

CONSTRUCTIVE DISMISSAL



By Toronto Employment Lawyer David Ertl

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WHAT IS CONSTRUCTIVE DISMISSAL?

Constructive dismissal occurs when the employer is responsible for some objective conduct which constitutes a fundamental change in employment or a unilateral change of a significant term of that employment.

Constructive dismissal can also be found without identifying a specific breach of a fundamental term, for example, where the employer's treatment of an employee makes continued employment intolerable.

Caution: This is a complex area of employment law. You should be consulting with an experienced employment lawyer. Do not, for example, rely on your cousin who practices real estate law.

WHAT ARE SOME COMMON EXAMPLES OF CONSTRUCTIVE DISMISSAL?

Changes that may constitute constructive dismissal include:

MONETARY

- reduction in salary (either by a pure cut or by a change in the salary structure)
- reduction in hours of work (resulting in less pay)
- additional work with no compensation
- change in benefits (for example, a reduced non-discretionary bonus)

DUTIES / JOB FUNCTION / RESPONSIBILITIES

- reduction in job responsibilities
- change in job status / demotion
- change in reporting structure
- reduction of effectiveness
- marginalization of employee

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WHAT ARE SOME COMMON EXAMPLES OF CONSTRUCTIVE DISMISSAL? (CONT'D)

Changes that may constitute constructive dismissal include:

WORKPLACE BEHAVIOUR

- inappropriate and abusive behaviour by employer or co-workers
- destruction of trust
- discrimination / harassment

PERFORMANCE AND DISCIPLINE

- negative performance reviews
- unwarranted warnings and suspensions
- discipline short of termination
- placing an employee on a performance improvement plan (PIP)
- placing an employee on probationary status

MISCELLANEOUS

- layoffs
- geographic transfers
- employer demanding resignation
- employer forcing employee to sign new contract
- employer change in ownership

Caution:

While these are the common causes of constructive dismissal, it is not an exhaustive list.

LAYOFFS

Ontario's *Employment Standards Act* authorizes employers to "temporarily" lay off workers. If the worker is not returned to work within a specific period of time, the worker is considered "terminated" and he or she is afforded statutory entitlements (i.e. termination pay, vacation pay etc.).

However, the common law treats a "layoff" as a loss of employment --- and a loss of employment is usually considered a constructive dismissal, unless:

- a) your employment contract expressly permits layoffs; or
- b) circumstances exist such that the right to lay you off is "implied" into your contract of employment (i.e. you have been laid off before, it is common practice in your particular industry, etc.)

Caution:

This is a time-sensitive area of employment law. If you have been laid off, consult with an employment lawyer *early*.



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TOXIC OR POISON WORK ENVIRONMENT

Our courts have stated that there is an implied term of the employment relationship that the employer will treat the employee with civility, decency, dignity and respect.

As with most everything in employment law, whether this implied term has been breached *depends on the circumstances*.

On one hand, employees have been found to have been constructively dis-

missed where the following employer conduct was found:

- serious but unfounded criticism
- verbal abuse, shouting and swearing
- physical assault
- attack on the integrity of professional employees
- sexual harassment
- flagrant and outrageous conduct
- actions that humiliated the employee

The common law has also developed such that the employer is also required to prevent abuse and inappropriate conduct by co-workers.

However, not every workplace disagreement or altercation (or other employer action) will be considered constructive dismissal. Sometimes a poor management style is just that – and employees may be expected to put up with it.

Caution: It is advisable to have good notes and other written documents to support your position. If you have any questions about how to properly document what has been happening to you, consult with a lawyer.



WHAT IF I HAVE BEEN SUBJECTED TO MANY CHANGES OVER A CERTAIN PERIOD (I.E. THINGS KEEP GETTING WORSE)?

In the simplest example, constructive dismissal occurs after a single significant unilateral change.

However, constructive dismissal can occur as a result of a number of many smaller changes, and it is possible that one of these changes might be the “last straw” resulting in a constructive dismissal.



HOW MUCH TIME DO I HAVE TO CONSIDER THE CHANGES TO MY EMPLOYMENT?

Generally, an employee must accept or refuse the change within a “reasonable” period of time. What is reasonable can depend on a variety of factors including: when and how the change in employment was communicated to the employee and how long the employee has worked with the employer. Long term employees may be deserving of more time to make decisions affecting their livelihood.

Significantly, prolonged silence will (at some point) constitute acceptance.

Caution:

It is critical that you consult an employment lawyer as soon as possible to discuss your options and strategies for moving forward.

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SHOULD I JUST RESIGN AND CLAIM CONSTRUCTIVE DISMISSAL?

Short Answer: While resigning might, ultimately, be the appropriate solution, it is not the only potential solution. Therefore it is generally recommended to *speak with a lawyer first*.

While a constructive dismissal permits the employee to treat the employment relationship as being at an end, in some circumstances an employee may be expected to

continue to work for the employer in order to mitigate his or her damages

In other words, even if the change constitutes a constructive dismissal (which can sometimes be difficult to determine), it may not be in your best interest to resign.

Therefore, the answer to the above question is to consult with a lawyer *early* in order to understand your options.



IF I RESIGN FROM MY JOB, DO I LOSE MY RIGHT TO EMPLOYMENT INSURANCE BENEFITS?

Under the *Employment Insurance Act*, the general rule is that if you quit your job, you are not entitled to Employment Insurance benefits. However, where an employee has "no other reasonable alternative" but to quit, he or she is still entitled to Employment Insurance Benefits. Circumstances may include:



- sexual or other harassment
- discrimination
- working conditions that endanger your health or safety
- major changes in the terms and conditions of your job affecting wages or salary
- excessive overtime or an employer's refusal to pay for overtime work
- major changes in work duties
- difficult relations with a supervisor, for which you are not primarily responsible
- your employer is doing things which break the law
- discrimination on account of membership in an association, organization or union of workers
- pressure from your employer or fellow workers to quit your job

In short, circumstances which could support a conclusion of "constructive dismissal" can also support a finding that you had "no other reasonable alternative" but to quit.

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WHAT INFORMATION SHOULD I GATHER BEFORE MY FREE CALL BACK WITH ERTL LAWYERS?

| KEY DETAILS | WRITE YOUR COMMENTS HERE |
|---|--------------------------|
| Name of employer | |
| Your most recent job title | |
| Your length of employment (i.e. start date and termination date) | |
| If there were any gaps in your employment with your employer | |
| Your compensation (e.g. salary, bonuses, commissions) | |
| Your benefits (e.g. health benefits, insurance, RRSP, pension, car allowance, stock purchase plans, etc.) | |
| Did you sign an employment agreement or job offer letter? If so, do you have a copy of it? | |
| Why do you believe you have been constructively dismissed? | |

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Disclaimer:

This guide is intended to provide basic information to help you better understand constructive dismissal.

It is not legal advice.

For legal advice, please contact:



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