



Navigating Constructive Dismissal

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## Introduction

The termination of employment under Maltese Law has its roots in the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta, hereinafter referred to as the “Act”). The law and jurisprudence provide for various ways of termination, some more conventional than others.

The situation where an employee is placed in the unfortunate circumstance where he would feel obliged to resign, without any other possible alternative, is also a form of termination. This amounts to constructive dismissal potentially resulting from either a clear repudiatory breach of the employee’s contract of employment or else in response to the existence of any harmful conduct shown by the employer.

The concept of an employee being constructively dismissed is not cited in the law, and therefore it is necessary to refer to case-law and literature on the topic to recognise the factors for why and how constructive dismissal happens, and what materialises in practice.

## What constitutes Constructive Dismissal?

Selwyn<sup>1</sup> states that constructive dismissal is “*Where the **employee himself terminates the contract, with or without notice, in circumstances where he is entitled to terminate it without notice by reason of the employer’s conduct**<sup>2</sup>..., for although the employee resigns, it is the employer’s conduct which constitutes a repudiation of the contract, and the employee accepts that repudiation by resigning.*”

Essentially, a case for constructive dismissal occurs when the employee is forced to resign from his role because of negative circumstances at the place of work, including, where there has been a fundamental breach in the conditions of the employee’s employment contract by the employer’s actions and the overall hostile attitude towards the employee.

In fact, in *Western Excavating (ECG) Ltd v Sharp (1978)*, Lord Denning, by following the same reasoning of the law, dictated that “*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one (1) or more of the essential elements of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then **he would be terminating the contract by reason of the employer’s conduct.** He is constructively dismissed*”.

Although no law refers to, or properly regulates, constructive dismissal, it has been introduced locally through the recognition provided by the Industrial Tribunal and the Maltese Courts,<sup>3</sup> which follow the

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<sup>1</sup> Selwyn’s Law of Employment, Norman M.Selwyn (22<sup>nd</sup> edition);

<sup>2</sup> As defined in the UK Employment Rights Act of 1996 in section 95(1) and referred to in *Lufthansa Technik Malta Limited vs Ramon Caruana* decided on the 7<sup>th</sup> of May, 2014;

<sup>3</sup> As stated in *Geniew Zerafa u Phone Direct Ltd* decided on the 27<sup>th</sup> of July 2007;



concept of “*implied term of trust and confidence*”<sup>4</sup> between the parties to an employment contract, as developed by English common law.<sup>5</sup>

In basic terms, an employee is deemed to be constructively dismissed when the unilateral, direct and/or indirect yet majorly illicit conduct of the employer<sup>6</sup> is such that the employee is entitled to regard the employment contract as having been terminated by the employer, even though the employee would have himself, unwillingly, resigned.<sup>7</sup> Indeed, “*Meta nghidu constructive dismissal nifhmu li ghalkemm mad-daqqa t’ghajn l-impjegat ikun telaq irrizenja, hu fil-fatt dan il-pass ikun rizultat tal-fatt li min ihaddem ikun, irragonevolment, pogga lill-haddiem daru mall-hajt sal-punt li dan ma kellux triq ohra hlief dik li jitleq. Ma jkunux kwistjonijiet frivoli izda serji sew.*”<sup>8</sup>

Additionally, in *Lufthansa Technik Malta Limited vs Ramon Caruana*,<sup>9</sup> the First Hall, Civil Court dictated that “*Ikun hemm lok ta’ constructive dismissal meta l-impjegat ikun imgieghel jirrozenja mix-xoghol tieghu minhabba cirkostanzi ta’ natura negattiva fuq l-lant tax-xoghol jew/u jkun hemm xi ksur fundamentali tal-kundizzjonijiet fil-kuntratt ta’ impjeg. Per ezempju, meta l-impjegat ikun talab l-assistenza ta’ haddiema ohra izda minkejja l-htiega ta’ dan it-talba ma tkunx giet accettata b’hekk ikun hemm rizultat ta’ stress qawwi fuq l-impjegat peress li ma jkunx qieghed ilahhaq ma xogholu u jkollu jiddedika hafna aktar hin milli suppost ghax-xoghol tieghu u anke ma jiehu l-leave li huwa ghandu dritt ghalih.*”

A similar definition was provided in *Philip Camilleri vs Bortex Clothing Co. Ltd.*,<sup>10</sup> whereby the Industrial Tribunal stated “*li ghalkemm mad-daqqa t’ghajn l-impjegat ikun telaq u irrizenja, hu fil-fatt dan il-pass ikun rizultat tal-fatt li min ihaddem ikun, irragonevolment, pogga lill-haddiem daru mall-hajt sal-punt li dan ma kellux triq ohra hlief dik li jitleq. Ma jkunux kwistjonijiet frivoli izda serji sew.*”

## On a Case-by-Case Basis

Every instance of constructive dismissal must be decided on its own merits. Not every act shown by the employer is so serious and would amount to a repudiatory breach of contract of employment, resulting in the employee to resign and claim constructive dismissal. Essentially, if the employer can adequately prove that the unfortunate history of difficulties and disputes between the employer and employee are

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<sup>4</sup> Quoted in the case of *Christopher Stanley vs. Roger Satariano & Sons Ltd* decided on the 21st April 2022;

<sup>5</sup> Also reiterated in the recent case of *Francesca Busuttil vs. Laguna Marina Limited* 11th May 2022;

<sup>6</sup> As defined in the case of *Geniew Zerafa u Phone Direct Ltd* decided on the 27<sup>th</sup> of July 2007;

<sup>7</sup> In this regard, see also *Col.Claudio Spiteri Ret’d vs Malta Gaming Authority*, dated the 24<sup>th</sup> February 2023;

<sup>8</sup> *Philip Camilleri vs Bortex Clothing Co Ltd* decided on the 4<sup>th</sup> of February, 2014;

<sup>9</sup> Decided on the 7<sup>th</sup> of May 2014;

<sup>10</sup> Decided on the 3<sup>rd</sup> of February 2014;



merited to a reasonable extent, the employee cannot claim that he was constructively dismissed, and hence would not be entitled to any form of compensation.

In this discussion, any occurrence of a constructive dismissal has to refer to concrete aspects of attitudes and behaviours shown by the employer, comprising several negative instances suffered by the employee until he reaches his last straw.<sup>11</sup> In fact, and as further reiterated in the Bortex Clothing case,<sup>12</sup> which quoted *Cavendish Hotels Limited vs Jesmond Beck*,<sup>13</sup> it was understood that “*Kull valutazzjoni dwarhom trid issir b’riferiment għal dak dawk l-aspetti konkreti, kollegati man-natura tar-rapport singlu, il-posizzjoni tal-partijiet fl-azjenda jew stabbiliment, u mhux lanqas il-portata soġġettiva tal-fatt innifsu, ossija ċ-ċirkostanzi verifikati fil-motivi u l-intensità tagħhom, kompriz kull aspekt ieħor korrelat li jista’ jincidi negattivament fuq ir-rapport*”.

For instance, in the case of *Amanda Scerri vs MI ChildCare Ltd*,<sup>14</sup> the Industrial Tribunal discussed the elements of malicious acts and unpleasant attitudes depicted by the employer towards the employee during the course of her duties. The Industrial Tribunal recognised that the necessity for the restructuring of the Company, which was a result of the need to safeguard the investments made by the owners, outweighed the emotional effects suffered by the employee due to the employer’s acts, and hence it did not amount to constructive dismissal.

On this point, the Industrial Tribunal, in *Philisian Debono u Arrigo Group of Hotels Ltd*,<sup>15</sup> held that it is the Tribunal itself which must objectively decide whether there indeed is the degrading behaviour demonstrated by the employer being alleged by the employee which can certainly **not** go unnoticed.<sup>16</sup> In this regard, “*Quite what amounts to a case of constructive dismissal is largely, although not wholly, a matter of evidence and fact rather than of law*”.<sup>17</sup>

## Burden of Proof

In a particular judgment delivered by the First Hall, Civil Court, the importance of proving one's case was highlighted, and this also applies when proving constructive dismissal. Fundamentally, any employee alleging constructive dismissal must essentially be able to prove it with enough valid evidence. In this case, “*l-Qorti [riedet] tagħmilha ċara li f’kull kawża, l-attur irid jipprova l-każ tiegħu u dan fi grad xieraq kif imfisser fir-regoli ewlenin tal-liġi tal-proċedura u skond il-ħaqq. Attur ma jistax ineħhi minn*

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Decided on the 23<sup>rd</sup> of November, 2005;

<sup>14</sup> Decided on the 12<sup>th</sup> of January 2022;

<sup>15</sup> Decided on the 5<sup>th</sup> of November, 2008;

<sup>16</sup> “*Għaliex partikolarment fil-każi ta’ allegat constructive dismissal irid jiġi ppruvat li kien hemm nuqqas reali ta’ fiduċja u mhux nuqqas percettibli. Huwa fid-dmir tat-Tribunal li jara jekk oġġettivament kien hemm dak laġir li jagħti lok għal prova inkonfutabbli li dak allegat ikun fil-fatt sar.*”

<sup>17</sup> *Day v Pickles Farm Ltd*, 1999;



*fuqu dan l-obbligu billi jappella għas-sens ta' ħniena jew dehen arbitrali tal-ġudikant mingħajr ma jagħti ħjiel ta' prova ta' dak li jitlob.*"<sup>18</sup>

Furthermore, in the Amanda Scerri case referred to earlier,<sup>19</sup> the Industrial Tribunal also held that the burden of proof lies on the employee, as the applicant, who alleged the constructive dismissal, therefore having the obligation to prove that it was the employer that drove the employee to terminate his contract of employment. In this case, the employee did not bring forward enough concrete proof to show that the management intentionally and maliciously created dissatisfaction on the part of the employee, which imposed the resignation on the employee to leave her work.

In another case, under the name of Perit Andrew Ellul vs Fondazzjoni għall-Iskejjel ta' Ghada,<sup>20</sup> the Industrial Tribunal reiterated the same reasoning regarding proof and explained that the employee alleging constructive dismissal is bound to prove that there existed a situation which led to the resignation, therefore applying the legal maxim *onus probandi incumbit ei qui dicit non ei qui negat*.<sup>21</sup>

## The Dual Test approach to Constructive Dismissal

In order to take a decision as to whether an employee was forced to resign from his employment by acts of the employer or otherwise, a dual test needs to be satisfied.

The first test is the contractual test or the entitlement test, whereby the employee would resign because he claims that there has been a fundamental breach of his contract. This fundamental breach may be one which was either mutually implied by the parties, or else expressed directly within the contract of employment.

In this situation, the Industrial Tribunal would need to examine the facts of the case at hand to determine whether the employer had indeed seriously breached the conditions of employment. The breach is understood to be so flagrantly serious, so much so that the employee would immediately decide to resign because the relationship between the parties has been destroyed to no point of return.<sup>22</sup>

In line with this approach, in one case,<sup>23</sup> the Industrial Tribunal stated that *"biex jiġi deċiż li hemm constructive dismissal huwa biss meħtieġ li jiġi stabbilit li **kien hemm bidla notevoli fil-kundizzjonijiet***

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<sup>18</sup> Roland Schaffrath vs. Travel TV plc, (Citazz. Nru. 1962/00 JRM);

<sup>19</sup> Amanda Scerri vs MI ChildCare Ltd, 12<sup>th</sup> of January 2022;

<sup>20</sup> Perit Andrew Ellul vs Fondazzjoni għall-Iskejjel ta' Ghada decided on the 11<sup>th</sup> of March, 2022;

<sup>21</sup> The onus of proof is on he who alleges it, as further dictated in the case of Philip Camilleri vs Bortex Clothing Co Ltd in that *"Il-principju legali li fl-isfond tieghu irid jitqies dan il-kaz **hu li min jallega jrid jipprova**";*

<sup>22</sup> Christopher Stanley vs. Roger Satariano & Sons Ltd decided on the 21st April 2022;

<sup>23</sup> Francesca Busuttil vs. Laguna Marina Limited, decided on the 11<sup>th</sup> of May, 2022;



*tax-xogħol tagħha għad-detriment tagħha, u m'għandiex għalfejn turi li kien hemm ksur fundamentali ieħor tal-kuntratt.”*

The second test relates to the reasonableness test, meaning when the Industrial Tribunal or Court must determine whether there was a breach of trust in the employer and employee relationship and comprehending that the breach of contract was serious enough to justify the employee's resignation.<sup>24</sup>

In the implied duty of mutual respect which exists between the employer and the employee, the element of unreasonableness *da parte* the employer, must be duly examined. The very absence of reason or the display of an action which targets this mutual respect, shown unequivocally by the employer, amounts to constructive dismissal. This would include, for instance, using abusive, bad or offensive language, and instances of immodest conduct by the employer at the workplace.<sup>25</sup> Normally, it would be a collective series of events displayed by the employer which become unbearable for the employee to remain performing in that work environment.

In *Geniew Zerafa u Phone Direct Ltd*<sup>26</sup> decided by the Industrial Tribunal, the latter explained that in constructive dismissal, all unilateral acts of commission or omission portrayed by the employer induce the employee to leave work, *“allura ghandu tigi interpretata bhala terminazzjoni forzata jew indotta sabiex l-impjegat jiftermi l-impieg tieghu.”*<sup>27</sup> This was echoed in the case of *Morrow v Safeway Stores plc*<sup>28</sup> in that *“if there has been conduct by the employer likely to **destroy or seriously damage** the trust and confidence relationship this will mean, inevitably, that there has been a fundamental breach going to the root of the contract and entitling the employee to resign and claim constructive dismissal.”*

The employer's whimsical conduct is to be adjudged by the Industrial Tribunal to regard it as right and fair for the employee to be placed in that situation, or otherwise. Coupled with the reasonableness test, is the examination of whether the employer's grave conduct may be deemed to destroy or seriously damage the relationship of trust and confidence between the employer and employee. In *Western*

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<sup>24</sup> *Charichelon Company Limited vs Amanda Greaves* decided on the 17<sup>th</sup> of May, 2016;

<sup>25</sup> As stated in *Geniew Zerafa u Phone Direct Ltd* decided on the 27<sup>th</sup> of July 2007, the following was dictated; *Wahda mir-raguni anzi principali ta' nozzjoni ta' “constructive dismissal” huwa fid-dover implicitu ta' rispett reciproku bejn minn ihaddem u min jahdem. Fin-nuqqas tieghu jew fin-nuqqas ta' ezistenza tieghu jew azzjoni li l-azzjoni kellha immirata dak ir-rispett jammontaw ghal “constructive dismissal”. Kif ukoll ta' lingwagg ta' uzu abbuziv u hazin, ghagir offensiv u kondotta xejn dekoruza tal-principali fuq ix-xogħol;*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Decided by the Employment Appeal Tribunal on the 21<sup>st</sup> of September, 2001;



Excavating (ECC) Ltd v Sharp,<sup>29</sup> Lord Denning defined unreasonable conduct to be similar to the concept of unfairness in a case of unfair dismissal.

Therefore, “*the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee*”.<sup>30</sup> The main difference would be that in the case of unfair dismissal, it is the employer who is dismissing the employee, albeit unfairly, whilst in the case of constructive dismissal, it is the employee who resigns, due to unreasonable and unfair habits from the employer’s part.

### Satisfying the Three Elements

For the employee to succeed in a claim for constructive dismissal, he must prove the existence of three (3) main elements:

- a) The employer’s actions fundamentally breached one of the express or implied terms of the employee’s contract; and
- b) The employee resigned as a direct result of the serious breach of terms; and
- c) The employee resigned immediately in response to the employer’s alleged breach in contract terms, as opposed to waiting too long before resigning.

These elements are listed in several cases on constructive dismissal, a recent one of which is Christopher Bonello vs OZO Services Limited decided on the 28<sup>th</sup> of September 2023, which summarised the three (3) elements as follows: “*Illi jigu kkunsidrati tlett elementi illi jirrigwardjaw : (a) kienx hemm ksur mill-principal tal-kuntratt ta limpjeg; (b) li l-ksur kien ta natura serja li tiggistifika rizenja minhabba dan l-agir; u (c) li l-impjegat ma accettax il-ksur fis-sens li l-impjegat ma rrezenjax mix-xoghol hafna zmien wara li sehh l-agir*”.

It is important to delve into the above elements in some detail to grasp a better insight on the concept of being constructively dismissed.

#### **Breach of express or implied terms of the contract of employment**

Firstly, there must exist a breach of the contract’s expressed or implied terms by the employer which will entitle the employee to resign and claim constructive dismissal. The breach in question cannot be a simple or minor crack, but it must be a significant and fundamental disregard of the terms and conditions expressly defined in, or implied by, the contract of employment entered into mutually by both

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<sup>29</sup> Decided by the England and Wales Court of Appeal (Civil Division) on the 14<sup>th</sup> of November, 1977;

<sup>30</sup> Western Excavating (ECC) Ltd v Sharp, 1977;





parties.<sup>31</sup> The circumstances shown by the employer, as a brazen violation of contract or intolerable and abusive treatment towards the employee, are normally so blatant that they indicate by themselves that there is a case of constructive dismissal.

The breach of employment contract can be of an express term of the contract or an implied term, including that of mutual trust and confidence which exists among the parties. However, not all criticism on an employee's performance would, lead to that constituting repudiatory conduct.<sup>32</sup> Once the employee loses such confidence and trust in the employer to be able to carry out their duties properly, the implied terms of a contract become violated, so much so, that the employee should not be expected to continue to work for the employer in such circumstances.<sup>33</sup>

Indeed, some examples which classify as a situation where the employee begins to lose confidence and trust in his employer including; being overburdened with work to an extreme amount, the depiction of lack of flexibility of the employer in handling the employee's grievance and working in a very poor work environment, or with poor equipment with no prospect of improving the situation. In *Moore v Bude Stratton Town Council*,<sup>34</sup> it was stated that “*even a single incident of verbal abuse may found a claim for constructive and unfair dismissal on the basis that its **having been destructive of the mutual obligations of trust and confidence between employer and employee***”. In addition, discriminating against an employee will almost invariably lead to a fundamental breach by the employer.<sup>35</sup> Essentially, the mutual trust between the employer and employee is the foundation of any employment relationship so if it is prejudiced, this signifies the beginning of the end of the employment contract.<sup>36</sup>

### **The Forced Resignation by the Employee**

The concept of forced resignation was considered in the recent cases of *Amanda Scerri vs MI Child Care Ltd*,<sup>37</sup> and *Christopher Stanley vs. Roger Satariano & Sons Ltd* respectively.<sup>38</sup>

In the former case, it was evident that certain repetitive and enduring acts at the workplace led to the forced resignation of the employee. The latter did not have any staff or support to work with, leading to a work overload, and his coworker, who had given him the handover did not have the qualifications and necessary experience to give the necessary handover. Considering the circumstances of the case, the Industrial Tribunal held that the employee felt forced to hand in his resignation because of a breach of

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<sup>31</sup> *Geniev Zerafa u Phone Direct*, 27<sup>th</sup> of July 2007;

<sup>32</sup> *Woods v W.M. Car Services (Peterborough) Ltd*, 28<sup>th</sup> June 1982;

<sup>33</sup> *Tullett Prebon plc and others v BGC Brokers LP and others*, 22<sup>nd</sup> February 2011;

<sup>34</sup> Decided by the UK Employment Appeal tribunal on the 27<sup>th</sup> of March 2000;

<sup>35</sup> As in the case of *Shaw v CCL Ltd*;

<sup>36</sup> *Philisian Debono u Arrigo Group of Hotels Ltd*, 5<sup>th</sup> November 2008;

<sup>37</sup> Decided on the 12<sup>th</sup> of January 2022;

<sup>38</sup> Decided on the 21<sup>st</sup> April 2022;



the employment contract and non-observance of its agreed terms, lack of cooperation and lack of communication on the part of the employer.

In the latter case, the employee felt that he had no other option but to also resign because the demanding work environment, especially presented by the Managing Director through humiliating acts, abuse, oppression and other behaviour which negatively impacted his overall health.

In another case, namely that of Olivia Ann Camilleri vs HSBC Bank Malta plc,<sup>39</sup> the Industrial Tribunal dismissed the employee's claims for a constructive dismissal. It held that the employer acted in accordance with the employment agreement in force between the parties. Moreover, the employer was reasonable in the way in which decisions were made relating to the employee's reduced hours of work, flexible working and accommodating to the employee's needs, finally confirming there was no discriminatory treatment shown towards the employee.

Additionally, in the case of Aneka Paula Balzan vs. MMH Malta Limited,<sup>40</sup> the Industrial Tribunal, in considering the reason for the plaintiff's resignation from her employment, declared that the employee decided to terminate her contract due to being transferred to another department. Due to this transfer, the employee presumed that she would be assigned different tasks than those for which she was qualified to undertake. However, the Industrial Tribunal noted that the plaintiff's contract of employment permitted her to be transferred to any company within the employer's Group of Companies. This made her transfer not in breach of the employment contract, and hence not satisfying the first two (2) elements of constructive dismissal.

### **Resigning today, and not tomorrow**

The third element which must be present, is that the employee must prove an almost immediate or instant resignation following the employer's conduct and breach of contract. In fact, in Perit Andrew Ellul vs Fondazzjoni għall-Iskejjel ta'Għada,<sup>41</sup> the employee had no other choice but to resign, and to resign with immediate effect, and this amounted to a clear case of constructive dismissal.

However, in Jonathan Rafal Jan Bryslawski vs. Rhinoceros Operations Limited,<sup>42</sup> the employee resigned after one (1) month from the incident, whereby he claimed that this incident led to his forced resignation. Due to the time lag, the Industrial Tribunal did not consider the case to fall under the remit of constructive dismissal. Additionally, in the Christopher Stanley case,<sup>43</sup> the element of time did not suffice, since following the employee's resignation, the employer was immediately ready to consider his reinstatement. The employee's claim that he was receiving additional work as a sign of insufficient

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<sup>39</sup>Decided on the 14<sup>th</sup> March 2022;

<sup>40</sup> Decided on the 26<sup>th</sup> of September 2023;

<sup>41</sup> Decided on the 11<sup>th</sup> of March, 2022;

<sup>42</sup> Decided on the 12<sup>th</sup> May 2022;

<sup>43</sup> Christopher Stanley vs. Roger Satariano & Sons Ltd, 21<sup>st</sup> April 2022.



productivity, was ill-founded. Rather, the Industrial Tribunal considered this point to be indicative of the trust shown by the employer towards the employee.

## Conclusion

Constructive dismissal is a complex and nuanced legal concept that has significant implications for both employers and employees. The Maltese legal system has found a way to provide a foundation for employees to seek recourse when faced with intolerable working conditions that force them to resign. Employers, on the other hand, must remain vigilant in ensuring a fair and supportive work environment, adhering to the legal obligations set forth by decided judgments. Our exploration of constructive dismissal highlights the importance of clear communication, fair treatment, and compliance with all employment principles to prevent the emergence of situations that may lead to constructive dismissal claims.



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