

CONSTRUCTIVE DISMISSAL

Constructive dismissal cases are rarely straight-forward. Before filing a claim, you should be well informed about the issues involved. You should read this infosheet along with Job Watch's *Unfair Dismissal, Adverse Action and Notice of Termination* infosheets which give you information on how to make a claim.

If you wish to take action against your employer for constructive dismissal, as part of an **unfair** or **adverse action** dismissal claim, you must be able to show that your employment was terminated '**at the initiative of the employer**', not because you decided to voluntarily resign.

If your employer tells you that you have been sacked, it is very clear that the termination of your employment was **at the initiative of the employer**. However, in some cases an employer may not say "you're sacked", but may still force an employee to leave because of the things the employer says, does or fails to do. That is, an employer may treat an employee so badly that their conduct fundamentally breaches the employment contract between the employer and the employee. This is what is known as a '**constructive dismissal**'.

Constructive dismissal means that even though your employer did not say you were sacked, the employer's behaviour forced you to leave your employment. In this situation the termination of your employment is still said to be **at the initiative of the employer**.



Job Watch Inc is

an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to Victorian workers.

Hours:- **Monday – Friday 9am-5pm**
(Except Tuesday 12-2pm)

Phone: **(03) 9662 1933** or
Rural - 1800 331 617
Website: **www.jobwatch.org.au**

Constructive dismissal is not a separate legal claim

A constructive dismissal argument is put as part of an unfair or adverse action dismissal claim or as part of a claim for pay instead of notice of termination. An unfair dismissal claim must be filed with Fair Work Australia (FWA) within **14 days** of a termination of employment. An Adverse Action dismissal claim must be filed at FWA within 60 days of your dismissal and you have up to 6 years from the date of your dismissal to file a claim for unpaid pay instead notice at an eligible Court.

However, not all employees are eligible to make an unfair dismissal claim. See JobWatch's *Unfair Dismissal* infosheet to check if you are eligible to make a claim.

A constructive dismissal arises if you can show, on the balance of probabilities, that you did not leave your employment voluntarily but rather you were forced to leave because of your employer's conduct. Note, however, that just because you may not like your employer's conduct, does not mean that you will succeed with a constructive dismissal claim. It is a high threshold to show that your employer's conduct fundamentally damaged the employment relationship between you and the employer for the purpose of a constructive dismissal claim.

If you are considering leaving your employment because of your employer's conduct, you should first obtain legal advice about the likelihood of making a successful claim.

When will termination be "at the initiative of my employer"?

The key to establishing your constructive dismissal argument is being able to show that your employer's conduct or course of conduct caused you to leave. You have to be able to show

that something that your employer did, or failed to do, left you with no other option but to leave work.

Some examples of conduct on the part of employers which has been found to amount to a constructive dismissal are:

- Repeated failure to pay wages, including changing the rate of pay already agreed upon;
- Reducing the responsibilities and duties of an employee who returned from maternity leave;
- Assaulting an employee;
- Failing to properly address a sexual harassment complaint;
- Continued failure to investigate allegations of bullying or to take appropriate steps to protect the employee from the bullying.

To successfully argue constructive dismissal, you must show that your employer's bad conduct was the **principal contributing factor** in the termination of your employment.

Working out what the **principal contributing factor** was in a termination of employment is difficult, and always depends on the individual circumstances of the case.

What if I resign?

If you are currently employed but you feel that you have no choice but to resign because of something your employer is or is not doing, it is important that you get further advice about the prospects of success for a constructive dismissal claim **before** you resign.

If you agree to resign from your job, you may have weakened your argument for constructive dismissal. However, depending on the exact circumstances of your case, it may be possible to succeed with a constructive dismissal claim if you can show that you only resigned because you were told by your employer to choose between resigning or being sacked.

Major changes to your employment contract without your consent

A contract of employment can be written or verbal. If it is written, it can be a lengthy document detailing all your rights, or just a letter of offer.

Whatever form it takes, this contract reflects the understanding between you and your employer about your terms and conditions of employment. Major changes to your terms and conditions that occur without the consent or agreement of both parties can amount to a breach of contract. If your employer breaches your contract in a fundamental way, this may give rise to a constructive dismissal claim.

For example:

Ranni, a cinema worker, is a permanent employee who works 38 hours per week. His employer cuts his hours from 38 to 15 hours per week without Ranni's consent. Arguably, the employer here has breached the employment contract in a fundamental way and has therefore constructively dismissed Ranni.

Note:

- **Not** all situations involving a variation of your hours will amount to a constructive dismissal.
- If you lose your job because of a genuine redundancy and your employer has complied with its obligations to consult or attempt to redeploy you, you are not eligible to make an unfair dismissal claim but you may still be entitled to make an adverse action or notice of termination claim (see JobWatch's *General Protections Dispute - Adverse Action and Notice of Termination* infosheets).

It is recommended that you seek legal advice before filing a constructive dismissal claim.

What should I do if I want to argue constructive dismissal?

It is up to **you** to show that the termination of your employment was "**at the initiative of your employer**".

This can often be very hard to prove. If you make a constructive dismissal claim, you will have to convince independent people hearing your case - who will know nothing about you, your employer, your workplace or the sorts of things that went on there - that your employment was terminated "**at the initiative of your employer**".

Remember that your version of events will not necessarily be accepted.

You can add weight to your argument by doing the following things:

1. Keep a diary

- Make a note of incidents, accusations, discussions, meetings, telephone conversations and other events that help to build a picture of what happened.
- Write down what happened, who was involved, and the date and time of each relevant event. A note that is made at the time will carry more weight than something you recall later.

2. Act quickly – put your concerns in writing

If your employer has done something (or failed to do something) serious that you are concerned about, put your concerns in writing. Be clear about your complaint or grievance, what you want to happen to fix the problem, and a time frame for resolution. Some important situations where you should consider a written response include these:

- When you've received a warning that you don't agree with, explain your side of the story in writing and keep a copy;
- If your employment circumstances are altered by your employer without your agreement, but you are forced to accept the change, record the fact that you didn't agree with the change by writing a letter to your employer explaining your position (for example, if your hours are significantly reduced, write to your employer advising that you don't accept this change).

Before dealing with your employer, you should first work out if you are eligible to make an unfair dismissal claim.

Always keep a copy of any correspondence. Copies of letters to your employer can be useful later on, if the situation leads to a termination of employment and there are grounds to lodge a constructive dismissal claim.

3. Seek legal advice

If possible, seek legal advice **before** you decide to resign or leave the workplace. This is important. If you do not get legal advice before leaving, try to do so as quickly as you can afterwards. Remember, claims for unfair dismissal must be made within **14 days** of a termination of employment.

4. Tell your employer in writing why you are leaving

Do not use the term "I resign" in any correspondence. If your employment has become so intolerable that you feel you have no option but to leave, it is important to reflect this in the correspondence and to explain the reasons why you are leaving. Your letter to your employer should include a reference to the conduct of your employer which has made your continuing employment intolerable.

For example " .. because of dangerous health and safety standards ...(etc)".

**Always keep a copy of your letter to your employer.
If you are unsure what to write, seek legal advice**

Where to get help

Job Watch Inc:

**(03) 9662 1933 (metro);
1800 331 617 (rural)**

Fair Work Infoline

**(Office of the Fair Work Ombudsman)
13 13 94**

Fair Work Australia Helpline

1300 799 675

**Victoria Equal Opportunity and Human
Rights Commission:**

**(03) 9281 7111
1800 134 142**

ACTU Worker Information line

**(Referral to a union):
1300 362 223**

Law Institute of Victoria

**(Referral to a lawyer):
(03) 9607 9550**

Important disclaimer

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