

CONSTRUCTIVE DISMISSAL*

In case ADJ15105 the AO in this case helpfully set out the tests for constructive dismissal

The AO set out that the burden of proof is a high one. The AO pointed out that as set out in *Western Excavating ECC Limited v. Sharp* the legal test to be applied is firstly, for the Tribunal to look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract where it was held,

“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 of more the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance.”

The AO pointed out that if the AO was not satisfied that the contract tests had been proven then they are obliged to consider the “reasonableness” test. This is,

“the employer conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, then the employee is justified in leaving”.

The AO helpfully pointed out that there is a general obligation on an employee to exhaust the internal grievance procedures as set out in *McCormack v. Dunnes Stores UD1421/2008* where it was held,

“the notion places a high burden of proof on the employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her grievance with his/her employers. The employee would need to demonstrate that the employers conduct was so unreasonable as to make the continuation of the employment with the particular employer intolerable.”

The importance of exhausting the internal grievance procedures was highlighted in *Terminal Four Solutions Limited v. Rahman UD898/2011* where it was held,

“Furthermore, it is incumbent on any employee to utilise all internal remedies made available to her unless she can show the said remedies are unfair”.

It is very useful that the AO in this case has taken the time to set the tests out at some length and in a comprehensive manner. In addition, this is a Decision that is set out in an easy to read format.

Unfortunately, a significant number of employees are simply resigning and are doing so without getting legal advice and without understanding the legal tests which are there to justify them bringing a constructive dismissal claim.

It would certainly be our experience from those coming to us that the number of individuals who bring constructive dismissal claims who can show to us that they would pass either the contract test or the reasonableness test and in particular utilise the company grievance procedures is extremely small.

Before any employee resigns they should get legal advice, unfortunately, very few do.

****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.***