach of the obligation under the quality legislation relating to disability to make reasonable adjustments; and
- suspending the employee in response to unsubstantiated allegations of child abuse.

(Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition, Chapter 5.70)

In **British Aircraft Corp v Austin [1978] IRLR 332, EAT**, a failure to investigate a complaint about the inadequacy of protective spectacles was held to be a breach of the employer's implied duty to take reasonable care for the employee's safety.

In **Graham Oxley Tool Steels Ltd v Firth [1980] IRLR 135, EAT**, it was held that there was an implied term that the employer will provide a proper working environment.

If no reasonable employer would have expected the employee to work in those conditions, then there is a fundamental breach of the contract of employment (**Dutton & Clark Ltd v Daly [1985] ICR 780**).

There is an implied duty of mutual respect, and therefore any action by or on behalf of the employer which runs contrary to that duty may amount to a constructive dismissal. This could be the use of foul and abusive language (**Palmanor Ltd v Cedron [1978] ICR 1008**), making unjustifiable complaints or giving unjustified warnings (**Walker v Josiah Wedgwood [1978] ICR 744**), making statements which destroy or seriously damage the relationship of trust and confidence which must exist between the parties (**Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT**), such as ill-founded allegations of theft (**Robinson v Crompton Parkinson Ltd [1978] ICR 401**), or offensive and insensitive conduct by a supervisor (**Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316, EAT**).

Even if there is an express term in the contract enabling an employer to transfer the employee to another location, there is an implied term that the employer will give reasonable notice of the transfer and, where appropriate, relocation and other allowances will be made, so as to make it feasible for the employee to comply with the contractual obligation to transfer (**Selwyn's Law of Employment, Twentieth Edition, 17.27**).

In *FC Gardner Ltd v Beresford*, an employee resigned because she had not had a pay increase for two years, whereas other employees had. It was held that although there was no express term of the contract relating to pay increases, in most cases it was possible to imply a term that an employer would not treat an employee capriciously, arbitrarily, or inequitably in matters of

remuneration. This does not mean, however, that a failure to give an annual pay rise to an employee is a breach of contract, for it is impossible to say that there is an implied term to that effect. The test is whether such failure is arbitrary and capricious.

Thus, if the employer can show a good reason, such as inadequate performance by the employee, there is no breach of the duty of mutual trust and confidence (*Murco Petroleum Ltd v Forge*).

(Selwyn's Law of Employment, Twentieth Edition, 17.30).

A disciplinary sanction which is disproportionate to the offence, even though carried out in accordance with the terms of the contract, can be a constructive dismissal (***BBC v Beckett [1983] IRLR 43, EAT***).

Unilateral Alteration of Job Title, Roles & Responsibilities

An attempt by the employer unilaterally to vary the express contract terms, by, for example, cutting pay, reducing hours, or requiring the employee to relinquish his principal job in favour of another role, will almost certainly be regarded as a repudiation.

TD 327 of 2018 BIGWU v Kam Wah Restaurant Limited

The Worker had a specified job description for which she was paid an agreed sum. The worker was employed with terms of a contract specifying her duties/responsibilities. A request for her assistance by the Company to carry out temporary work, not forming part of her contractual portfolio, turned into permanent work and when the Worker raised the issue, as she was entitled to do, the Company found her to be an obstacle to the progress of the business and dismissed her. There was no justification for dismissing this Worker as she had not in any way breached the terms of her contract with the Company and was in no way duty bound to accept any proposed amendment to her job specification. The Company's unilateral alteration of the worker's job description and its denial of additional pay to the Worker amounted to a repudiation of contract. The conduct of the Company in directing the Worker to carry out functions other than what she was normally required to do in a unilateral fashion was enough to constitute constructive dismissal.

Alleyne, Arthur and Hunte Ltd v Griffith and Another (1992) 42 WIR 53

The workers were being offered new positions with the employer's parent company without loss of pay and status; however, they would now be required to work occasionally on Saturdays. One of the workers had two small children who would normally be left at a nursery while she was at work, but that facility did not open on Saturdays, so she had no childcare assistance on the days she would now be required to work. The other operated a catering business on weekends, and this new requirement would adversely affect this enterprise. The Barbados Court of Appeal in finding that the offers were unsuitable and the refusal of the employees to accept them, was not unreasonable, also found that the employer, in attempting to unilaterally change the workers' contractual terms, had in effect repudiated the contract, and the employees could regard themselves as being dismissed and they were eligible to receive redundancy entitlements.

Demotion & Extended Probation

TD No. 303 of 2002 Banking, Insurance and General Workers Union v Cariflex Limited

The Company's evidence was that it considered whether or not the worker should be placed in another section where he will earn a lower wage, but the Court was given no good reason why such action was even contemplated. When the Company informed the worker that he would be placed to work in another section at the lower rate of pay, that was in fact an attempt on the Company's part to "demote" or "redeploy" the worker without the worker receiving any award and/or benefit. The worker protested very strongly against this arrangement. The Company had been advised by the Ministry of Labour that the new arrangement can only be done if the worker has been paid all of his severance benefits, and an offer has been made to him to accept the new position in the Company at a lower rate of pay. The Company ignored this very sound advice. An attempt to "redeploy" a worker without consultation and without an award of the necessary benefits can only be regarded as an attempt to dismiss a worker in unfair circumstances.

When the worker was sent to work in the new section at a lower rate of pay, the contract of employment between the worker and the Company ended.

The Worker then wrote a letter to the Company and it was clear from its content that the worker recognized that the transfer from one department to another at a much lower rate of pay was in fact an attempt by the Company to unilaterally and radically change his terms and conditions of employment to his disadvantage which, in fact amount to the repudiation of his contract of employment.

TD No. 47 of 2003 The Association of Technical, Administrative and Supervisory Staff and Grace Kennedy (Trinidad and Tobago) Limited

Was the Company's action of extending the worker's probationary period a breach of the principles and practices of good industrial relations? Was the worker constructively dismissed? The issue is whether the Company can unilaterally vary the terms in the contract of employment. The terms of the contract of employment may only be varied with the consent of both parties unless otherwise provided in the contract.

The Company did not show that it had taken the necessary steps to maintain appraisal of the worker during his initial period of probation through guidance, assistance, advice, assessment and warning. The action of the Company to extend the worker's probationary period was a unilateral variation of the employment contract and not in accordance with the principles and practices of good industrial relations.

The Company was telling the worker that since he had not fulfilled the performance requirements of the position of Marketing Manager (after the 3 extensions of his probation) he was being offered the position of Marketing Officer subject to a successful completion of a two month probationary period. The Worker declined the offer and informed the company that he was challenging his dismissal through his union.

Faced with the worker's refusal to accept the lower position, the Company informed him that there was no other position available. Effectively the worker was dismissed.

The company's offer of the position of Marketing Officer was clearly a demotion for the Worker. Redesignation as Marketing Officer, even with salary unchanged, was more than a change in nomenclature; it was a fundamental change in job content and status. As Marketing Officer the Worker would be a functionary rather than a Manager. Moreover, he would have to report to a Marketing Manager yet to be recruited.

The Company's unilateral variation of the worker's terms amounted to a fundamental breach of the employment contract and the worker was free to accept or leave the employ of the Company.

The worker opted with alacrity to decline the Company's offer and to leave.

The vital ingredients of constructive dismissal- a fundamental breach by the Company and the Worker's departure in direct response to the Company's actions- have been established. The Worker was constructively dismissed.

Nonpayment/Reduction in Wages & Failure to Pay Sick Leave

TD 407 of 2015 National Union of Domestic Employees v VG's Bakery Limited

The Worker held the position of road sales. On January 24, 2015 the Worker arrived to work and was waiting to start road sales. Ms. Natalie Camacho, daughter of the owner of the Company, began cursing the Worker about not packing the shelves. The Worker called Ms. Valarie Camacho, the owner of the Company/the Worker's boss, to tell her about the incident. She was informed by the boss that her daughter would be taking over the bakery, as owner, as of February 01, 2015.

Ms. Natalie Camacho became annoyed that the Worker had called her mother; in retaliation she notified the Worker that her salary would be cut.

On the said day, the Worker attended Arima Hospital where, upon being diagnosed with high blood pressure was given four days sick leave. Despite notifying the Company and providing the medical, the Worker, as promised by Natalie Camacho, received a reduced salary.

The Worker treated herself as having been constructively dismissed and on February 01, 2015 by letter addressed to Ms. Valarie Camacho she stated unilateral alteration of her job description, reduced work days, the incident with Ms. Natalie Camacho and then without notification, an announcement by Ms. Valarie Camacho that as at February 01, 2015, her daughter Ms. Natalie Camacho would be her new boss as forming legitimate grounds for constructive dismissal.

The Company's unilateral alteration of the Worker's job description and its denial of pay to the Worker cannot be seen to be good practice. Additionally, failure to inform the Worker that the Company was being handed over as a going concern and that she would, after 15 years of employment, be accountable to a new owner without giving to her notice or calling upon her to consider her options is unacceptable.

The conduct of the Company in directing the Worker to carry out functions other than what she was normally required to do and unilaterally denying her wages for authorized sick leave is enough to constitute constructive dismissal. The conduct of Ms. Natalie Camacho was not only unreasonable but amounted to a breach of the contract of employment.

Final Straw

A series of separate acts, taken together, may amount to good grounds for repudiation. It is not necessary for the 'final straw' itself to be a breach of contract to result in a breach of the implied term of trust and confidence, but:

...the quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term...The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. (***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***)

Forced Resignation

If a worker is forced to resign that may be considered a constructive dismissal, and it may be deemed unfair.

TD No. 353 of 2009 Government Industrial and General Workers Union and Island Club Casino Limited

The Employer gave an ultimatum either to resign or face an uncertain future with the company which would have likely ended in dismissal. While the Employer informed the Workers that it was downsizing its operations, their unchallenged evidence was that while they were being let go, workers were being trained to take their places. In the absence of evidence to contradict that of the Workers, the Court refutes any notion of termination on account of redundancy.

The Court must consider whether the Worker's resignation was voluntary or whether pressure was brought upon them such that they had no other course but to leave.

In one of Australia's authoritative cases, *Allison v Bega Valley Council 1995 63 IR 68* in which the question of the true cause of dismissal was considered in circumstances where a worker resigned after being told that if he did not do so the police would have been called in, the Queensland industrial Relations Commission stated: "Where an employee initiates the termination of the contract it is necessary to consider whether that ostensible act of termination was given freely and without any undue pressure. If the ostensible resignation is, in effect, a response to and consistent with a desire by an employer that such resignation be forthcoming, then what has occurred may be that the termination has been brought about by the employer and that in this way the employee has been dismissed...The fact that the act of resignation subsumed the act of dismissal does not alter the essential transaction between the parties." In that case, it was found that "in pith and substance" there was a dismissal.

In the instant case, the enforced resignation by the employer with threats of uncertainty for continued employment was tantamount to a dismissal. In addition, in deliberating on an employer's conduct which gives rise to a claim of constructive dismissal, the Court must, as in all cases of dismissal, have regard to section 10(5) and make a determination whether the circumstances of the dismissal were harsh.

The Workers were dismissed, and the dismissals were harsh. The fact that they were paid for their services did not negate the harsh nature of the dismissals which were without any good or

sufficient reason. Such practices have the effect of depriving employees of tenure which impacts on employment opportunities for long-term benefits.

TD No. 108 of 2009 National Union of Domestic Employees v Courts (Trinidad) Limited

The question of resignation prompted by a threat of dismissal or resignation under “duress” has been considered by this Court...from the cases it has emerged that “...the employer’s conduct is also of importance in determining the voluntariness or otherwise of the worker’s action...”In the Republic Bank Limited case, supra, the Court opined that the aspect of “duress” comes into play where the employer’s conduct puts the worker in such a position that there is no other reasonably practical course to follow but to terminate the contract. Where the resignation is brought about by a threat of dismissal and the employee resigns, the mechanics of the resignation do not cause it to be other than a dismissal.

The Worker was not informed before the meeting that he was attending a disciplinary meeting. One of the tenets of good industrial relations practice is that a Worker who is about to face disciplinary action should be informed of the allegations made against him and be afforded an opportunity to be heard on those allegations as well as on the proposed disciplinary action. The test for constructive dismissal is the contract test involving conduct by the employer which goes to the root of the contract, resulting in the resignation of the employee.

The conduct of the Employer, which amounted to a threat of dismissal should the Worker fail to resign, was conduct likely to undermine the requisite “trust and confidence” in the employment relationship. The threat of dismissal brought pressure to bear on the Worker and led him to sign the resignation letter. This resulted in a fundamental breach of the employment contract by the Company and the Worker resigned immediately in response to the breach. This constitutes constructive dismissal.

Summary:

1. There must be a breach of contract by the employer (this can be an actual or anticipatory breach).
2. The breach must be sufficiently serious, namely a repudiatory or a fundamental breach, or the last of a series of breaches, which taken together form sufficiently serious conduct by the employer (“the last straw”).
3. The employee must leave as a result of the breach.
4. There must be no waiver of the breach, for example through the employee's delay in leaving.
5. Our Courts examine: (i) The immediacy of the resignation; (ii) The contents of the resignation letter; and (iii) The requirement that the employer must be afforded the opportunity to remedy any breaches (if they exist) prior to resignation.
6. Typical breaches include:(a) A failure to pay wages or a unilateral decision to cut pay; (b) Demotion or other change in status; (c) A change of job content not permitted or envisaged by the contract; (d) Undermining a senior employee’s position; (e) Change of the place of work, or breach of a mobility clause, whether express or implied; (f) Unilateral change of hours; (g) Failure to ensure the employee’s safety; (h) Breach of the term of trust and respect; (i) Failure to follow a contractually binding disciplinary procedure; (j) Imposition of a disciplinary measure in a disproportionate manner; (k)

Failure to provide a reasonably suitable working environment; and, (I) Failure to deal with grievances properly and timeously.

7. Other breaches include: subjecting the employee to abusive and insulting language; refusing to investigate a justified complaint relating to health and safety; making an unsubstantiated allegation of theft against the employee; issuing a final written warning in respect of a relatively minor incident; insisting without good cause that the employee should undergo a psychiatric examination; 'arbitrarily, capriciously and inequitably' singling out an employee for an inferior pay rise to that received by other employees; unjustifiably demoting the employee for a minor disciplinary offence; denying the employee access to the company's premises by changing the locks, and telling customers that the employee no longer worked for the company; failing to support the employee, who was a supervisor, in his relations with shop-floor workers; failing reasonably and promptly to afford a reasonable opportunity to obtain redress of grievances; apparent bias in an internal grievance appeal panel; instructing the employee to change her place of work in the absence of a term authorising this; allowing an employee to be subjected to sexual harassment; giving the employee an instruction which amounted to discrimination on racial grounds; writing a misleading reference for a prospective employer; failing to inform an employee on maternity leave about a vacancy for which she would have applied had she known about it; rejection of a request for flexible, including part-time, working; a serious breach of the obligation under the quality legislation relating to disability to make reasonable adjustments; and suspending the employee in response to unsubstantiated allegations of child abuse.
8. A forced resignation, or resignation under duress, is a constructive dismissal.
9. A constructive dismissal may be fair, if the employer has a good reason for his conduct (for eg. reducing wages due to a decrease in funding or demoting an employee, where there is no contractual right to do so, because of misconduct on the part of the employee).

Questions to ask your client to determine if he may have been constructively dismissed:

1. Did your employer breach your contract or do something that made you want to leave?
Did he do a series of acts that made you want to leave?
2. Did your employer change your roles and responsibilities without your consent?
3. Did he refuse to pay your wages? Did he reduce your wage without your consent?
4. Did he refuse to pay your sick leave?
5. Were you demoted without good reason?
6. Was your probation unfairly extended?
7. *(Did the employer commit any of the breaches listed above?)
8. Did you tell your employer about the issue and give him an opportunity to rectify it before you left? Did you state in your resignation letter the reasons that you were leaving? Did you leave immediately after the issue arose or did you delay?
9. Did your employer force you to resign?

Sources:

1. Case Law

2. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Roper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir