CONSTRUCTIVE DISMISSAL*

The State in case UDD 1863 Advanced Environmental Solutions Ireland Limited and Ilori the Labour Court in this case has helpfully again set out the law relating to the issue of Constructive Dismissal. The Court has said that in such cases the Court must firstly examine the conduct of both parties. The Court has set out that in normal circumstances a person who seeks to invoke the reasonableness test in furtherance of a claim must also act reasonably by providing the employee with an opportunity to address whatever grievance they have. They must normally demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before resigning. The Court referred to the case of Conway -v- Ulster Bank Limited UD474/1981. The Court also referred to the case of Beatty -v- Bayside Supermarkets, UD142/1987 in referring to the need to utilise grievance procedures where it was held:

"The Tribunal considers that it is reasonable to expect that the procedures laid down in such agreements be substantially followed in appropriate cases by employer and employee as the case may be, this is the view expressed and followed by the Tribunal in Conway -v- Ulster Bank Limited 474/1981. In this case the Tribunal considers that the procedure was not followed by the Claimant and that it was unreasonable for him not to do so. Accordingly, we consider that applying the test of reasonableness to the Claimant's resignation he was not constructively dismissed."

The Court did point out on the other hand in the case of Allen -v- Independent Newspapers (Ireland) Limited 2002 IlR84 that the Employment Appeals Tribunal has held that it was reasonable on the facts of that case for the Complainant not to have faith in the employer's ability to properly or effectively address grievances.

In our view the Court has very clearly and carefully set out what the law on this issue is. In our experience a number of employees seek to rely on the Allen case. The Allen case is one where there were particularly serious issues. It would be our view that only in exceptional circumstances will an employee be able to rely on not going through the grievance procedure where they are relying on the reasonableness test. Those circumstances will be the exception rather than the norm.

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Where employees are seeking to rely on the fact that the employer has acted in an unreasonable manner towards them it would be our advice that before anybody resigns, appropriate advice from an Employment Law Solicitor should be obtained. The percentage of Constructive Dismissal cases which are won on the reasonableness test being applied to employees who simply resign is minimal. The majority of these cases are lost simply because the employee has not gone through the grievance procedure.

We would point out that simply going through the grievance procedure in itself is not sufficient. That is only one step. The employee must still show that the action of the employer was such that it was reasonable for the employee to resign.

Where there has been a breach of contract, which is the alternative test, then the requirement to go through the grievance procedure does not apply.

Constructive Dismissal cases are becoming very common. Our experience is that the vast majority of people simply resign without getting any legal advice and bring claims which have no realistic prospect of being successful.

Where an employer receives a grievance from an employee, it is vitally important that the employer addresses same in accordance with their policies. Failure to do so may well assist an employee in bringing a Constructive Dismissal claim.

There are two interesting cases that have issued in this area being ADJ14840 and ADJ12828.

In the first case the AO helpfully quoted the case Margot Conway-v-Ulster Bank Limited UD474/1981 where the tribunal stated.

"*The Tribunal considers the appellant did not act reasonably in resigning without first having substantially utilised the grievance procedure to attempt to remedy her complaints. An elaborate procedure existed but the appellant did not use it. It is not for the Tribunal to say whether using this procedure would have produced a decision more favourable to her but it is possible*"

In this case the AO held that the employee through the actions of a named individual had been completely overwhelmed and felt forced to resign.

In the second case the AO held that part of the responsibility of an employer is to manage staff and if bullying complaints are made these

should not be ignored or brushed aside as happened in this case. The AO in this case held that the actions of the Respondent in failing to put in place a process whereby a grievance could be made and heard properly resulted in the complainant coming to the reasonable belief that her employment could no longer continue. The AO in this case also found that the employee had been subject to constructive dismissal.

Both of these cases are unusual. Normally it is necessary for an employee to show they have gone through the grievance procedures. There are exceptions. The case of Allen and Independent Newspapers is of course the leading case on this issue.

While these cases won it will always be our advice to an employee that an employee should always raise a grievance before resigning. There are exceptions. The exceptions arose in the particulars of these cases. In one of them there was no disciplinary procedure. In the other it appears to have been a quite aggressive manager. Cases which employees win where they have not gone through the grievance procedure are unusual.

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 as a proportion or percentage of any award or settlement.***