

What is constructive dismissal?

It is not uncommon for employees who are under investigation to claim that they are being bullied or otherwise treated unfairly, and for claims of unjustified disadvantage or unjustified dismissal to arise. Providing the employer can meet the test of justification, establishing that there were substantive grounds for the investigation and that they followed a fair process at all times, these claims can be successfully defended. If the employer's decision is one a fair and reasonable employer could reasonably make in all the circumstances at the time, then the Court will not order the employer to make a different decision.

When an employee claims to have been unjustifiably disadvantaged or dismissed, the onus is on the employer to establish that its actions were justified. In an unjustified "constructive dismissal" claim, where the employee has not actually been dismissed but believes they have been given no choice but to resign, the onus is on the employee to establish that their resignation was due to the employer's actions. If the employee can

do so, then the employer's actions will be assessed against the test of justification.

As with most employment disputes, the general principles are clear but can be complicated in practice. In brief, a constructive dismissal claim may arise when:

- The employer gives an employee the option of resigning or being dismissed. This is one of the reasons that any discussions about exit packages must be carefully managed and conducted strictly on a 'without prejudice' basis;
- The employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign. Examples might include making unreasonable demands on an employee; failing to provide appropriate support when they have raised concerns about being stressed at work; unilaterally reducing their agreed hours; or those 'private discussions' querying whether the employee can really be happy working at a place where no one likes them;
- The employer breaches the duties it owes to its employee, leading the employee to resign. This will involve consideration of whether there was a breach of the express or implied terms of employment sufficiently serious to warrant the employee leaving, including whether the employer has acted in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

This third ground for constructive dismissal was recently considered by the Employment Court in a case involving Ms Darnley, an experienced HR practitioner, and her employer, New Zealand Defence Force (NZDF).¹ Ms Darnley was investigated for apparently failing to comply with a new policy directive regarding payment of ex-gratia and compensatory settlement

¹ *The Chief of New Zealand Defence Force v Juliette Darnley* [2022] NZEmpC 4

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payments to employees. NZDF decided that Ms Darnley had knowingly circumvented the approval process, and proposed to terminate her employment for serious misconduct. Before her employment could be terminated Ms Darnley accepted a position elsewhere, commencing the position without informing NZDF. She then claimed to have been constructively dismissed when NZDF commenced its investigation and alleged that her actions amounted to serious misconduct. She said the investigation was far-reaching, unnecessary, and fundamentally unfair.

The Employment Relations Authority agreed with Ms Darnley, awarding her \$25,000 compensation for her unjustified constructive dismissal. This was overturned by the Employment Court. The Court was concerned about a "preliminary decision" letter which expressed predetermined conclusions, but ultimately found the reason for Ms Darnley's resignation was that she chose to accept an alternative position before NZDF had reached any final decisions.

In place of the \$25,000 awarded by the Authority, the Court awarded Ms Darnley \$6,000 compensation (less 10% for contributory conduct) for the disadvantage she had suffered when NZDF reached a preliminary decision that her dismissal would be justified. The Court also ordered her to pay a \$1,500 penalty for breaching her employment agreement and her duty of good faith to NZDF by failing to disclose she had already commenced new employment.

Want to know more?

If you have any questions about constructive dismissal please contact our specialist [Employment Team](#).