



**CONSTRUCTIVE DISMISSAL
PITFALLS AND POINTERS**

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INTRODUCTION

Employees are protected from being unfairly dismissed by their employer by section 94 of the Employment Rights Act 1996. A dismissal traditionally takes place when an employer expressly terminates the contract of employment, but section 95(1)(c) of the Employment Rights Act 1996 states that an employee shall also be treated as being dismissed if he or she “*terminates the contract under which he is employed (without or without notice) in circumstances in which he is entitled to terminate it without notice by virtue of the employer’s conduct*”, thereby effectively enabling employees to make claims for constructive dismissal.

In unfair dismissal claims the burden is on the Respondent to show a fair reason for the Claimant’s dismissal. At trial this burden on the Respondent will generally result in the Respondent’s witnesses giving evidence before the Claimant, and in many cases it may only take a relatively innocuous error or failure to render a dismissal unfair.

Constructive dismissal claims are entirely different both from a legal and practical standpoint. Perhaps the most obvious difference is that the burden is on the Claimant to prove their claim, and indeed to succeed in a constructive dismissal claim the Tribunal must be satisfied of the following;

- That the Respondent’s conduct amounted to a fundamental breach of contract.
- That the Claimant resigned in response to that breach.
- That the Claimant resigned promptly and did not waive the breach.

From a practical perspective, the fact that the burden is on the Claimant means that the Claimant will usually be required to give evidence first at trial, but in preparing for trial it is important for both parties to consider each of the tests individually.

FUNDAMENTAL BREACH

In order for the Claimant to be dismissed in accordance with section 95(1)(c), the Respondent's conduct must amount to a fundamental breach of the contract of employment. It is exceptionally important in any given case to realistically assess whether or not the conduct complained of is likely to be considered as a fundamental breach of contract or not.

In any given case the contract of employment will contain a number of express terms, the breach of which may amount to a fundamental breach of contract depending on the circumstances. Examples of breaches to terms of the contract that have been held as being fundamental are:

- Imposing a salary reduction¹
- Materially reducing benefits²
- Reduction in status³
- Moving someone from a hands on role to a management one⁴

The above examples are all fairly clear cut breaches of important terms of the contract. It should be remembered, however, that a breach of a fundamental term will not necessarily amount to a fundamental breach. In this regard cases usually turn on their individual facts. For example, the term requiring an employer to pay an employee is clearly a fundamental one, but whether or not a failure to pay an employee amounts to a fundamental breach will invariably depend on the circumstances of the failure to pay.

Whilst an employee can rely on the breach of an express term of the contract as being a fundamental breach, it is common for employees to rely on their employer having breached the implied term of trust and confidence in order to substantiate a constructive dismissal claim. It is established law that a breach of the implied term of trust and confidence will be a fundamental one, but what

¹ *Industrial Rubber Products v Gillon* [1977] IRLR 389

² *French v Barclays Bank Plc* [1998] IRLR 646

³ *Lewis v Motorworld Garages Ltd* [1985] IRLR 465

⁴ *Land Securities Trillium Limited v Thornley* [2005] IRLR 765

exactly amounts to a breach of that term can be difficult to judge. Examples of breaches of the implied term of trust and confidence are as follows:

- The employer conducting a fraudulent business⁵
- Giving an employee a low or no salary rise or bonus compared to other employees without justification⁶
- Allowing a bullying or harassing environment to persist, or failing to investigate allegations of harassment⁷
- Suspending an employee without reasonable and proper cause⁸
- Failing adequately to investigate a grievance⁹

It is important to note that the “range of reasonable responses” test, which features so prominently in many cases of unfair dismissal, is not the correct test when assessing whether or not a breach is fundamental. That point was finally settled in **Buckland v Bournemouth University [2010] EWCA Civ 121**. In that case the Sedley LJ held that whilst “*reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach [...] it cannot be a legal requirement*”.

Therefore, whilst the reasonableness of the employer’s actions may be relevant to some degree, the correct test is simply one of objectivity. In that regard it is important for Claimants to ensure in assessing their own case that the actions complained of can realistically amount to a *fundamental* breach of the contract of employment. Equally, Respondents must ensure in assessing the strength of their position that they consider matters objectively and not whether or not they have acted reasonably.

⁵ *Malik v BCCI* [1997] IRLR 462

⁶ *Clarke v Nomura International Plc* [2000] IRLR 766

⁷ *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3

⁸ *Gogay v Hertfordshire County Council* [2000] IRLR 703

⁹ *GAB Gibbons (UK) Ltd v Triggs* [2008] IRLR 317

THE LAST STRAW

Whilst it is possible for a single act or failure on the part of an employer to constitute a fundamental breach of contract, a Claimant can also bring a claim for constructive dismissal citing a pattern of actions, behaviour or failures, claiming that taken together those actions constitute a fundamental breach of contract. In such circumstances the final act complained of will be the 'last straw'.

It is well established that the final straw does not need to be of the same quality as the previous act(s) relied upon as cumulatively amounting to a breach of the implied term of trust and confidence. Viewed alone, it also does not need to amount to unreasonable or blameworthy conduct. It must, however, contribute something to the breach and be more than utterly trivial. In **Thornton Print Ltd v Morton UKEAT/0090/08**, for example, the last straw was the Claimant being invited to a disciplinary meeting following acrimonious exchanges between him and the Respondent, which included the Respondent effectively inviting the Claimant to resign and take a lower paid position.

It was established in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** that the correct test in relation to whether or not an act constitutes the 'last straw' is one of objectivity. As such, an entirely innocuous act on the part of the employer cannot constitute the last straw, even if the employee genuinely but mistakenly interprets the employer's act as breaching the implied term of trust and confidence. In that case, the Claimant relied on the Respondent's failure to pay him as the last straw, yet in the circumstances the failure to pay was entirely reasonable and in accordance with the contract of employment, and could not therefore constitute the last straw.

Whilst in **Thornton Print Ltd** it was held that the Claimant did not need to explicitly refer to the 'last straw' at the point of resignation in order to rely upon that doctrine, in the case of **Wishaw and District Housing Association v Moncrieff UKEATS/0066/08** it was held that the tribunal must clearly identify what the final straw is when determining whether or not the Claimant was entitled to resign.

Claimants should therefore be aware that there is a need to clearly identify what the last straw is in any particular case, and indeed it would be advisable to make it clear in the ET1 what exactly the Claimant relies upon as the last straw. That said, it should also be noted that reliance on the last straw doctrine can be done in the alternative. There may, for example, be a situation where the individual acts complained of could be fundamental breaches in and of themselves, or alternatively they could demonstrate a pattern that constitutes a fundamental breach when combined with a valid last straw. In such situations Claimants can and should plead reliance on the last straw doctrine as an alternative to allegations of fundamental breach as regards individual actions.

Respondents should clearly be aware that even a pattern of conduct that could easily be criticised still requires a valid final straw, and the latter needs to be considered in isolation in order to establish whether or not there are reasonable prospects of defending the claim. Claimants are often uncertain and imprecise when it comes to identifying the last straw, and Respondents should be on the look out for inconsistencies between the resignation letter, ET1, witness statements, and other documentation as to what the Claimant views as the last straw.

THE RESIGNATION

It is a discrete element of the test relating to constructive dismissal that the Claimant must resign in response to the fundamental breach, whether it is brought about through an individual act or a pattern of actions. The EAT held in **Wright v North Ayrshire Council UKEATS/0017/13** that the repudiatory breach does not need to be 'the effective cause' of the resignation, but it must be 'an' effective cause. There is no requirement that the breach relied upon is the most important cause of the resignation.

Clearly it is possible to terminate a contract by ways other than written communication, but the majority of employees will resign by way of letter or other written communication. It should go without saying that in those cases where the employee does resign in writing, the resignation letter is potentially an extremely important piece of contemporaneous evidence.

Whilst many Claimants will resign before they engage solicitors to act for them, those who advise Claimants prior to resignation should ensure that the resignation letter clearly sets out the basis for the resignation. The letter certainly does not need to be exhaustive, but it should be remembered that inconsistencies between the content of that letter and the ET1, witness statement, and other written evidence will likely be picked up on and criticised at trial.

Conversely, Respondents should ensure that they take stock of the resignation letter early, and a point should be made of raising any inconsistencies in that regard at the appropriate time. Resignation letters that give no reason for the resignation can obviously be subject to criticism, but equally resignation letters that are lengthy and deal with unrelated or superfluous points can also be used tactically at trial. Clearly on the basis of the test it would not necessarily be fatal to the Claimant's case to state matters in the resignation letter that are subsequently not relied upon, but it does not mean that those points shouldn't be taken in cross examination anyway, either in an attempt to weaken the Claimant's case, or to defeat it entirely.

WAIVING THE BREACH

Even in cases where there has been a clear fundamental breach of contract on the part of the employer, the employee must act promptly in resigning following the breach or they may be deemed to have waived the breach. What is 'prompt' will vary from case to case, though in **Quigley v University of St Andrews UKEATS/0025/05** a delay of two months was found to have been sufficient to affirm the contract and prevent the Claimant from claiming constructive dismissal, even though in that particular case the Claimant had stated that gap was caused by the length of time that it took him to consult his solicitor.

However, in the recent decision of **Chindove v Morrisons Supermarkets UKEAT/0201/13/BA** Langstaff J confirmed that delay in resigning cannot in and of itself amount to a waiver of a breach of contract, stating that "*We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do. He may affirm a continuation of the contract in other ways; by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time.*"

Two further recent decisions have provided apt illustrations on this point. **Cockram v Air Products Plc UKEAT/0038/14/LA** the Claimant was found to have affirmed the contract by providing 7 months notice rather than the 3 months required by his contract. Resigning with notice cannot in and of itself be an automatic affirmation of the contract due to the wording of section 95(1)(c) of the Employment Rights Act 1996, but in this particular case the EAT held that the Claimant had given a longer notice period due to his own financial reasons, and had thereby affirmed the contract.

By contrast, in **Colomar Mari v Reuters UKEAT/0539/13/MC** the EAT confirmed that an employee does not automatically affirm the contract simply by drawing sick pay, though in the circumstances the period of time that the

Claimant had been drawing sick pay, some 19 months, was sufficient to affirm the contract.

Both Claimants and Respondents therefore need to be mindful that arguments either way as to whether or not a breach has been affirmed will need to be made with reference to the Claimant's conduct, and not simply to the passage of time. In many cases the Claimant will have continued to work throughout the period of time, which gives rise to a natural argument for the Respondent to use as to conduct, but any additional actions undertaken by the Claimant during that time will need to be considered carefully as to their potential impact either way on the issue of waiver.

DEFENCES

The case of **Buckland v Bournemouth University**, as referred to above, also confirmed the principle that an employer who has committed a fundamental breach of contract cannot “cure” it whilst the employee is considering whether to treat that breach as a dismissal.

However, that is not to say that an employer will never have a defence to a constructive dismissal claim. Whilst it is rarely relied upon in constructive dismissal claims, it is still open to Respondent to claim that a Claimant that has resigned in response to a fundamental breach of contract was dismissed fairly, either due to one of the reasons set out at section 98(2) of the Employment Rights Act 1996, or due to some other substantial reason as stated at section 98(1)(b).

Whilst not a defence, Respondents should also be aware that the Acas Code of Practice on Disciplinary and Grievance Procedures specifically advises employees at paragraph 32 to raise grievances formally and without unreasonable delay. A failure to do so will not prevent an employee from bringing a claim for constructive dismissal, but the Tribunal does have the discretion to reduce any subsequent award by up to 25% to reflect the failure to comply with the Acas Code of Practice. In appropriate cases Respondents should therefore give consideration to arguing for a reduction in the Claimant’s compensation on that basis, and indeed Claimants should be mindful of the content of the Code of Practice and would be well advised to follow it if at all possible prior to any resignation.

RESIGNATIONS IN THE HEAT OF THE MOMENT

As noted previously, an employee can resign in a number of different ways, and a verbal resignation can be just as effective as a written one to the extent that it will bring the contract to an end. However, Respondents should be very careful when dealing with verbal resignations to ensure that the words used can indeed be relied upon as a resignation.

In **Kwik Fit v Lineham [1992] IRLR 156** an employee reacted angrily to what he considered to be a humiliating warning, and after some provocation he threw down his office keys and drove away. These facts gave rise to what Wood J described as 'special circumstances', on which point it was stated:

"Words may be spoken or actions expressed in temper or in the heat of the moment or under extreme pressure, and indeed the make-up of an employee may be relevant. These we refer to as special circumstances. Where special circumstances exist it may be unreasonable for an employer to assume a resignation and to accept it forthwith. A reasonable period of time should be allowed to lapse and if circumstances arise during that period which put the employer on notice that further enquiry is needed to see whether the resignation was really intended and can properly be assumed, then such enquiry is ignored at the employer's risk."

This authority does not specify time limits, though Wood J did describe as a reasonable period as *"relatively short, a day or two"*.

Whilst not strictly dealing with constructive dismissal claims, this case does serve as a word of warning to employers to ensure that time is taken in appropriate cases to ensure that an employee's resignation can be accepted. Otherwise an employer could easily find itself facing a more traditional unfair dismissal claim, one that would likely be very difficult to defend.

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