

Constructive Dismissal – A Well Argued Case*

We thought it would be useful to look at case ADJ-00022491 on the basis of the legal arguments that were raised by both the employer and the employee. While the case was lost by the employee the arguments put forward are useful to consider by anybody who is thinking of bringing or defending a Constructive Dismissal case.

The employee argued that there were two situations envisaged by Section 1 of the Unfair Dismissals Act 1997 to justify a resignation. They pointed to the test being that set out in *Western Excavating (EEC) Limited –v- Sharp* 1978 IRL332, being the first test being the contract test where an employer must be;

“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 further performance”.

They secondly pointed to the additional reasonableness test which is that the employee can show that the employer conducted his or her affairs in relation to the employee;

“So unreasonably that the employee cannot be fairly expected to put up with it any longer, if so, he is justified in leaving”.

The employee referred to the case of Catherine Hurley –v- An Post 2017 IEHC568 being a decision of the High Court which was taken under the Safety Health and Welfare at Work Act. In that decision it was stated;

“The Court is satisfied that there is a common law duty on an employer to take all reasonable precautions for the safety of its employees and not to expose them to reasonably foreseeable risk of injury”.

In that case it was argued that the Court found that the defendant was in breach of its common law duty of care to the plaintiff as an employee under Section 8 of the 2005 Act and exposed the plaintiff to the damage and injuries suffered as a result. Failing to address this complaint about excessive working hours when on notice of the need for more staff created continuing distress. It was argued the unlawful ongoing and excessive working hours in breach of the Organisation of

Working Time Act 1997 constituted a continuing breach which was allowed to continue and would of itself be reasonable grounds for the complainant to terminate his contract of employment.

The employee addressed the issue of the need to exhaust internal procedures prior to resigning and quoted the case of Beatty –v- Bayside Supermarkets UD142/1987 where an understandable lack of faith in the employers ability to properly or effectively address her grievances and her failure to use the grievance procedure did not invalidate the complainants claim of constructive dismissal.

In Allen –v- Independent Newspapers (Ireland) Limited 2002 ELR84 the Tribunal held that it was reasonable on the facts of that case for the complainant not to have faith in the employers ability to properly or effectively address her grievances and her failure to use the grievance procedure did not invalidate her complaint.

For the employer it was argued that the case of Conway –v- Ulster Bank UD474/1981 was authority that a complainant did not act reasonably in resigning employment before exhausting the respondent’s grievance procedures.

The employer submitted that even where there was a purported breach of contract the obligation still exists to use the procedures as decided in the case of Travers –v- MBNA Ireland Limited UD720/2006 where the Court found that although the respondent changed the complainants role in a manner not in keeping with the contract of employment that did not relieve the complainant of the obligation to exhaust the grievance procedures.

The respondent also referred to the case of Fitzsimons –v- Mount Carvel Hotel UD855/2007 where the complaint of Constructive Dismissal was not upheld in circumstances where the complainant declined the offer of returning and activating the grievance procedure.

The Adjudication Officer held that the employee in line with Irish authorities would have to justify the decision to resign the employment and demonstrate that the circumstances of the dismissal met the test set out by Lord Denning MR in Western Excavating (ECC) –v- Sharp 1978 IRL332.

In relation to that issue the Adjudication Officer referred to the case of Ruffley –v- Board of Management of St Anne’s 2017 IESC33

concerning the allegation of bullying by an employee put through a disciplinary process because of performance issues. The Supreme Court did not accept that this was bullying although accepted the process used was not perfect.

Mr. Justice Charleton in that case stated;

“An employer is entitled to expect ordinary robustness from its employees... correction and instruction are necessary in the functioning of any workplace...it may be necessary to point to fault...it is a kindness to attempt to instil a work ethic or to save a job or a career by an early intervention...bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must simply be taken in the right spirit. Sometimes a disciplinary intervention may be necessary”.

The Adjudication Officer then looked at the issue of the conduct of the employer being the necessity of a PIP, which the employee was put under. The Adjudication Officer referred to the Labour Court case in Luke Glogoski –v- Boots UDD187 which sets out that an adjudicative body is required to establish that the decision to evaluate an employee’s performance on the job is based on;

“Up to date relevant information which has been considered through appropriate processes applied in a consistent manner in accordance with basic fairness and in observance of the rights of fair procedures”.

In relation to the obligation to exhaust grievance procedures prior to resigning the Adjudication Officer pointed out that the requirement to do so in cases of Constructive Dismissal have been identified in McCormack –v- Dunnes Stores UD142/2008 and Terminal Four Solutions –v- Rahman UD898/2011 and have been followed in many other decisions.

While the employee lost in this case this is a helpful decision for setting out the arguments.

There will be Constructive Dismissal cases where the employee has not used the internal grievance procedure and wins but they will be a minority of cases.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**

***In contentious cases a solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.**