

Constructive Dismissal

Constructive dismissal/ termination is the cessation of employment brought about by an employer, making the employee's working conditions so intolerable that the employee feels compelled to leave. Consequently, the Employee is rendered unemployed by virtue of the misconduct of the Employer. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.



The basic ingredients in constructive dismissal are set out below:

a) The employer must be in breach of the contract of employment and the breach must be fundamental

The Employer must have gone against the terms of the employment contract. This mostly occurs when an employer changes the terms of the contract without prior consultation with the employee. Fundamental breach includes changing terms of the contract that deal with wages and salary, working hours and working conditions. For instance, where an employer reduces the salary or willfully refuses to pay salary, increases or changes working hours, changes the job description or refuses to allocate work to the employee.

b) The employee must resign as a result of that breach

Resignation signifies that although the employee was not dismissed expressly, his choice to end the contract was because of the Employer's conduct. The courts have previously held that an employee who resigned because of constantly being transferred from one region to another without being given time to settle was constructively dismissed and therefore entitled to compensation. On the other hand, the courts have held that resigning out of fear of being dismissed does not amount to constructive dismissal.

c) The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived

A delay in resigning only means that the employee by conduct was agreeable to his Employer's misconduct. The employee must therefore resign within a reasonable time, so as not to be seen to be condoning the employer's misconduct.

All these acts have to be considered together and not individually for it to be termed constructive dismissal.

The burden of proving that the employer was responsible for the intolerable condition and that there was no other way of resolving the issue except for resignation is usually on the employee. Other acts that could amount to constructive dismissal include:

- i) Advertising an employee's job under a different title and requiring qualification that such an employee cannot meet.
- ii) Failing to provide an employee with the necessary tools and equipment needed in the performance of his work. (This includes failing to obtain a work permit for an employee where the same is required)
- iii) Failing to address concerns or complaints raised by an employee.