

Constructive Dismissal – The Concept of Dismissal by Resignation

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Maltese employment law, particularly Chapter 452 of the Laws of Malta explains the different ways in which an employment relationship can be terminated. Such termination generally takes place either in virtue of the resignation of the employee or by the employer, either due to redundancy or for a good and sufficient reason at law. This is subject to a few exceptions where the termination of employment does not result from the decision of either party but due to other reasons, such as the expiration of a definite contract, reaching retirement age or death of an employee. However, Maltese employment law does not explicitly mention another common way in which an employment relationship can come to an end, more specifically due to constructive dismissal.

What is constructive dismissal?

Constructive dismissal or ‘forceful dismissal’ takes place when an employee resigns from an employment as a result of the employer’s conduct.

Despite the absence of a legal definition of constructive dismissal under Maltese law, constructive dismissal is still recognised as a form of unfair termination from employment in Malta and its concept has been further developed in virtue of a number of judgments delivered by the Industrial Tribunal and Civil Courts, which in turn make reference to common law authors and case law.

The most commonly referred to definition of constructive dismissal is that given by Selwyn in Selwyn’s Law of Employment, whereby he explains that:

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: this is known as ‘constructive dismissal’, for although the employee resigns, it is the employer’s conduct which constitutes a repudiation of the contract, and the employee accepts the repudiation by resigning. The employee must clearly indicate that he is treating the contract as having been repudiated by the employer (Logabox Ltd v Titherley), and if he fails to do so, by word or by conduct, he is not entitled to claim that he has been constructively dismissed (Holland v Glendale Industries Ltd).⁹²

In the case **Western Excavating (ECG) Ltd v Sharp**⁹³, Lord Denning similarly defines constructive dismissal as follows:

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 or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or;

⁹² Selwyn, N.M Selwyn’s Law of Employment, 22nd edition, Oxford University Press (2022) p. 425

⁹³ Decided by the England and Wales Court of Appeal (Civil Division) on the 14th of November, 1977

*alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must, in either case, be sufficiently serious to entitle him to leave at once.*⁹⁴

In the landmark judgment of **Lufthansa Technik Malta Limited vs Ramon Caruana**⁹⁵, the Court of Magistrates (Malta) explains the way Maltese Courts apply constructive dismissal in quite some detail. First and foremost, it confirms that since Maltese law does not provide a definition for constructive dismissal, then one must make reference to English law on which Maltese employment law is based. More specifically, it makes reference to the Employment Rights Act 1996 (section 95(1) (c) which defines constructive dismissal as a situation in which:

*The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*⁹⁶

The Court of Magistrates also makes reference to the case **Morrow vs Safeway Stores** in which the English Employment Appeal Tribunal explained 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. No distinction can be made between degrees of seriousness of the breach of this implied term.*⁹⁷

On the basis of these references, the Court of Magistrates (Malta) provides the following definition of constructive dismissal:

*Ikun hemm lok ta' constructive dismissal meta l-impjegat, ikun imgieghel jirrienza mix-xoghol tieghu minhabba cirkostanzi ta' natura negattiva fuq il-lant tax-xoghol jew/u jkun hemm xi ksur fundamentali tal-kundizzjonijiet fil-kuntratt ta' impjieg. 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 jiehux il-leave li huwa ghandu dritt ghalih. Ezempju iehor huwa meta persuna taghmel xoghol li jkun jeccedi bi kbir il-job description tal-pozizzjoni taghha, u taghmel dan ghall-istess paga, jew l-impjegat jigi mghajjar mill-klijenti jew kollegi, u l-principal ma jaghmel xejn biex jara kif jista' jtejjeb il-kundizzjonijiet tax-xoghol.*⁹⁸

Elements of Constructive Dismissal

The main difficulty with cases of constructive dismissal is proving that the dismissal took place due to reasons attributable to the employer. This is because in cases of constructive dismissal, it is the employee who resigns and leaves the place of work and the employee is not formally terminated from the workplace.

⁹⁴ *ibid*

⁹⁵ Application 260/2012 as per Magistrate Scerri Herrera 07 May 2014

⁹⁶ *Ibid*, p. 48

⁹⁷ *Ibid*, p. 50

⁹⁸ *Ibid*, p. 49

Based on the definitions outlined in the previous sections, it has been reiterated in numerous Maltese judgments that in cases of constructive dismissal, employees must prove three main elements:

- a) A clear breach of the contract of employment by the employer, which breach can be either express or implied;
- b) The breach must be of a serious nature which justifies the resignation of the employee from his employment and that the employee resigned because of such breach;
- c) The employee did not accept this breach, and therefore, the employee resigned immediately in response to the employer's alleged breach in contract terms, as opposed to waiting too long before resigning.

Given the importance of these elements in proving a case for constructive dismissal, it will be opportune to analyse each element in more detail.

The first element of constructive dismissal necessitates a clear breach of the contract of employment by the employer, which breach can be either express or implied. This element is generally examined by the Maltese Courts and Industrial Tribunal on a case-by-case basis since it requires an analysis of specific types of express and implicit breaches of the employment contract by the employer, according to the case in question. Therefore, in order to analyse this element, one would need to take a look at examples of breaches which have already been decided upon by the Industrial Tribunal and Courts of Malta.

An example of a clear breach of employment contract leading to Constructive Dismissal was examined in the case **Miriam Reid vs Kestrel Services Limited**⁹⁹. In this case Ms Reid was employed as “Custodian” in Hibernia House. Whilst she was out on vacation leave, a new employee Mrs Ripard was engaged to supervise the tasks carried out by Ms Reid. The latter did not deem this to be acceptable and therefore, she tried to resolve the issue with the Managing Director. However, the Managing Director instead of discussing the issue with Ms Reid, he simply declared that since Ms Reid was not willing to work with Mrs Ripard, then he had no other alternative but to inform the authorities that the employee had resigned from her employment. As explained by the Industrial Tribunal in its decision:

It-Tribunal jifhem li l-Management ghandu d-dritt li jissorvelja l-impjegati izda f'dan il-kaz kien jistenna lis-Sur Stivala jghamel dan il-pass fil-prezenza ta' l-appellanta u stenniha tirritorna mill-leave. Ghar minn hekk naqas li jiddiskuti din il-problema ma' l-appellanta u baqa ma tax widen ghall-complaints taghha. Jekk veru kienet “Custodian” ta' Hibernia House Mrs Reid kellha kull dritt thares linteressi taghha daqs is-Sur Stivala, li bhala Manager kien imissu kien konverzanti mal-procedura. Kien ukoll zbaljat meta ppretenda li tiffirma l-formola tat-terminazzjoni ta' l-impieg u jhallasha ta' xogholha. Veru li s-Sur Stivala kien intitolat jiehu l-passi kollha biex ihares l-interessi tas-socjeta izda fl-istess hin ried ukoll anzi kellu d-dover li ma jinjorax id-drittijiet ta' l-appellanta. Jekk kien hemm xi dubbju dwar it-trattament tieghu spjegat fl-istatement of case meta semma numru ta' nuqqasijiet li allega l-appellanta kkomettiet fid-doveri taghha; indikazzjoni cara li l-iskop kien li jehles mill-appellanta.¹⁰⁰

Therefore, in this case,

⁹⁹ Case 2286/CD Industrial Tribunal per Chairperson Carmel Debono 15th December 2006

¹⁰⁰ Ibid, p. 4

“irrizulta illi kien hemm lok ta' constructive dismissal, peress li kien jidher b'mod car li l-attrici infurmat lill-principal taghha bil-kundizzjonijiet tax-xoghol, li ma kienu xejn tajbin u li l-attrici kellha tahdem fihom. L-attrici kienet hadet dawk il-mizuri kollha possibli ghaliha biex taghti l-opportunita' lill-principal taghha jameljora l-kundizzjonijiet, u dan billi infurmatu verbalment, kif ukoll permezz ta' diversi emails ipprezentati fil-kawza, izda l-principal qatt ma ha dawk il-passi rikjesti u ghalhekk l-attrici kienet imgieghla titlaq bl-agir tal-principal taghha.”¹⁰¹

In the case of **Geniev Zerafa u Phone Direct**¹⁰², the Industrial Tribunal provided other examples of implicit breaches of an employment contract. In particular, it explained the implicit obligation of reciprocal respect between the employer and the employee. When there is a lack of such respect, then there might be cause for constructive dismissal. Such lack of respect includes *“lingwagg ta' uzu abbużiv u hazin, ghagir offencis u kondotta xejn dekoruza tal-principal fuq il-post tax-xoghol.”*¹⁰³

Another example of such breach was discussed in the case **Anthony Schiavone vs Emmanuel Bajada noe**¹⁰⁴, whereby it was explained that when the work environment provided by the employer is completely different from that agreed upon with the employee, then this will be enough reason for the employee to refuse work or to terminate the employment on the basis of constructive dismissal.

When considering the second element which must be satisfied in front of the Maltese Courts and Tribunals in constructive dismissal cases, then one must prove that the breach was of such a serious nature as to justify the resignation of the employee from employment and that the employee resigned before of such breach.

In the case of **Philip Camilleri vs Bortex Clothing Industry Co Ltd**¹⁰⁵, the Industrial Tribunal explained that:

Meta nghidu constructive dismissal nifhmu li ghalkemm mad-daqqa t'ghajn l-impjegat ikun telaq, irriżenja hu, fil-fatt dan il-pass ikun riżultat talfatt li min ihaddem ikun, irragonevolment, poġġa lill-ħaddiem daru mall-ħajt sal-punt li dan ma kellux triq oħra hlief dik li jitlaq. Ma jkunux kwistjonijiet frivoli iżda serji sew.¹⁰⁶

In order to determine whether the breach was of a serious enough nature to constitute constructive dismissal, the courts of Malta require that the dual test, established under English law used to determine the severity of the breaches in such cases, is satisfied. The dual test consists of the contractual or entitlement test, whereby the employee resigns because of a fundamental breach of the employment contract. As mentioned in the analyses of the first element, this breach may either be one which was implied or expressly stated in the employment contract. The second test relates to a reasonable test, in virtue of which one is to analyse the breach in the trust between the employer and the employee.

¹⁰¹ Application 260/2012, Lufthansa Technik Malta Limited vs Ramon Caruana, the Court of Magistrates (Malta) as per Magistrate Scerri Herrera 07 May 2014, p. 50

¹⁰² Case 2267/JB Industrial Tribunal per Chairperson Dr Joseph P Bonnici 27th of July 2007

¹⁰³ Ibid, p. 2-3

¹⁰⁴ Court of Appeal (Commercial), 1 February 1988

¹⁰⁵ Case 2269/YMS Industrial Tribunal as per Chairperson Dr Yana Micallef Stafrace 03 February 2014

¹⁰⁶ Ibid, p. 8

When the mutual trust and confidence between the employer and employee no longer exists, due to a serious breach of contract by the employer which renders it impossible for the employee to carry out their duties properly, then the employee is no longer expected to continue working for such employer and his dismissal will be considered to be constructive in nature.

The third element of constructive dismissal requires an employee to resign immediately from his employment as evidence that the employee does not accept the employer's breaches. The element of immediate resignation was analysed by the Industrial Tribunal in **Perit Andrew Ellul vs Fondazzjoni għall-Iskejjel ta' Ghada**¹⁰⁷, whereby constructive dismissal was proven by the fact that the employee had no other choice but to resign with immediate effect.

On the other hand, since the employee resigned after one month from the employer's alleged breach in **Jonathan Rafal Jan Bryslawski vs. Rhinoceros Operations Limited**¹⁰⁸, the Industrial Tribunal considered that the elements of constructive dismissal were not satisfied. This was especially so since the employee considered reinstatement with the employer following the termination from employment, thus further proving that there was no serious breach on the part of the employer which could have led to the employee's resignation from employment.

Similarly, the Industrial Tribunal did not find that constructive dismissal took place in the case **Adrian Mallia v Mediterranean Bank plc**¹⁰⁹ due to the employee continuing his employment, albeit against his will, since by doing so, the employee showed that he accepted the situation. The Industrial Tribunal explains that:

Ir-riferenza ta' raġunijiet oħra, kif riferuti waqt is-smieġh tal-każ u li għalihom ma giet mehuda l-ebda azzjoni immedjata mill-istess rikorrenti, wassal sabiex ir-rikorrent, wera li anke jekk kontra xewqtu, hu kompla miexi fix-xogħol tiegħu, għalhekk ir-rikorrent kien aċċetta s-sitwazzjoni.

Lord Demming stated: "Moreover the employee must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."¹¹⁰

An interesting case in relation to the third element is that of **Doreen Saliba vs Foster Clarks Products Limited**¹¹¹. In this case, the employee resigned on the basis of constructive dismissal as she felt offended by the downgrading of her status. Despite her resignation on the basis of constructive dismissal, the employee worked her notice period as she was given the impression that matters can be resolved between the employer and the employee during the notice period and therefore, the notice period was supposed to be used for this purpose. The Court in fact explains that initially the issue was not so severe as to warrant immediate dismissal since the issue could have actually been resolved amicably between the parties. In fact, discussions took place during the notice period to resolve this issue. Nonetheless, when the notice period lapsed, management did not correct its actions and therefore Saliba went to her Union. In this case,

¹⁰⁷ Case 3555/17/AM Industrial Tribunal per Chairperson Dr Anna Mallia 11 March 2022

¹⁰⁸ Case 2824/ET Industrial Tribunal as per Chairperson Edmund Tabone 12 May 2022

¹⁰⁹ Case 3491/JHP Industrial Tribunal as per Chairperson James Henry Pearsall 12 January 2026

¹¹⁰ Ibid, p 12

¹¹¹ Application 57/2019 LM Court of Appeal (Inferior) as per Judge Lawrence Mintoff 12 June 2020

although the employee still worked her notice period, the Court still found that she was dismissed due to constructive dismissal since the breach of the employment conditions by the employer continued till the very end of the notice period.

Onus of Proof

Similarly to the practice in the United Kingdom, in cases of unfair dismissal heard before the Industrial Tribunal, the onus of proof is inverted. This means that whilst employees initiate a case against the employer for unfair dismissal, it is the employer's responsibility to prove that the termination took place because of a good and sufficient reason at law. However, in cases of constructive dismissal, this inversion of the burden of proof does not apply. Instead, these cases follow the Latin maxim *onus probandi incumbit ei qui dicit non ei qui negat*, whereby it is the employee's responsibility to prove that the resignation from employment took place due to reasons solely attributable to the employer.

Jurisdiction

In Malta, cases of constructive dismissal are generally heard by the Industrial Tribunal as the latter tribunal has exclusive jurisdiction to determine such cases.

However, in the case of **Arabella Tonna vs Malta Stock Exchange et**¹¹², the Court of Appeal made a distinction between the exclusive jurisdiction of the First Hall Civil Court and that of the Industrial Tribunal. In this case, it was explained that the exclusive jurisdiction shall be determined by the nature of the action brought forward. Whilst the exclusive jurisdiction of the Industrial Tribunal is limited to remedies related to dismissals, namely remedies of reinstatement, reengagement and compensation, in terms of Article 81 of Chapter 452 of the Laws of Malta, in the case *Arabella Tonna vs Malta Stock Exchange et*, the claimant did not seek any of the abovementioned remedies, but rather it sought compensation for moral and emotional damages suffered by the employee due to the employer's actions during the employee's employment. Therefore, given that the claim lodged by the plaintiff was for damages suffered by the employee during her employment which ultimately led to the constructive dismissal, and not for damages suffered as a result of the constructive dismissal, meant that First Hall Civil Court had the exclusive jurisdiction to hear the case and not the Industrial Tribunal.

This judgment shed further light on the limitations of the Industrial Tribunal's jurisdiction, whereby one should not only look at the subject matter of the contentious issue but also at the remedy which is being claimed by the plaintiff.

Conclusion

Although the concept of constructive dismissal is not legally defined under Maltese law, it is a reality which many face in an employment relationship. It is a complex type of dismissal which presents challenges to employers and employees alike. This article highlights the importance of employees to act without hesitation in cases where they feel that the employer is forcing them to resign due to serious breaches of the employment contract, which dissolve the trust between them. On the other hand, employers must abide with the implicit and express conditions of employment to ensure that they are treating their employees fairly and respectfully. Upon the receipt of a resignation by the employee, employers must analyse and determine whether such resignation was truly based on the employee's decisions or whether

¹¹²Application 592/2023 Court of Appeal (Superior) 15 July 2025

there were ulterior factors attributable to the same employer which could have forced the employee to terminate the employment relationship. Fostering a healthy working environment for all employees is key to ensuring a strong employment relationship between the employer and all employees, which in turn will strengthen the trust and sense of loyalty between them.