

# Constructive Dismissal Quiz



## **QUESTION**

What are the two steps employees must take if they feel that they are being constructively dismissed by an employer?

## **ANSWER**

1. Object to the substantial changes in their employment within a short time of the occurrence. But if they do resign, make it clear to the employer that the resignation is due to the substantial change or incidents.
2. In both wrongful and constructive dismissal situations, the employee has a duty to mitigate damages by seeking new employment.

## **WHY IS IT RIGHT**

### **Constructive Dismissals are Covered Under Part III of the *Canada Labour Code***

The unjust dismissal provisions in section 240 of the *Canada Labour Code* cover unjust constructive dismissals as well as those unjust dismissals made by the open unambiguous action of the employer.

The individual terminations of employment provisions in sections 230 to 234 of the Code, and the severance pay provisions in sections 235 to 237, may also apply in cases of constructive dismissal.

### **Definition of Constructive Dismissal**

The phrase "constructive dismissal" describes situations where the employer has not directly fired the employee. Rather the employer has failed to comply with the contract of employment in a major respect, unilaterally changed the terms of employment or expressed a settled intention to do either thus forcing the employee to quit. Constructive dismissal is sometimes called "disguised dismissal" or "quitting with cause" because it often occurs in situations where the employee is offered the alternative of leaving or of submitting to a unilateral and substantial alteration of a fundamental term or condition of his/her employment. Whether or not there has been a constructive dismissal is based on an objective view of the employer's conduct and not merely on the employee's perception of the situation.

It is the employer's failure to meet its contractual obligations that distinguishes a constructive dismissal from an ordinary resignation. The seriousness of the

employer's failure as well as the amount of deliberation apparent in its actions are also important factors.

The employer's action must be unilateral, which means that it must have been done without the consent of the employee. If it is not unilateral, the variation is not a constructive dismissal but merely an agreed change to the contract of employment. Generally, if the employee clearly indicates non-acceptance of the new conditions of employment to the employer, there has been a constructive dismissal only if the employee leaves within a reasonable (usually short) period of time. By not resigning, the employee indicates his/her acceptance of the new conditions of employment.

There have been rare and exceptional cases where courts have held that there has been a constructive dismissal even though the complainant remains in the employ of the employer. This includes, for example, cases where the employee continues to work under the new conditions in order to mitigate damages and either protests the new conditions explicitly or makes it clear that he or she still reserves the right to take legal action. In such cases the employee cannot be said to have condoned or accepted the change in working conditions. Furthermore, courts have held that an employee cannot be said to have condoned the change in working conditions if the employee formally commences legal proceedings in respect of the change while remaining in the employ of the employer. If the employee does not formally initiate proceedings but simply attempts to negotiate the matter while remaining at work, the employee cannot be said to have condoned the change as long as negotiations are ongoing.

For the purposes of determining whether or not a complaint has been filed within the 90-day time period as required by s.240(2), a constructive dismissal takes place at the time the employer changes the terms and conditions of employment. In order to be admissible, the complaint must be filed within 90 days of that time, unless the complainant qualifies for an extension of the time to file under s.240(3).

In cases of alleged unjust dismissal, if a doubt exists as to whether the complainant has been constructively dismissed the inspector shall proceed to assist the parties in reaching a settlement, and if no settlement is reached within a reasonable time, the complaint shall be referred to an adjudicator. This is consistent with paragraphs 6.3 and 7.2 of the Operations Program Directive 815-1 entitled *Response to Complaints of Unjust Dismissal*.

### **Examples of Constructive Dismissal:**

The following examples are of cases in which the Courts have found that an employee has been constructively dismissed. The examples are not exhaustive and the results will vary with the facts of each case and with the terms of each employment contract.

#### **1. Changes in Powers or Duties**

The most common cases of constructive dismissal are where the employee leaves as a result of material changes in powers or duties. Usually, a main area of responsibility is removed or the employee's duties are decreased; for example, a plant superintendent whose duties are confined to those of yard foreman. Such actions are in fact a dismissal in disguise, whether or not they are accompanied by changes in salary or job title. Commonly, this form of constructive dismissal involves a significant loss of prestige and status as a result of a corporate reorganization or change in reporting arrangements.

#### **2. Threats and Suspensions**

The employee's quitting in response to threats of dismissal or demotion has been held, in some cases, to constitute a constructive dismissal. However, mere encouragement to resign will not necessarily be sufficient. Similarly, a constructive dismissal may occur when an unfair suspension or reduction in salary creates an intolerable situation for the employee.

### **3. Reduced Hours, Salary, Status or Benefits**

The employee's quitting due to a major reduction in an employee's hours of work or change in the location of employment is often sufficient to make up a constructive dismissal. However, there is no constructive dismissal where the employee is moved to another location in the same city or if the employee knew that potential relocation was part of the job.

A unilateral change in the employment status of a salesperson from employee to independent contractor has been held to be constructive dismissal. The withdrawal of a company vehicle may constitute a dismissal in disguise, if the vehicle is an essential work tool, and the employer does not have a good reason for its removal.

If your employer has changed your contract and created a hostile environment through these means, it can force you to leave your workplace as a result.

If you, as an employee, feel there is no other option besides leaving a workplace to deal with changes in your contract, then you've been constructively dismissed. In order to consider termination as a **constructive dismissal**, the changes to your contract have to be made at the heart of the contract. Minor changes will not lead to consideration, as an employer is allowed to change the duties and responsibilities of an employee as they see fit.

## **OBTAINING RELIEF FROM CONSTRUCTIVE DISMISSAL**

**Employees must.....**

### **1. Object to Changes/Incidents**

Constructive dismissal must also be accompanied by certain actions by the employee. The employee would generally have to object to the substantial changes or incidents within a short period of time of their occurrence. It is not recommended that an employee resign without first obtaining legal advice. However, if the employee does resign, the employee must make it clear to the employer that the resignation is due to the substantial change or incidents.

If the employee does not make it clear to the employer that they do not accept the new terms, then the employee may be seen as having agreed to the changes made. Additionally, employees may not be able to claim constructive dismissal if, for a period of time, they act in accordance with the changes made to their employment. This would be considered implied acceptance and may provide a basis for believing that the employee is in agreement with the unilateral changes. If the employee later becomes dissatisfied with the new terms and conditions of employment, they may not be successful in a claim for constructive dismissal.

### **2. The Employee's Duty to Mitigate**

In both wrongful and constructive dismissal situations, the employee has a duty to mitigate damages by seeking new employment. In most cases, the employee may not be required to continue working for the employer who constructively dismissed the employee.

An employee would, however, be expected to return to work for the dismissing employer in an effort to mitigate damages if:

- the former employer offers temporary, comparable employment;
- there are no conditions that make such a return to work unreasonable or intolerable; and,
- a reasonable person would accept such an opportunity

## WHY IS EVERYTHING ELSE WRONG

**THE [SUPREME COURT OF CANADA](#) ILLUSTRATES TWO FORMS THAT CONSTRUCTIVE DISMISSAL CAN TAKE:**

1. **A single act by the employer that violates an essential term of an employee's employment contract.**
2. **A series of actions that, when added together, show that the employer no longer intends to abide by an employment contract.**

Essentially, the first form creates the need for an analysis of an employee's contract. This arises because an employer has unilaterally made changes to an employee's wages/compensation, workplace duties or the workplace location that was otherwise outlined in the original contract.

With the second form, an occurrence develops when an employer makes it clear that they no longer want to be bound by the employment contract they once signed. An employer's intention can be made clear as their conduct can make it intolerable for an employee to continue at work.

These two forms basically force an employee to resign, by making major changes to their contracts and creating a hostile work environment.

## How Long Before You Can Claim Constructive Dismissal In Ontario?

If your employer has created a hostile work environment by fundamentally breaching your employment contract, you may be eligible to claim constructive dismissal. In most cases, Canadian courts will acknowledge your claim if a fundamental change has been made to your contract after it was signed.

This means that if something that was once agreed upon, has now changed, your claim is valid. These fundamental changes and can include:

- A Demotion
- Alteration of a job description
- Alteration of working conditions
- Lowering wages or compensation
- Changing work hours
- Imposing a suspension or leave of absence without sufficient reasoning
- Relocating an employee's workplace without notice

## Can You Claim Constructive Dismissal After You Resign?

Yes. If your workplace has become a hostile environment due to a breach of contract and you are left with no other option but to resign, you are still able to claim constructive dismissal.

This should be the worst case scenario if you need to resign before making your claim as it is very high-risk. However, if your work has become intolerable by an employer's fundamental changes to your contract, then you are able to resign before

your claim.

Of course, it can always be beneficial to stay at your place of employment to mitigate damages while making your claim; if it is possible.

### **Can You Sue For Constructive Dismissal In Ontario?**

The answer is fully dependent on each case. If your contract has been breached, and your working conditions have become unbearable, the changes that were in breach must be the ones responsible for your resignation.

For example, if your employer has assigned you to a new workplace that was not mentioned in your employment contract and has added an unrealistic commute to your workday, that must be the reason for your claim and your lawsuit. If you continue to work under those conditions, you could be out of luck. The courts will see your continuation as acceptance and that can discredit your case.

After your employment contract has been breached, you've made your claim and you've resigned, you can sue your employer for damages incurred from constructive dismissal.

Damages can include lost wages, travel fees (if the workplace has changed) or the lack of severance package. Note: If you implicitly or explicitly accept your changed work conditions from your original contract, you can void your right to take your employer to court.

### **What Can You Receive If You Are Constructively Dismissed?**

If an employer is found to have constructively dismissed an employee, the employee is entitled to a severance package.

While there is not a mathematical formula to calculate just what is included in a package, there are a few factors that can be considered. These factors include:

- Employee's age
- length of employment
- Character of employment
- Availability of similar employment