KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Constructive Dismissal

In a number of our newsletters we have addressed the issue of constructive dismissal. We are again doing so. The reason for doing so is that there appears to be a considerable amount of misunderstanding as to what is needed to bring a successful constructive dismissal claim. For those who are interested in this area of law case ADJ15711 is a very useful summary of issues.

In this case the employee argued that there were two tests in relation to constructive dismissal being the contract test where there are fundamental breaches to the contract by the employer and the reasonableness test where the conduct of the employer was such that it was reasonable for the employee to resign. The employee in this case as part of their claim cited applicable case law in relation to the maintenance of mutual trust and confidence including O'Kane –v- Dunnes Stores Limited UD1547/2003, the provisions of a safe place of work Maddy –v- Duffner Brothers Limited UD803/86 and the right to be treated with respect Corcoran –v- Central Remedial Clinic UD7/1978.

In relation to the relevant tests the employer cited the leading case law with regard to the need to carry out an objective assessment of the reasonableness of the employer's behaviour being Berber –v- Dunnes Stores 2009 and the reasonableness test Western Excavating ECC Limited –v- Sharp 1978. The employer contended that the onus of proof rests on the employee and is a stringent one. The employer also contended that it was incumbent on an employee to use the internal grievance procedure and quoted the case of Conway –v- Ulster Bank UD1981.

The AO in this case set out that the appropriate test in respect of constructive dismissal is set out in the Western Excavating (ECC) Ltd –v- Sharp 1978 1 ALLER713 in that it comprises two tests being the contract test and the reasonableness test.

It summarised the contract test 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 other performance"

The reasonableness test assess the conduct of the employer and whether it is one where the employer

"Conducts himself or his affairs so unreasonably that the employee cannot be expected to put up with it any longer, if so the employee is justified in leaving"

The AO pointed out that the Supreme Court in Berber –v- Dunnes Stores 2009 ELR61 said that

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it"

The AO in this case also helpfully pointed out that the Labour Court held in the case of Ranchin –v- Allianz World Wide Care S.A. UDD1636 that

"In constructive dismissal cases, the court must examine the conduct of both parties. In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the steps to resign"

Conway –v- Ulster Bank Limited UDA474/1981.

The AO in this case dealt with the issue where an employee had not used the internal grievance procedure and referred to the employment appeals case of Travers –v- MBNA Ireland Limited UD720/2006 where the EAT held paragraph

"We find that the claimant did not exhaust the grievance procedure made available to him by the respondent and this proves fatal to the claimant's case… In constructive dismissal cases it is incumbent for a

claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair"
In constructive dismissal cases effectively the employee must show either

1. That the employer has broken a fundamental term of the contract of employment; or
2. That the conduct of the employer was so unreasonable that the employee had no alternative to resign.

The burden of proof is on the employee in a constructive dismissal case.
It is not the opinion of the employee which counts. The issue as to whether the employer acted unreasonably is to be judged objectively, reasonably and sensibly by a tribunal in either the WRC or the Labour Court.

An employee who believes that there has been a breach of their contract or that the employer has acted unreasonably must in the majority of cases go through the internal grievance procedure laid down in their contract of employment. The fact that the employee may believe that that process may not result in any change is not the relevant question to be looked at. It is whether or not the process is fair or unfair.

There are limited and by this we mean very limited circumstances where an employee would be entitled to resign without going through the internal grievance procedure. The case of Allen and Independent Newspapers would be an example of this. However, it must be stressed that failure to use the internal grievance procedure will only apply in a tiny minority of cases.

As Solicitors we are regularly seeing clients who have resigned before getting legal advice. Very often they have not gone through the internal grievance procedure. The reality of matters is that in a number of these cases we will see claims which we believe would have been good cases except for the fact that the employee has not raised an internal grievance and given the employer an opportunity to respond.

We can only advise that any employee considering bringing a constructive dismissal case where they feel that they have to resign that they never resign without getting legal advice in advance.