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Nicky is the owner of HR Support Consultancy. She has a BA(Hons) in Business Studies, is a member of the Chartered Institute of Personnel and Development and has been a practising HR manager for more than 20 years. HR Support Consultancy has provided the BVNA Members Advisory Service (formerly known as the Industrial Relations Service) since it began in 2002.

Constructive dismissal and unfair dismissal

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Constructive Dismissal is the term used when you leave your employment because your employer's conduct is such that you are forced to leave your job. Although there has been no actual dismissal, the treatment is sufficiently bad that the employee is entitled to regard themselves as having been dismissed, because they have been forced to resign.

This might be because you have had unreasonable changes imposed on you, or your employer has allowed you to be bullied or your pay has been withheld or reduced. It could be if you have been forced to work in unsafe working conditions, or you were demoted, had benefits removed when you are contractually entitled to them or didn't give you the support you reasonably required. It might be one major incident or a situation that has been allowed to go on for some time.

Sometimes, you may be able to take action if you have had to leave your employment because you felt you had no choice. In order to be able to do this you must have been with your employer for at least two years. You also need to claim within three months of resigning (there are some exceptions to this).

Constructive dismissal is not a claim itself, but if an employee can demonstrate they have in effect been dismissed in this way, they can claim unfair dismissal and/or wrongful dismissal.

Proving constructive dismissal is not easy. There has to be a good case and good evidence. A court will look for a 'breach of the duty of trust and confidence'.

If you are experiencing difficulties at work, you should use the appropriate processes that are in place and give your employer the opportunity to rectify the situation. This will usually be talking to your employer and probably raising a formal grievance. You should familiarise yourself with your company's processes and these will usually be in your staff handbook.

The employee has to show that they have resigned in response to a fundamental breach of contract by the employer.

Sometimes that conduct will be the breach of an express term of the contract of employment, such as the right to be paid a certain amount on a certain date. More often it will be that the employer's behaviour has breached the term of mutual trust and confidence that is implied into all contracts of employment. The term basically requires employers to refrain from conducting themselves in a manner that is likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Examples of such conduct may include isolating the employee, humiliating them in front of others and falsely accusing the Constructive dismissal is often very difficult to prove. There has to be a fundamental breach of contract by the employer – not just a minor breach.

The employee also has to show that their decision to terminate their employment was in response to the breach and not, for example, because they had been offered a more attractive job. There is also the question of timing, if an employee delays in resigning an employment tribunal might take the view that the resignation was not actually in response to the breach. There is also an expectation that an employee will have raised a grievance to try to resolve the issue before resigning.

After resigning, and if it has been shown that they have been constructively dismissed, the employee cannot 'rely on the contract' in the future, therefore they may not be bound by post termination restrictions in the contract – very often these are in the contract to prevent the employee from working for a competitor for a period of time after leaving for example.

Constructive dismissal is complicated, if you are considering claiming this, or need advice on any employment issue please contact us.

For further support with this or any other HR issue, BVNA members can call the BVNA Advisory Service Helpline on 01822 870270 or email AdvisoryService@bvna.co.uk