



Constructive Dismissal NEU guidance for members

The purpose of this document is to provide members with a basic understanding of constructive dismissal, and the pros and cons of claiming constructive dismissal.

What is constructive dismissal?

Constructive dismissal is the legal term used to describe what happens when an employee resigns because their employer has broken the employment contract in a very serious way. The breach must be so serious that it leaves the employee with no choice but to resign.

By resigning, the employee treats him or herself as having been 'dismissed' by the employer. This is why it is called 'constructive' dismissal. It is very important to spell out clearly in any resignation letter that the resignation is because of the contract breach. Resigning with a view to claiming constructive dismissal is a very high risk strategy that should only ever be considered after careful thought and after taking legal advice from the NEU. You can read about some of the risks below.

What kind of behaviour by an employer might justify a constructive dismissal claim?

Every case is different and depends on its facts and evidence, but here are a few examples of the kinds of employer behaviour that have been relied on by employees to support a constructive dismissal claim:

- engaging in serious bullying or harassment
- using foul language or publicly humiliating an employee
- significant cuts to pay or other terms and conditions without agreement
- fundamental changes to contract duties without agreement.

What evidence should I look for to support a claim for constructive dismissal?

The evidence needed will depend on the particular situation you are facing. Remember that you will need to prove, in particular, that:

- the employer's actions were bad enough to amount to a fundamental breach of the employment contract
- you resigned in response to that fundamental breach.

Useful evidence could include:

- written evidence of the employment contract terms, for example, written statement of employment particulars, handbook, collective agreements and policies, offer letters
- any relevant contemporaneous written evidence that helps to tell your story of what happened, for example, emails, texts etc
- statements from witnesses who support your version of events.

Keep a journal to record incidents as they happen and keep it at home. Do not use your school/college email account to correspond with your union rep about this matter.

What is the deadline for bringing a claim for constructive dismissal in the employment tribunal?

All deadlines for bringing claims in the employment tribunal are very short. A claim for constructive unfair dismissal in the employment tribunal must be brought within three months of your resignation date. Take advice as soon as possible from the union. Do not delay and do not leave your claim to the last minute. If you miss the deadline, your claim will be dismissed. Extensions of time are rarely allowed by an employment tribunal.

Should I follow my employer's grievance procedure before resigning?

If you intend to claim constructive dismissal in an employment tribunal, you should normally work through your employer's grievance procedure before resigning, although it is accepted that sometimes it could be detrimental to your health and wellbeing to continue in work after a fundamental breach has occurred. Below are some of the risks of not following an employer's grievance procedure:

- You miss out on the possibility of resolving your dispute in a way that enables you to keep your job.
- You breach the Advisory, Conciliation and Arbitration Service (ACAS) code of practice on disciplinary and grievance procedures, which requires you to set out your grievance in writing and send it to your employer. An unjustified failure to follow the code will result in any compensation being cut by up to 25 per cent, even if your claim is successful.
- An employment tribunal may dismiss your claim on the basis that, by resigning before the grievance process was completed, you moved too quickly and failed to give your employer a proper chance to address your concerns.

Why is resigning and bringing a claim for constructive dismissal always a risky strategy?

Resigning and claiming constructive dismissal is a very high risk strategy because it has serious consequences, including the loss of your job. It should always be a last resort. Here are some of the general obstacles that arise in most cases but there will be other risks to consider, depending on your particular circumstances:

- Even if your employer fundamentally breaks the employment contract, in most cases you must have at least two years' service to claim constructive unfair dismissal.
- You must be sure the contract has been broken before you resign but there is often a dispute over whether the contract has been broken at all. You must take very careful advice about this. If the employer has not broken the employment contract, your claim for constructive dismissal will fail.
- The breach of contract must be very serious. There is likely to be a dispute not only as to what happened, but also as to whether what happened was serious enough to justify your resignation. If the behaviour was not serious enough to be a fundamental breach of the employment contract, the claim will fail.
- Constructive dismissal claims usually rely on evidence from witnesses, who must attend the employment tribunal to be cross-examined, but in practice co-workers are often unwilling to come forward and give evidence about a manager's bad behaviour. Often you will be the only witness telling your side of the story. The tribunal may prefer the account given by the employer's witnesses.
- To succeed in your claim you must show that you resigned in response to the employer's bad behaviour. A tribunal may conclude that you would have probably resigned anyway, for a different reason. Even if you win, this will mean that any compensation is significantly reduced.
- An employee who wants to bring a claim for constructive dismissal in the employment tribunal must decide quite quickly whether or not to resign, but at the same time it is important not to act too hastily. The law allows an employee to work their notice before resigning and claiming constructive dismissal. However any further delay may result in a tribunal deciding that the employee has 'affirmed' (ie accepted) the employer's conduct and forgiven the breach. If this happens, the claim will be lost.

- Even if a manager's initial behaviour was unacceptable, follow-up actions by your employer – for example, if a more senior manager offers an apology or a solution to your dispute – can prevent a fundamental breach of contract happening at all.
- Even if a claim for unfair dismissal is successful, compensation is very limited. In particular, unlike discrimination cases, there is no right to compensation for injury to feelings or damage to health in a successful claim for unfair dismissal, no matter how badly the employer has behaved.
- Constructive dismissal claims nearly always involve disputes over facts – who said or did what to who, when, how and why. The employment tribunal must listen to all the evidence and then decide who it thinks is telling the truth. Because constructive unfair dismissal hearings tend to be longer and to rely more on the evidence of individual witnesses, they are stressful and the outcome is often difficult to predict.
- Even if you win your claim, will you get enough compensation to compensate for resigning and losing your job? In 2016/17, the median award for a claim for unfair dismissal was just £7,521. Would it be better not to resign, and instead to look for another job while still employed?
- Union activity, such as industrial action, may be a better way of eliciting positive change in your workplace, not just for yourself, but for your colleagues too. However, that may be an option only if there is a strong staff group to support you.

What are some of my other options?

Take legal advice from the NEU as soon as possible to talk about your options. There are nearly always better possibilities than resignation. For instance, the dispute between you and your employer might be resolved through mediation. The right decision for you will depend on your own circumstances. Remember that it is much easier to find another job while you are still in work. In the meantime, if you have developed mental health issues as a result of your situation at work, seek help. See your GP and explain your situation.

What should I do next?

If further advice is needed, contact your NEU workplace rep in the first instance. If there is no NEU rep in your workplace, or the peripatetic nature of your employment makes contact with a workplace rep difficult, contact the NEU Adviceline in England on 0345 811 8111 or NEU Cymru in Wales on 029 2049 1818.

Further contact details may be found at: neu.org.uk/contact-us

Further information

NEU guidance, available at: neu.org.uk/

- Dismissal Guidance
- Notice Periods
- Fixed-term Contracts
- Express And Implied Contract Terms
- Disciplinary Procedures
- Grievance Procedures
- Capability Procedures

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