

12CP BARRISTERS EMPLOYMENT

FACT 4

CONSTRUCTIVE DISMISSAL

The employee must establish a breach of contract by the employer.

The breach must be fundamental: The test is whether the employers conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and can walk out of his job without prior notice (but he can give notice).

Most claims are based upon conduct that has breached the term of trust and confidence. This term is only breached where there is no reasonable or proper cause for the employers conduct.

The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered, is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

The breach can be by means of a single act or by a series of acts add up to a fundamental breach repudiatory breach. In some cases the last action of the employer might not be a breach of contract – the question is – “does the cumulative series of acts taken together amount to a breach of the implied term?” This is the last straw situation.

The employee must leave his employment with the employer because of the breach and not for some other unconnected reason. It is sufficient if the breach is one of the reasons for the resignation.

The employee must also not wait too long. Acts which show that an employee wants to continue his contract of employment such as accepting wages or following instructions can amount to affirmation, especially if coupled with delay. It is possible to avoid this by continuing to work under protest.

Once an employer is guilty of fundamental breach he cannot make amends. All the cards are then in the employees hands only the employee can decide whether to continue to work for the employer or not.