



Constructive dismissal appeal refused by Full Bench of the Fair Work Commission

Author: [Claire McGee](#)

Email: cmcgee@gnl.com.au

Phone: 0450 630 612

Date: Monday January 1, 2024

A forced resignation takes place where the employee is given no choice but to resign. The employee has the onus of proving that he or she did not resign voluntarily but was forced to do so. If a resignation is determined to have been forced, it is referred to as a constructive dismissal. The worker may have options to pursue an [unfair dismissal claim](#) or take [general protections action](#) against the employer.

In this article, we review the outcome of a 2023 general protections matter that tested the grounds for whether a resignation was forced or not.

Determining if a resignation constitutes a constructive dismissal

The following principles are relevant in determining whether an employee was forced to resign:

- Forced resignation may result from some action on the part of the employer intended to bring the employment to an end or an action which would, on any reasonable view, probably have that effect;
- The actions of the employer must be examined in addition to all the other circumstances of the termination;
- The employer's conduct must be weighed objectively; and
- it is an important feature of forced resignation that the act of the employer results directly or consequentially in the termination of employment and the employment relationship is not voluntarily left by the employee.

The test for constructive dismissal was recently considered in [David Hill v Pilbara Iron Company \(Services\) Pty Ltd \[2023\] FWCFB 140](#).

A Full Bench of the Fair Work Commission (FWC) refused the appellant (the employee) permission to appeal the earlier decision of the FWC (Beaumont DP – Commissioner in the original hearing).

The Full Bench dismissed the appellant's application under section 365 of the *Fair Work Act 2009* (Cth) (FW Act). The Full Bench considered the test for a constructive dismissal when doing so.

Background

The appellant was employed as a mobile plant operator at the respondent's mine site in Western Australia. From August 2022, the appellant was absent from work on personal leave, having suffered from a heart condition.

The respondent's occupational physician had certified that the appellant was not fit to work until 28 October 2022. On that date, he was scheduled to undergo a heart ablation procedure connected with his heart condition.

By late October 2022, the appellant had come to the view that the respondent was not going to facilitate his return to work. His leave entitlements had been exhausted by this time.

On 7 November 2022, the appellant's lawyer sent a letter (dated 27 October 2022) to the respondent indicating that the appellant had no alternative but to resign from his employment and that the circumstances amounted to a constructive dismissal.

The appellant then applied to the FWC, claiming that he had been dismissed in contravention of the general protections provisions of Part 3-1 of the *Fair Work Act* (the FW Act).

The respondent objected to the application on jurisdictional grounds. It contended that the appellant had not been dismissed within the meaning of section 386 of the FW Act. Section 386 sets out the "meaning of dismissed".

Full Bench considers the test for constructive dismissal

The Full Bench noted various findings of Beaumont DP (the Commissioner in the original hearing), including that:

- the FWC is obliged to determine whether a person has been dismissed before exercising any powers under section 368 of the FW Act (which deals with dismissal disputes);
- the respondent was not preventing the appellant from ever returning to work, but rather, the immediate medical priority was the completion of the ablation procedure on 28 October 2022; and
- the respondent had secured the appellant a position at another mine site.

The Full Bench considered the test for when a resignation is forced by the conduct of the employer and is, thereby, a dismissal within the meaning of [section 386\(1\)\(b\)](#) of the FW Act. It considered whether the employer engaged in the conduct with the

intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign.

Full Bench denies appellant (employee) permission to appeal

The Full Bench concluded that Beaumont DP's conclusion that the respondent's conduct did not meet this description was plainly correct.

In the circumstances, the Full Bench found that there was no arguable case of appealable error in the FWC decision and no other public interest or discretionary basis upon which permission to appeal should be granted.

An allegation that a resignation was, in fact, a constructive dismissal for the purposes of [s 386\(1\)\(b\)](#) of the FW Act raises two questions:

- Was the employer's conduct engaged in with the intention of bringing the employment to an end?
- Alternatively, did the conduct have the probable result of terminating the employment?

If the evidence does not support an affirmative answer to one of these questions, it is unlikely that the employee will be successful in pursuing any claim due to constructive dismissal.

What is not constructive dismissal?

The following conduct will not be considered a forced resignation:

1. Resigning before a disciplinary interview: *Love v Alcoa of Australia Limited* [2012] FWA 6754 (Boulton J, Kaufman SDP, Lee C, 10 August 2012), [(2012) 224 IR 50].
2. Resigning due to suspension and investigation: [Davidson v Commonwealth \[2011\] FWA 3610 \(Deegan C, 7 June 2011\)](#).
3. Resigning due to being placed on a performance management plan: [Ashton v Consumer Action Law Centre \[2010\] FWA 9356 \(Bissett C, 20 December 2010\)](#).
4. Resigning before a disciplinary decision is made: *Pacific National (NSW) Limited v Bell* (2008) 175 IR 208.

Get help from an employment lawyer

Determining if a resignation may, in fact, be a constructive dismissal requires careful consideration of all the facts prior to the resignation. These matters can be technically complex. It is crucial that you seek legal advice from a lawyer experienced in employment law if you feel you were forced to resign.

It is worth noting that there are strict time limits associated with certain claims so early advice and assistance is strongly recommended to ensure your rights are protected.

Contacting Gilshenan & Employment Lawyers

[07 3361 0222](tel:0733610222) (24/7)

gnl@gnl.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.