Constructive Dismissal

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Constructive dismissal is one of the most misunderstood concepts in employment law –it is often used mistakenly to describe situations where an employee resigns under difficult circumstances or pressure in the workplace.

A constructive dismissal, according to case law, arises only in specific circumstances. Many constructive dismissal arguments do not succeed.

The aim of this guide is to help both employers and employees better understand the legal concept of constructive dismissal in order to make better strategic decisions.

What is constructive dismissal?

A constructive dismissal occurs when an employee is forced to resign, either because they are presented with the option of resigning or being dismissed, or because the employer has significantly breached its obligations to the employee.

A long-standing leading case broke constructive dismissals into three categories as follows:

1. The employer gives the employee a choice between resigning or being dismissed.
2. The employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
3. A breach of duty by the employer leads an employee to resign.

The employer gives the employee a choice between resigning or being dismissed.

This type of constructive dismissal consists of an ultimatum that often follows misconduct, or the employer perceiving misconduct on the part of an employee.

The usual form of this style of constructive dismissal is that the employer confronts an employee a`nd tells them it is in their interests not to have a dismissal on record and that they have an opportunity to resign.

The driver of this approach is usually an employer that doesn't want to engage in a full disciplinary or investigative process. It is usually seen as a shortcut by the Employment Relations Authority, or Employment Court.

The above example is perhaps the most clear-cut version of the constructive dismissal. It's the easiest version for the employee to argue.

This category of constructive dismissal can be easily avoided by conducting a thorough investigative process; this way employers can avoid misinterpreting information or operating without all the facts.

The employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

The typical case here is when an employee is bullied out of the role by the employer's conduct. Typical tactics we have observed are:

- Setting menial or boring tasks that aren't the employee's usual work;
- Setting an employee up to fail and chastising them; and
- Unreasonable performance management.

In our experience, this conduct does not occur frequently.

Due to the deliberate and egregious nature of this approach, it is viewed very negatively by decision-makers in the Authority and Employment Court.

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Many issues where the employer is at fault may justify an argument of constructive dismissal. The common thread is that they must be a serious issue.

The Court of appeal explained:

"[…]the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions…"

The most common trap for employees arguing this kind of constructive dismissal is that they perceive an issue as more serious than it objectively is and act on the issue by resigning. This reaction is understandable; when things are causing us harm, it is natural to see them in their worst light.

However, our interpretation of the situation may not be the whole truth. Employees should not make rash decisions to resign without first asking for an objective second opinion. If they fail to do so, employees may resign while thinking they will be able to claim constructive dismissal and then be left with no legal recourse if their claim fails.

Experienced employment lawyers are best placed to give an objective assessment of the situation. In our experience, we often need to tell employees that the conduct they have complained of might not be sufficiently serious, such that it would be reasonably foreseeable to the employer that the employee would not be prepared to work under the conditions.

However, if the conduct is not serious enough to argue a constructive dismissal, there are often opportunities to negotiate solutions or an exit package and employment lawyers are best placed to assist to negotiate a good outcome.

The danger in not objecting to a breach when it occurs

Constructive dismissal has its origins in the law of contracts. One of the features of this area of law is that where there is a breach, there is an opportunity to either end the agreement or keep the agreement going and ask for damages.

There is a danger here for employees. If, after a breach has occurred an employee continues to work without objecting to it, they may lose the opportunity to call the employment relationship to an end. In such a circumstance, their conduct of continuing to work may be seen as affirming that the employment agreement is continuing.

For example, if an employer unilaterally changed a major part of the employee's role and they kept working without objection (for a decent time frame) they would not then be able to resign and argue a constructive dismissal. As they kept working, their conduct affirmed the agreement continued. They could only argue for damages relating to the change in the role or that the change should be reversed.

Proof

The real difficulty with constructive dismissal is that the employee has to prove the conduct of the employer and that it is serious enough to justify it being deemed a constructive dismissal. This burden can be difficult to meet as often there are factual disputes and accounts from the employer and employees that are at odds with each other with little independent evidence.

A constructive dismissal is regarded by employment lawyers as more difficult to argue then many overt dismissals.

Relationship to bullying

Many bullying cases end with the victim employee walking away from the employment relationship. Constructive dismissal is often utilised in these situations. The argument is that the employer is obliged to keep a safe workplace that is free from bullying. This argument succeeds where the employer is aware of the concern about bullying and takes inadequate steps to address it.

A common trap for employees is that they leave employment citing bullying, but haven't raised the bullying for the employer to address it before their departure. In this circumstance, often, the employer can't be viewed as being reasonably on notice of the issue. In this circumstance, the resignation cannot be viewed as being foreseeable by the employer, and the argument of constructive dismissal fails.

Bullying should always be raised before an attempt at a constructive dismissal argument.

Strategic disadvantages of arguing constructive dismissal

In our view, there are a number of strategic disadvantages associated with arguing a constructive dismissal. These are as follows:

- Setting menial or boring tasks that aren't the employee's usual work;
- Setting an employee up to fail and chastising them; and
- Unreasonable performance management.

Where we represent employees, our preference is only to argue constructive dismissal as a last resort. Instead, it is preferable to negotiate with employers for special leave or sick leave to

keep employees safe from a difficult situation. We then attempt to negotiate an exit while the employment relationship is continuing. Negotiations are either done directly between the employee and their employer, or at a mediation. To address the affirmation point above, we make it clear that there is an issue and that the employee has a right to end the employment relationship but we wish to negotiate with the employer before a decision about leaving employment is made. In our experience this creates an urgent and front-of-mind situation for the employer to result and generally achieves a faster, better and more cost effective result for employees.

About Us

Bell & Co is a boutique dispute resolution firm. We've led extensive restructures for clients and acted on behalf of disadvantaged employees.

This guide is not a replacement for good advice. At Bell & Co, we can offer advice from both a human resource and legal point of view.

If you have further concerns or questions, regarding requesting flexible working, please don't hesitate to get in contact with Bell and Co at 04 499 4014.

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