

EMPLOYMENT LAW - CONSTRUCTIVELY DISMISSED?

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This article will provide a general understanding of constructive dismissal in terms of Maltese Employment Law. The author shall delve into the development of the notion, its applicability within the industry, along with an understanding of its interpretation by the Courts.

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This article will provide a general understanding of constructive dismissal in terms of Maltese Employment Law. The author shall delve into the development of the notion, its applicability within the industry, along with an understanding of its interpretation by the Courts.

The legislator failed to provide a clear definition of what is to be considered as to qualify as a constructive dismissal. Nevertheless, this notwithstanding, the Maltese jurisprudence has applied the doctrine as found under English law.

The Employment and Industrial Relations Act¹ together with the Maltese Constitution² protects the right to employment. Hence law shields employees from the employers being granting an unfettered right to dismiss – this results from a number of measures, including that employers may not abruptly terminate a fixed-term (definite) contract prior to the agreed stipulated period without penalty, and with even more restrictive provisions in the case of an indefinite contract where the legislator imposed that such termination can also take place on good and sufficient cause.³ Therefore in the case of an indefinite contract the law explains that the employment agreement merely terminates upon retirement, death, voluntary resignation, redundancy or dismissal for good and sufficient cause.

If the employer abruptly terminates a fixed-term contract before it reaches its predetermined termination, the latter would have to pay half of the remuneration the employee would have been paid had he fulfilled his contractual obligations⁴

Conversely, the situation would be the same should the employee terminate the employment contract before its natural termination.⁵ In this situation the protection is merely financial, thus the employer may terminate the employment contact if one would fulfil the monitory obligations as above-mentioned, without having to provide for a good and sufficient cause.

1 Chapter 452 of the Laws of Malta.

2 Constitution of Malta, Article 12(1) *'The State shall protect work.'*

3 Employment and Industrial Relations Act (n 2) Article 36(14) *'Notwithstanding the foregoing provisions of this article, an employer may dismiss the employee and the employee may abandon the service of the employer, without giving notice and without any liability to make payment as provided in subarticles (10), (11) and (12) if there is good and sufficient cause for such dismissal or abandonment of service.'*

4 Article 36(11) *'An employer who dismisses an employee before the expiration of the time definitely specified by a contract of service, shall pay to the employee one-half of the full wages that would have accrued to the employee in respect of the remainder of the time specifically agreed upon.'*

5 *ibid* Article 36(12) *'An employee who abandons the service of his employer before the time definitely specified by the contract of service shall pay to his employer a sum equal to one-half of the full wages to which he would have become entitled if he had continued in the service for the remainder of the time so specifically agreed upon.'*

In the case that the employment is subject to an indefinite contract and the termination thereof is not on the grounds above stated, the employee has the right to seek action before the Industrial Tribunal⁶ pleading either for reinstatement, re-engagement, or compensation.

When is there constructive dismissal?

Occasionally prima facie an employee's resignation, or as referred to in the industry 'walking out', may not be what it seems. Hence one is to determine if the termination, being abrupt or not, was indirectly or directly instigated by an external force. If the external force is related to the employer, there might be the elements which can be considered as tantamount to a constructive dismissal.

It must clear from the outset that notwithstanding that a constructive dismissal may have its foundations at law, the fairness or unfairness are to be determined by the facts of this case coupled with the qualifying element of whether the employer acted reasonably.

Harrison opines that where the reason behind such walking out was due to the conduct of the employer, or related to any matter or situation which is directly or indirectly under the employer's control, it can be argued that it qualifies as a constructive dismissal, if the employee may prove that the employer is somewhat responsible for the termination of the employment contract.⁷ Therefore, this implies that the burden of proof is on the employee alleging constructive dismissal.

Macdonald asserts that one may consider the doctrine of constructive dismissal as referring to where an employee resigns as a direct result of a fundamental breach of a contract on the part of the employer. One would then need to determine whether there was a breach of the contract and if such the provision which was breached was fundamental or otherwise.⁸ In **Morrow v Safeway Stores plc**⁹ the court held 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.

6 *ibid* Article 73(1) 'There is hereby established a tribunal to be known as the Industrial Tribunal'

7 Harrison, T. *Employment Law*, 6th edition, Business Education Publishers Limited (2006) 299

8 MacDonal, L. *Blackhall Guide to Sensitive Issues in Employment*, Blackhall Publishing (1999) 8

9 [2002] IRLR 9

In **British Aircraft Corpn vs Austin**¹⁰ the court concluded that the failure on the part of the employer to deal, and properly investigate a complaint lodged by an employee related to the inadequacy of protective glasses amounts to a fundamental breach of the employer's duties to care for the employee's well-being.

In **Hilton International Hotels (UK) Ltd vs Portopapa**¹¹ the mere use of offensive and foul language applied by the supervisor against the worker led to the resignation of an employee. The court expounded that any action running against the implied duty of mutual respect, therefore any action, being directly or indirectly, executed by or on behalf of the employer which goes against such implied duty may amount to constructive dismissal.

Hence it can be held that the mere use of foul or abusive language, the making of statements which are meant to damage the employment relationship, trust and confidence which exist between the employee and employer,¹² qualify under the UK law position to be considered as grounds which lead to constructive dismissal.¹³

In defining constructive dismissal Selwyn holds 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 that repudiation by resigning.¹⁴

The crucial factor to be analysed to establish whether an employee's resignation is tantamount to constructive dismissal is the question as to whether the direct or indirect actions of the employer inflicted on the employee were so burdensome and intolerable to the extreme that it muddled the foundations of the employment contract, and left the employee with no alternative other than walking out. This implies that there must be some form of an unreasonable conduct on the part of the employer, which conduct is also classified as unbearable by the employee.¹⁵

In cases of constructive dismissal the employer (defendant) will inevitably argue that the resignation was not due to some form of fundamental

10 [1978] IRLR332 EAT 17.29

11 [1990] IRLR316 EAT 17.29

12 Selwyn, N.M *Selwyn's Law of Employment*, 14th edition, Oxford University Press (2006) 401

13 MacDonald, L. (n10) 9

14 Selwyn, N.M (n12) 339

15 Selwyn, N.M (n12) 402

breach on his part, whilst the former employee (claimant) will sustain that it was and furthermore it qualifies as a constructive dismissal case.¹⁶ The employee alleging constructive dismissal is bound to prove that there existed a situation which led to the resignation.¹⁷ Hence the maxim *Onus probandi incumbit ei qui dicit, non ei qui negat* applies to such situation.¹⁸

The employee to succeed in a claim for constructive dismissal must prove that: [1] the employer's actions fundamentally breached one of the express or implied terms of the employee's contract; and [2] the employee resigned as a direct result of the breach; and [3] the employee did not wait too long before resigning in response to the employer's breach.¹⁹ The above-mentioned elements have been highlighted in the case **Western Excavating (ECG) Ltd v Sharp**²⁰ where Lord Denning opined:

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 elements of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so than he would be terminating the contract by reason of the employer's conduct. He is constructively dismissed.²¹

Maltese Jurisprudence

As above mentioned, Maltese law does not set out the criteria to understand the notion of constructive dismissal and as a result, the English law position is used as a basis for interpretation by the Maltese courts (**Charichelon Company Limited [C-14614] vs Amanda Greaves**.²²)

The Court of Appeal in **William Saliba vs Avukat Dottor Louis Cassar Pullicino noe**²³ recognised the doctrine of constructive dismissal merely by referring to English case law related to constructive dismissal, without explicitly committing itself to such doctrine. The court held that the Maltese Employment Law fails to define exactly when there is dismissal:

16 Taylor, S. *Employment Law an Introduction*, 3rd edition, Oxford University Press (2012) 207
 17 Pitt, G. *Cases and Materials on Employment Law*, 3rd edition, Pearson Education Limited (2008) p367
 18 (*Translation - The burden of the proof lies upon him who affirms not he who denies.*)
 19 MacDonald, L. (n10) 9
 20 [1978] ICR 221. 203-4
 21 Taylor, S. (n 17) 203
 22 Application 309/2013 per Magistrate Scerri Herrera 17 May 2016
 23 Application 1667/94 9 May 1997

Il-liġi ma timponi l-ebda forma sagramentali meħtieġa biex tipprova l-fatt li ħaddiem inkun`dismissed' [omissis]. Il-liġi allura tħalli spazju għall-interpretazzjoni.²⁴

The perception towards the applicability of the doctrine of constructive dismissal in Malta, over the past three decades, saw considerable changes from the affirmation in the William Saliba Case. The Tribunal and the Court have accepted the doctrine of constructive dismissal without any limitations as to its practical applicability.

In **Miriam Reid ID Card Number 383757(M) vs Kestrel Services Limited C12983**²⁵ plaintiff was employed with Defendant Company as a Custodian in Hibernia House. After some time, the managing director Francis Stivala obo Defendant Company employed another person to supervise the work of plaintiff, and the employment of such supervisor happened whilst the plaintiff was on vacation leave. The Tribunal noted that:

It-Tribunal jifhem li l-Maniġment għandu d-dritt li jissorvelja l-impjegati iżda f'dan il-każ kien jistenna lis-Sur Stivala għamel dan il-pass fil-preżenza ta' l-appellanta u stenniha tirritorna mill-leave. Għar minn hekk naqas li jiddiskuti din il-problema ma' l-appellanta u baqa' ma tax widen għall-complaints tagħha. [omissis] Jekk veru s-Sur Stivala ried lil Mrs Reid tibqa fl-impieg seta' solva l-problema; iżda l-fatti jindikaw li uża l-nsistenza li tiffirma l-forma ta' l-ETC biex tikkonferma r-riżenja, indikazzjoni li ried tikkonfermalu r-riżenja bil-firma tagħha.²⁶

Therefore notwithstanding that the management had the absolute right to employ someone to supervise its employees, especially when such employment was not directly under the watchful eye of the managing director, the machinations and tactics used clearly show a lack of people relations skills coupled with the intent to pressure the employee to resign.

In the case of **Philip Camilleri vs Bortex Clothing Industry Co Ltd**²⁷ the plaintiff filed action requesting the Tribunal to find defendant responsible for the termination of the employment contract on the grounds that the defendant used machinations to push the plaintiff to walk out, hence

24 *ibid* (n19) 7 (Translation - The law does not impose any specific requirement that one needs to prove that an employee was dismissed [omissis]. The law leaves room for interpretation.)

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

26 *ibid* (n26) (Translation - The Tribunal understands that Management has the right to monitor employees, however in this case the tribunal would have expected Mr Stivala to executed such step in the presence of the appellant and wait until she return from leave. [Omissis] If Mr. Stivala truly wanted Mrs. Reid to remain in employment could have tried to solve the problem; but the facts indicate that he forcefulness of Mr. Stivala, for plaintiff to sign the ETC form to confirm the resignation, indicating he wanted her to confirm her resignation by having her signing the form in question)

27 Case 2997/YMS Industrial Tribunal per Chairperson Micallef Stafrace 3 February 2014

inferring constructive dismissal. The Tribunal whilst it did not uphold the arguments brought forward by the plaintiff gave a definition of what is understood to be tantamount to constructive dismissal and held that:

Meta ngħidu constructive dismissal nifhmu li għalkemm mad-daqqa t'għajn l-impjegat ikun telaq, irriżenja hu, fil-fatt dan il-pass ikun riżultat tal-fatt li min iħaddem ikun, irraġonevolment, poġġa lill-ħaddiem daru mall-ħajt sal-punt li dan ma kellux triq oħra ħlief dik li jitlaq. Ma jkunux kwistjonijiet frivoli iżda serji sew.²⁸

In **Geniev Zerafa u Phone Direct Ltd**²⁹ the Tribunal explained that constructive dismissal includes acts of commission or omission executed by the employer which force or induce the employee to walk out. The Tribunal held:

‘Constructive dismissal’ fil-kunċett tagħha tinvolti għadd ta’ atti unilaterali da part tal-impjegat. In vista tal-kommissjoni jew ommissjoni tal-prinċipal u allura għanda tiġi interpretata bħala terminazzjoni forzata jew indotta sabiex l-impjegat jittermina l-impieg tiegħu.³⁰

In a more recent case, **Lufthansa Technik Malta Limited Vs Raymond Caruana**,³¹ the Plaintiff Company requested the court to find defendant liable to pay the stipulated pre-liquidated damages related to the abrupt termination prior to the lapse of 5 years as stipulated in the employment agreement. Defendant amongst others argued that the abrupt termination was the result of constructive dismissal. The court defined constructive dismissal and held:

Ikun hemm lok ta’ constructive dismissal meta l-impjegat, ikun imġiegħel jirriżenja mix-xogħol tiegħu minħabba ċirkostanzi ta’ natura negattiva fuq il-lant tax-xogħol jew/u jkun hemm xi ksur fundamentali tal-kundizzjonijiet fil-kuntratt ta’ impjieg. Per eżempju, meta l-impjegat ikun talab l-assistenza ta’ ħaddiema oħra, iżda minkejja l-ħtieġa ta’ dan, it-talba ma tkunx ġiet aċċettata, b’hekk ikun hemm riżultat ta’ stress qawwi fuq l-impjegat peress li ma jkunx qiegħed ilaħħaq ma’ xogħolu u jkollu jid-dedika ħafna aktar ħin milli suppost għax-xogħol tiegħu u anke ma jieħux

28 *ibid* (n10) pra 34 (Translation - When refereeing to constructive dismissal prima facie the employee resignation seems voluntary, nevertheless factually such step is due to the fact that the employer, unreasonably, implicitly and indirectly force the worker to resign)

29 Case 2267/1B Industrial Tribunal per Chairperson Bonnici 27 July 2007

30 *ibid* (n17) 3 (Translation - As a concept, constructive dismissal is founded and can be seen from the execution of several unilateral acts carried out by the employee. The employer’s acts, being by commission or omission, must then be interpreted as induced or forced the employee to terminate his employment)

31 Application 260/2012 per Magistrate Scerri Herrera 7 May 2014

il-leave li huwa għandu dritt għalih.³²

In summation it can be held that notwithstanding the lack of reference found in the Maltese legislation,³³ the doctrine of constructive dismissal found its place incorporated into the Maltese Employment law via an active jurisprudence, having both the Courts and Tribunal widely embracing the doctrine as posed by the English Law.

Constrictive dismissal, from a management perspective, is one of the most tedious situations especially for a Human Resources Manager. Questions posed to legal advisers by Managers can never be replied to with certainty unless a similar case was considered before the Courts and Tribunal, and even were such a situation applies, considering that in Malta there is no doctrine of precedence, an advice cannot be considered undisputable. It would be advisable for any employer to avoid conduct that is likely to destroy or seriously damage the trust and confidence relationship vis-à-vis the employee, thus avoiding any possible fundamental breach which can be interpreted as going to the root of the contract which might lead the employee to resign and claim constructive dismissal.

³² *ibid* 49 (Translation - constructive dismissal can be considered where the employee is forced to resign from his employment because of a circumstance at the workplace and / or there existed is a fundamental breach of the conditions to the employment contract. For example, if the employee has requested the assistance of other co-workers, but despite the need arises for this, the request is turned down, thereby resulting into stress on the employee whom might not be coping with his tasks, hence ending up working extra hours and possibly restricting him from availing from his annual vacation leave).

³³ This article cannot be taken or considered as a full illustration of the Maltese Employment Law. Employment is one of the areas which is vastly legislated regulated by several European Union directives and regulations. This article was written before the 2 April 2017