

Constructive Dismissal

What is constructive dismissal?

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

If your employer tells you that you have been dismissed, 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 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, leaving the employee with no reasonable option but to leave their employment. This is what is known as a 'constructive dismissal.'

A constructive dismissal arises if you can show, on the balance of probabilities, that you did not leave your employment voluntarily but that you were forced to leave because of your employer's conduct.

However, 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 claim based on constructive dismissal.

You must be able to show that your employment was terminated 'at the initiative of the employer,' not because you decided to voluntarily resign.

Constructive dismissal is not a separate legal claim

A constructive dismissal argument is put as part of an unfair dismissal or General Protections Dispute – Termination claim or as part of an underpayments claim (for termination payments).

You have up to **6 years** from the date your notice fell due to file an underpayments claim at an eligible court. An unfair dismissal claim or a General Protections Dispute – Termination claim must be filed at the Fair Work Commission (FWC) within **21 days** of the employment being terminated. Not all employees are eligible to make an unfair dismissal claim. See JobWatch's 'Unfair Dismissal' Fact Sheet to check if you are eligible to make a claim.

If you are considering leaving your employment because of your employer's conduct, or taking action against your employer for constructive dismissal as part of an unfair dismissal, General Protections Dispute – Termination claim, or underpayments claim, you should first obtain legal advice about the likelihood of making a successful claim.

Important!
Constructive dismissal cases are rarely straight-forward. Before filing a claim, you should be well informed about the issues involved. Read this Fact Sheet along with JobWatch's 'Unfair Dismissal', 'General Protections Dispute – Termination claim' and 'Notice of Termination' Fact Sheets which give you information on how to make a claim. Before you leave your job, seek further assistance from JobWatch, your union, or a lawyer.

Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

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 reasonable option but to leave your employment. 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 agreed rate of pay;
- reducing the responsibilities and duties of an employee who returned from maternity leave;
- assaulting an employee;
- failing to properly address a sexual harassment complaint; and
- 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 obtain legal 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 and being sacked, or were otherwise forced to do so.

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.

If you lose your job because of a genuine redundancy and your employer has complied with its obligations to consult or consider redeploying you, you may not be eligible to make an unfair dismissal claim, but you may still be entitled to make a General Protections Dispute – Termination claim or a claim for your outstanding notice payment.

Case study:

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 has breached the employment contract in a fundamental way and has therefore constructively dismissed Ranni.

Important!
Not all situations involving a variation of your hours will amount to a constructive dismissal.

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, any witnesses, 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

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

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.

It is a breach of the General Protections for an employer to dismiss an employee for complaining about their employment. If you are dismissed, you may be eligible to make an unfair dismissal claim or a General Protections Dispute - Termination claim. Either claim must be filed at the FWC within **21 days** of the date your termination took effect.

Important situations where you should consider a written response include:

- When you've received a warning that you don't agree with, explain your side of the story in writing and keep a copy; and
- If your employment circumstances are altered by your employer without your agreement, 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.
- 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

Before you decide to resign or leave the workplace, seek further assistance from JobWatch, your union, or a lawyer. This is important. If you do not get legal advice before leaving, try to do so as quickly as you can afterwards.

See JobWatch's 'Unfair Dismissal' and 'General Protections Dispute – Termination claim' Fact Sheets for more information.

Note!

Remember, an unfair dismissal or a General Protections Dispute – Termination claim arguing a constructive dismissal must be filed at FWC within 21 days of a termination of employment taking effect.

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 breaches of health and safety standards ... (etc.)'.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

Note!

Always keep copies of your messages, letters or emails to your employer!

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.