Constructive dismissal - is it becoming an easier case to prove?

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The recent case of An Accountant v An Accountancy Firm (ADJ-00017674) concerns a claim for constructive dismissal, whereby the employee was successful and awarded €16,500.

Under the Unfair Dismissals Acts 1977 -2015 constructive dismissal is defined as being the "termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination of the employer."

Given the burden of proof rests with the employee in a constructive dismissal case, it has always been a claim that is notoriously more difficult to prove than a straightforward unfair dismissal claim. Historically case law has also required the employee to exhaust all internal avenues within the organisation before resigning, as the employee must show he/she used all endeavours to remedy the issue rather than automatically resigning when things get tough. However, this requirement has slowly started to dwindle over recent years, with there being a gradual increase of cases where it has been recognised that the actions of the employer are either so bad or the employee concerned was so senior within the organisation (Philip Smith v RSA Insurance Ireland Limited, UD 1673/2013) that the employee was correct to resign without raising a grievance.

This particular case is another example of where the usual pre cursor of raising a grievance was seen as unnecessary. The accountant had been working for the company from 2006 until 2018, with a short break in between when she went travelling. It appears, by and large, that the claimant and the respondent had a relatively good working relationship until matters came to ahead on 12 March 2018 when she was 7 months pregnant. The respondent had raised concerns with the complainant in relation to her performance due to the loss of a client and heated words were exchanged. The employer was on notice of the fact that the complainant's pregnancy was high risk as she had previously suffered two miscarriages. After the events on 12 March 2018 the complainant feared for her safety due to the

respondent's behaviour and ultimately resigned in August 2018.

After the incident on 12 March 2018 the complainant went out on certified stress leave until she gave birth to her baby. She received no contact from her employer during this period, and noticed her job was being advertised in July 2018, some 2 months after she had given birth. As such, the complainant decided to tender her resignation on 2 August 2018 which would take effect at the end of her maternity leave. Her resignation letter set out a summary of events that lead to her decision to resign, including the events on 12 March 2018, the lack of contact from her employer (starting from 12 March) and the impact the respondent's behaviour had had on her health.

The respondent did not respond to the resignation letter until 4 October 2018, whereby he asked the complainant to reconsider her resignation and offered mediation as form of conciliation, which was ultimately refused. The respondent argued that this was an unjustified refusal and that mediation was a reasonable attempt to resolve the complainant's concerns. The respondent also argued that the complainant's failure to request the matter be dealt with by an external HR advisor before resigning was unreasonable in the circumstances and ultimately prevented her from succeeding in bringing a constructive dismissal complaint.

Despite the lack of grievance or even the complainant's willingness to engage in mediation, the Adjudication Officer found in favour of the complainant. He held that the respondent had a duty of care towards the 7-months pregnant employee and found the respondent acted in an unreasonable manner towards the complainant. The Adjudication Officer placed particular significance on the fact that the complainant sent a detailed resignation letter (which in some ways could be viewed as a grievance) and the respondent continued to have no contact with her until some 2 months later. As such the employer had approximately seven months starting from 12 March 2018 to attempt to mend the relationship but took no steps until only a few weeks before the complainant's last day. It was the delay and the employer's conduct that made the employee's decision to terminate her employment as reasonable and justified.

If anything is to be learnt from this case is that employers should give particular attention and thought to an employee who is pregnant, and their subsequent sick leave. The Adjudication Officer here recognised that an employee is not immune from being performance managed merely because they are pregnant, but it will never be justified to be aggressive towards an employee, never mind someone who is heavily pregnant.

However, the latter does attract a higher duty of care. If an employee does go out on certified stress leave, it is important to have them assessed as soon as possible to ascertain whether the company can engage and/or make contact with the employee while they are off. More likely than not the employer in this case was probably concerned about troubling the employee when she was out sick and then on maternity leave. However, if the employer had medical evidence that enabled them to engage with the employee that could have potentially avoided the possibility of the employee not being contacted for such a long period of time, after a very stressful timeline of events.

For advice and information on constructive dismissal or employment law in general, please contact Bláthnaid at blathnaid.evans@ogier.com

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