Constructive Dismissal – A Last Resort Remedy

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Introduction:

A constructive dismissal arises where an employee involuntarily resigns from their employment, with or without providing the requisite notice to the employer. The resignation is classified as involuntary as it arises as a consequence of the unreasonable behaviour of the employer. In accordance with Section 1 of the Unfair Dismissals Act a constructive dismissal can be defined as:

> *"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 to the employer..."*

Eligibility Requirements:

In order to bring a claim for constructive dismissal under the terms of the Unfair Dismissals Act 1977-2007 the following pre-requisites must be satisfied:

A. The worker must be an employee – whether full-time, part-time, permanent, fixed term or specific purpose[1] (and irrespective of the number of hours worked); and
B. The employee must have been employed under a contract of service, at the date of dismissal, has at least one year's continuous service with the employer[2]. This requirement is waived where an employee is dismissed as a consequence of (1) pregnancy related matters, (2) trade union activity or (3) the exercise or attempted exercise of their rights under protective legislation[3]. Service is deemed continuous even if it is interrupted due to sickness, absences while on protective leave, strikes or lock-outs, lay-off periods, dismissal followed by immediate re-employment, or in certain instances dismissal followed by re-employment within 26-weeks.

In Case UD922/2010 the Employment Appeals Tribunal refused to hear a case of alleged constructive dismissal, wherein the resignation arose as a consequence of the non-payment of wages by the employer to the employee for the entire tenure of her employment, as the claimant did not have the requisite service for bringing a claim under the Acts[4].

To make a claim under the legislation, employees must be aged between 16 and normal retirement age.

The following persons are excluded from the terms of the Act:

[1] Except where the fixed term has expired or specific purpose no longer exists, and there are objective reasons justifying its non-renewal.

[2] Section 2(1)(a).

[3] Section 14 Unfair Dismissals (Amendment) Act 1993. Protective leave encompasses leave taken pursuant to the provisions of the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, the National Minimum Wage Act 2000, the Parental Leave Acts 1998 and 2006 and the Carer's Leave Act 2001 – as well as any subsequent amendments.

[4] Her employment covered the period February to October 2009.

A. An employee who has reached normal retirement age for employees of that grade with the same employer, assuming that one is agreed[5,6];
B. Persons employed by a close relative in a private house or farm where both reside[7];
C. A person in employment as a member of the Defence Forces, the Judge Advocate-General, the chairman of the Army Pensions Board or an ordinary member (who is not an officer of the Medical Corp of the Defence Forces)[8];
D. A member of the Garda Síochána[9];
E. FAS trainees and apprentices[10] in the first six months of training and during the first month following completion of the apprenticeship;
F. An employee on probation or training at the beginning of his employment, provided the contract is in writing and the duration of the training or probation is specified therein to be less than one year; or
G. Employees on once-off fixed term contracts[11].

Up until the 4th July 2006 all civil servants, employees of local authorities, health boards, vocational educational committees or committees of agriculture[12] were excluded from the legislation. However, the commencement of Part 7 of the Civil Service Regulation (Amendment) Act 2005 extends the protection of the Unfair Dismissals Act to certain civil servants[13].

Burden of Proof:

Unlike all other dismissals, where an employee claims that they have been constructively dismissed the onus/burden of proof is placed upon them to prove that their resignation was justified. In effect, they are required to prove that they have exhausted all other avenues of resolution before they have resigned from their position. This would generally require them to bring their grievance to the attention of their employer, follow all the employer's grievance procedures and industrial relations procedures, as outlined in their contract or the employee handbook. Only where these procedures have not achieved an appropriate outcome or where the employer has refused to comply with or engage in these procedures, then should an employee consider resigning from their position. A failure to invoke these procedures may leave the Court or Tribunal open to rejecting a claim of constructive dismissal.

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[5] Section 2(1)(b).

[6] Where a normal retirement age is not agreed – then there is no age limit, as per the Employment Equality Act 2004. In *Kerins v Roscommon County Council (2002)* the claimant was promoted to the position of a driver with the local fire service and at that time was furnished with a new contract of employment, which included the condition that the claimant would retire at 55 years of age. The claimant did not sign the contract but the EAT found that he could not deny that he had been furnished with a copy of the contract. The Tribunal held that in taking the post and not refuting the condition he was *estopped* from denying that the conditions of the new contract formed part of his contract of employment and they bound him. Therefore, his dismissal at the age of 55 was not unfair in the circumstances.

[7] Section 2(1)(c).

[8] Section 2(1)(d).

[9] Section 2(1)(e).

[10] Section 2(1)(f)-(g).

[11] Although those working for a close relative or in full-time FÁS training or apprenticeships are covered by the legislation if the dismissal results from the: (a) the employee's pregnancy, giving birth, breastfeeding or connected matters, or (b) the exercise of rights under the Maternity Protection Act, 1994-2004, the Adoptive Leave Act, 1995-2005, the Parental Leave Act, 1998-2006; or Carer's Leave Act, 2001. Similarly, the Gardaí are covered if their dismissal results from their attempt to exercise rights under the Parental Leave or Carer's Leave legislation.

[12] Section 2(1)(i)-(j).

[13] Sections 23-27, Civil Service (Amendment) Act 2005.

In *Betty Clifford v Maritrade Ltd (2000)*[14] Clifford made a claim for constructive dismissal arising from an incident between her and her manager, in which he questioned her regarding an allegation of undercharging customers. The claimant believed that the tone of the meeting and the nature of the questions she was asked undermined her good name and reputation. Following this incident the claimant told the owner of the business that she could not go back to work unless she received an apology from her manager. Subsequent to this, a meeting was scheduled with her and the owner of the business and at this meeting she was informed that her integrity had not been doubted and that as the manager was acting in accordance with his duty to investigate this incident, that it was not appropriate for him to issue an apology. She was invited back to work, but declined because she stated that *"she could no longer work with the manager"*. In relation to the claim for constructive dismissal the Employment Appeals Tribunal stated that it accepted her evidence, but added that the next reasonable step was to invoke the grievance procedure. Furthermore, as the claimant was a union member and a shop steward, she should have been aware of the procedures as set out in the company/union agreement. On this basis her claim was dismissed.

Similarly, in *G Keogh v Green Isle Foods (2007)*[15] the claimant believed that his employer was challenging his competence to do this job, and after a period of sick leave he was placed on lighter duties. He subsequently resigned his position, but did not invoke the company's grievance procedures prior to his resignation. The Tribunal, in dismissing his claim for constructive dismissal stated that as there were avenues open to him other than resignation he had failed to establish that it was impossible in all reasonable circumstances to continue employment with his employer.

More recently in July 2009 the former night manager at *The Radisson Hotel and Spa, Sligo* failed in his claim for constructive dismissal, as he had not invoked the proper internal grievance procedures prior to his resignation.

Tests for Constructive Dismissal:

Claims for constructive dismissals are generally based upon two tests: (1) the contract test, and (2) the reasonableness test. In brief, the contract test ascertains whether the employee's resignation arose as a consequence of a breach of contract by the employer. The reasonableness test evaluates whether the actions of the employer were so unreasonable that the employee was left with no option but to resign.

The following involves a more detailed review of these tests:

The Contract Test

In this context the employee argues entitlement to terminate the contract as the employer has breached a fundamental condition that goes to the root of the contract[16]. This generally arises where the actions of the employer demonstrate to the employee that they no longer intend to be bound by one or more of the essential terms of the contract of employment.

[14] UD27/2000, MN58/2000.

[15] UD516/07.

[16] If the employee does not resign in the event of a breach by the employer, the employee will be deemed to have accepted the breach and waived any rights to sue. However, the employee is not required to resign immediately and may, legitimately, wait until they have found another job, and still be eligible to claim constructive dismissal. In *Jeffrey v Laurence Scott & Electromotors Ltd (1977)* IRLR 466, the failure of the claimant to sue for constructive dismissal until 3.5 months after the employer breached his employment contract demonstrated acquiescence to his employer's actions and nullified his claim for constructive dismissal.

The contract test was described by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp (1978)*[17] 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 discharged from any further performance".*

The contract test can be applied in the following situations:

A. **The failure by the employer to provide pay and benefits to the employee as agreed in the contract**: In *Harrison v National Engineering and Electrical Trade Union (1987)*[18] the employer agreed to remunerate the employee by way of cheque, but when these cheques bounced on a variety of occasions the Tribunal classified this as a valid ground for claiming constructive dismissal. Similarly, in an English case, *Brannigan v Collins (1977)*[19] the employers failure to pay statutory contributions of tax and PRSI on behalf of the employee gave rise to a successful claim for constructive dismissal.

B. **Downgrading or demoting an employee, without valid reasons or agreement**: In *Gibbons v W F Rational Built-in Kitchens Ltd (1986)*[20] the claimant found that her position was filled by another employee when she returned from maternity leave. She claimed that a considerable part of her responsibilities had been removed, which effectively removed her from her position, which left her in an intolerable position, therefore, she terminated her own employment and subsequently claimed constructive dismissal. The Tribunal in upholding her claim stated that:

> *"The conduct of the respondent indicates to us that they no longer intended to be bound by one or more of its essential terms …. apart from the events immediately leading up to the dismissal, the respondents have not questioned the claimant's conduct, competence or capability."*[21]

C. **The imposition of a disciplinary penalty by an employer without complying with the agreed disciplinary procedure**: In *Dunne v Allied Legal Services (1996)*[22] the claimant was successful in her application for constructive dismissal as the Tribunal viewed the fact that the action of her employer in indicating to the claimant by letter that her work was unsatisfactory and then two days later, without any warning, informing her by letter that she was suspended, was unfair. This decision was based on the fact that: (1) no opportunity was given to the claimant to discuss the situation, and (2) no warning was given by the employer that the alleged inability of the claimant to perform her duties satisfactorily could lead to her dismissal. She was awarded compensation of IR£2000 for constructive dismissal.

D. **Breach of the employers obligations under the terms of the Health, Safety and Welfare at Work legislation**: In the English case of *British Aircraft Corporation v Austin (1978)*[23] the Tribunal held that:

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[17] IRLR 332.
[18] UD 406/87.
[19] UD 28/77.
[20] UD 226/86.
[21] As cited in *Emmerdale Ltd v A Worker (2002),* Labour Court Recommendation EED025.
[22] UD579/96.
[23] IRLR 332 EAT.

"… so long as the complaint is not obviously frivolous, failure by an employer to investigate a safety complaint may in itself amount to a breach of contract by the employer entitling the employee to resign and claim constructive dismissal."[24]

E. **Unilateral Alteration of the Contract**: Any alteration to the contract of employment must be mutually agreed between the employer and the employee. Where the employer attempts to alter the contract without the consent of the employee an action for constructive dismissal may arise. It is important to note that this alteration may be to an express term or an implied term.

This alteration may arise in a number of different ways, such as:

Change in Working Hours: In *Browne and Flanagan v Network Ltd (1996)* both claimants were successful in their action for constructive dismissal when their employer dramatically reduced their working hours following medical certified absences by both claimants. The Tribunal held that this action amounted to repudiation of the existing contract of employment such as to ground a successful claim for constructive dismissal.

Change in Job Description/Duties: In *RTE (DTTN) v A Worker (2003)*[25] the employee's job changed without consultation or agreement. She was employed as a business development assistant in the Business Development Unit (BDU) and transferred to an accounts receivable clerk position in the Finance section. As a result her duties and responsibilities were significantly reduced forcing her to resign. This was rejected by the company who stated that the changes were made in the best interests of the business and that a large portion of the claimant's duties remained with her. The Labour Court found that *"the claimant had no alternative but to transfer … to a position where the work involved was of less value than that held previously"*. They also found that the *"transfer was imposed upon her without consultation and was complied with under protest …. (and) this action culminated in a situation where she had no alternative but to resign"*. Compensation of €10,000 was recommended.

Change in Pay: *Byrne v Furniturelink International Limited (2007)*[26] involved a resignation as a result of the company's decision to change commission rates and the claimant's areas of work. The claimant maintained this would involve a significant cut in her sales and significantly reduce her income. The claimant did invoke the grievance procedure but ultimately the Tribunal found that the company had failed to follow its own procedures. The Tribunal clearly considered that the claimant's concerns about a reduction in her remuneration were reasonable but expressly stated that they accepted the employer's entitlement to restructure and to do so without consulting with staff on the details. However, as a result of the manner in which the company dealt with the claimant, the Tribunal found they had failed to act reasonably and had *"blatantly infringed her rights and integrity"* thereby forcing her to resign. Compensation of €35,000 was awarded.

Change in Location: In *Nolan v Hermans Limited (1987)*[27] the Tribunal held that the employee was entitled to treat the change in location as constructive dismissal notwithstanding the employer's assertions that there was a company policy permitting transfer and that this was well understood by all employees. It was held that the transfer

[24] http://www.xperthr.co.uk/employmentlaw/caselawarticle.aspx?caseid=1759.
[25] CD/03/643, Recommendation No. LCR17670.
[26] UD 70/2007.
[27] UD 43/87.

amounted to a unilateral change in the employee's place of employment where she had worked for the previous ten years[28].

F. **Breach of the duty of trust and confidence**: In *McKeigue v Downhill House Hotel (2006)* the applicant was awarded almost €30,000 for constructive dismissal arising from an incident involving a cash shortfall from a stall that McKeigue had manned for the hotel on Ballina's Annual Heritage Day. McKeigue said it had not been a commercial event and he felt *"completely humiliated to be ridiculed and questioned as if he was a criminal"*. He left the hotel and did not return. He told the tribunal that the treatment he received was *"like his brain was hit with a sledgehammer and disintegrated"*. He had to go for psychiatric treatment, which he was still receiving at the time of the hearing.

G. **Harassment and Bullying**: Employers are required to implement a code of practice in relation to harassment, sexual harassment and bullying in the workplace. Where an employee is being harassed by the employer or by any party connected with the employment and has communicated this to the employer, who has failed to take any action or reasonable action, a claim for constructive dismissal may arise. In the case of *Byrne v RHM Foods (Ireland) Ltd (1979[29])* the Court held that the Plaintiff, Byrne, was constructively dismissed as a consequence of her employer's failure to provide her with work, as this action constituted harassment. Byrne had been employed as the personal secretary of the marketing manager, and both were employed by RHM Foods. When the marketing manager was suspended, Byrne was assured of her job. However, work was entirely withdrawn from her, and she was isolated from other managers. The keys to the filing cabinet she used were taken from her, and when they were returned, she was instructed not to use the filing cabinet without the prior permission of a manager. Her telephone was also cut off. Byrne was subsequently diagnosed as having severe nervous strain as a result of this situation at work and accordingly the Employment Appeals Tribunal (EAT) ruled that she was constructively dismissed and awarded her compensation.

   In a UK case *Morse v Future Reality Ltd (1996)[30]* Morse shared an office with a number of men who downloaded sexually explicit/obscene images from the internet, which they then discussed. Although these activities were not usually directed at her, they did cause her to feel uncomfortable. She eventually resigned citing the pictures, bad language and atmosphere of obscenity in the office as the reason for doing so. The Tribunal held that all the above factors had a detrimental impact on her such as to constitute sexual harassment and that the company was liable for her constructive dismissal as they had failed to take action to prevent the discrimination[31].

   In *McKenna v Pizza Express Restaurants (2007)[32]* the Dublin Circuit Court awarded McKenna €63,000 compensation for unfair dismissal arising constructively. McKenna stated that she was repeatedly *"embarrassed and humiliated"* by her employer and she felt that she had no option but to resign after her employer unreasonably refused to reschedule disciplinary hearings when she was having a very difficult pregnancy. The Court accepted that Ms McKenna had been constructively dismissed and said her employer's conduct had been inappropriate and disproportionate and had embarrassed and humiliated her. The Court also noted that it was inappropriate that McKenna had been locked in a room with her senior operations manager, who was investigating what

[28] http://www.lkshields.ie/htmdocs/publications/articles/pub358_relocation.htm.
[29] UD 69/79.
[30] E.T. Case No. 54571/95.
[31] http://www.staffs.ac.uk/assets/EOC%20checklist%20-%20sexual%20harassment%20gudiance%20for%20managers%20and%20supervisors_tcm44-21508.pdf.
[32] WT331/2006, UD1062/2006.

he had described as unacceptable work practice relating to a customer's bill – the claimant had agreed to waive the bill as the customer had found a hair in their meal.

It is important to note that this list is not exhaustive and that the contract test can be applied in an infinite number of situations.

***The Reasonableness Test**:*

Within the ambit of this test the employee argues that while the employer may have acted within the terms laid down in the contract of employment, his conduct is nonetheless so unreasonable that it entitles the employee to treat the contract as being at an end. In effect, this means that although the actions of the employer may not amount to a fundamental breach of contract, they are still classified as so unreasonable as to justify the involuntary resignation of the employee.

According to the Labour Court in *An Employer v A Worker (2005)* [33]:

> *"This test asks whether the employer conducts his or her affairs in relation to the employee, so unreasonably that the employee cannot fairly be expected to put up with it any longer. Thus, an employer's conduct may not amount to a breach of contract but could, nonetheless, be regarded as so unreasonable as to justify the employee in leaving ... the employer may commit a breach of contract which may not be of such a nature as to constitute repudiation, but is so unreasonable as to justify the employee in resigning there and then."*

The reasonableness test is often cited in situations where the employee is told that if they fail to resign that the employer will dismiss them. In *Fell v H. Williams & Co. Ltd. (1982)*[34] Fell was employed by the respondent as a checkout operator. A dispute arose over Fell's practice of keeping single pound notes in a drawer underneath the cash till. She was warned not to use that drawer in the future. At a later date Fell found that £40, which she had put into the un-authorised drawer, was missing. She told the store manager that the money had been taken from the unlocked drawer during her lunch break. Fell was interviewed about the matter by the personnel manager and the area supervisor. There was a dispute as to what happened at that meeting. According to Fell, she had been given two options, either to leave or be dismissed. Her employer stated that they had given her the option of achieving normal cashier standards or resigning. In the event Fell resigned. The Tribunal noted they the whole conduct of the interview, in the absence of anybody to represent Fell, was likely to produce the result it did. By an application of the reasonableness test, the Tribunal ruled that it was appropriate for Fell to resign and accordingly they ruled that she was constructively dismissed.

In *Simpson v The Finglas Adult and Child Centre (2009)*, the claimant was successful in her action for constructive dismissal. Following a workplace incident the claimant was informed that if she admitted a breach of company protocol she would not face the sanction of dismissal. On that basis, Ms Simpson made a full admission. The following day, she was informed that her only option was to resign (with some benefits) to avoid being dismissed for misconduct. The Circuit Court upheld the EAT's finding that undue pressure to resign was put on Simpson by her employer and the union and the Court ordered that Simpson be re-engaged by the respondent in her previous position[35].

[33] ED02/57, Labour Court Determination No. EED0410.

[34] UD 518/82.

[35] Coveney, Muireann (2010). *Constructive Dismissal, Successful Claims and the EAT*. 7(4) IELJ 99.

In addition to forced resignations the reasonableness test can also be used in other situations. In *Keane v Western Health Board (1988)*[36], the Tribunal found that the respondent's blanket policy of never reconsidering letters of resignation tendered by employees was unreasonable. However, the Tribunal in its determination stated that it was *"... not suggesting in every situation where an employee purports to withdraw a notice of resignation that there is a concomitant obligation on the employer to not only to accede to such a request but also to consider it. There may, for example, be circumstances where an employee resigns against a background of obvious stable and satisfactory conditions of employment and who subsequently purports to withdraw his notice..."*[37].

In *An Employer v A Worker (2005)*[38] (an appeals case) the worker claimed that he was constructively dismissed as a consequence of his employers discrimination against him based on a disability. The Court has found that the employer had failed to do all that was reasonable to accommodate the workers needs, by providing him with special treatment or facilities so as to enable him to return to work on a phased basis after his absence based on his disability (an anxiety disorder). They also commented that *"the respondent was, at best, indifferent as to whether or not the complainant remained in its employment .... and that the worker had perceived this to be the position".* In applying the reasonableness test the Labour Court stated that:

> *"[w]hilst the conduct of the respondent may not, itself, have amounted to a repudiatory breach of the employment contract, the Court is satisfied that, having regard to the complainant's undoubted emotional and psychological vulnerability at the material time, the conduct of the respondent was so unreasonable as to justify the complainant in resigning there and then."*

The worker was awarded €49,000 for constructive dismissal, which was equivalent to one year's salary, and an additional €8,000 damages for discrimination based on disability.

Grounds Not Justifying a Constructive Dismissal Claim

However, where the actions of the employee are unreasonable in the circumstances then no action for constructive dismissal will be upheld. In *Western Excavating Ltd v Sharp (1978)*, Sharp was dismissed for taking time off from work without permission. On appeal to an internal disciplinary hearing, he was reinstated but was suspended for five days without pay. He agreed to accept this decision but asked his employer for an advance on his holiday pay as he was short of money; this was refused. He then asked for a loan of £40; that was also refused. Consequently Sharp decided to resign in order to get access to his holiday pay. Sharp instituted a claim for unfair dismissal on the basis that he had been forced to resign because of his employer's unreasonable conduct. The Tribunal found in Sharp's favour on the grounds that his employer's conduct had been so unreasonable that Sharp could not be expected to continue working there. However, on appeal the Court of Appeal held that before a valid constructive dismissal can take place the employer's conduct must amount to a breach of contract that is such that it entitles the employee to resign. In Sharp's case there was no such breach and therefore there was no constructive dismissal.

The case of *O'Leary v Crane Hire Ltd (1979)*, illustrates the importance of the particular circumstances in determining whether or not an employee's resignation is reasonable. In this case, the Court held that the verbal communications between the employee and his

[36] UD 940/88.
[37] Karina Cuffe, (1999). *An Overview of Constructive Dismissal*. HR Databank, Issue 415.
[38] ED02/57, Labour Court Determination No. EED0410.

employer (who was also the employee's brother) were not such as to make it reasonable for the employee to conclude that it was impossible for him to remain in his employment.

In *Cosgrave v Kavanagh Meat Products Ltd (1988)*[39], the Tribunal accepted that the claimant had been placed under considerable pressure in terms of the work-load requested of him by the respondent company both during and outside normal working hours and during holiday periods. However, the Tribunal found that there was no evidence to suggest that the claimant had objected seriously, or refused to work overtime without pay, or refused to work during his holiday periods. In this case, the Tribunal unanimously found that the claimant had failed to discharge the onus of proving that he was entitled to terminate the contract of employment without notice by reason of the respondent company's conduct.

This case highlights that to bring a successful claim for constructive dismissal it is not only imperative that the actions of the employer are unreasonable – but more importantly, that the actions of the employee are reasonable.

Dispute Resolution and Remedies:

A claim of unfair dismissal under the terms of the Act must be brought within six months[40] of the date of dismissal or possibly within 12 months, where exceptional circumstances prevented the making of the claim[41]. There are three possible stages of adjudication on claims for unfair dismissal. These include a Rights Commissioner, the Employment Appeals Tribunal (EAT)[42] and an appeal to the Circuit Court, with a possible appeal to the High Court.

A. **Rights Commissioner**: This role was created under Section 13 of the Industrial Relations Act, 1969 and the appointment of Rights Commissioner (by warrant of the Minister) is now governed by Section 34(3) of the Industrial Relations Act 1990. Presently there are fifteen Rights Commissioners in office who are available to hear disputes, provided that there is agreement by both parties and that they also agree to be bound by the decision. Hearings relating to constructive dismissal are held in private and the Rights Commissioner is obliged to issue a written recommendation outlining their opinions on the merits of the dispute.

   In relation to constructive dismissal, if an employee lodges a claim before a Rights Commissioner, and is dissatisfied with the result, they are then eligible to bring a case before the Employment Appeals Tribunal, within six weeks[43].

B. Employment Appeals Tribunal: Under the Unfair Dismissals Act 1977 the Employment Appeals Tribunal (EAT)[44],[45] has the power to hear all cases alleging constructive

[39] UD 6/88.
[40] Section 8(2).
[41] Section 7(2)(b) Unfair Dismissals (Amendment) Act 1993.
[42] Section 8(1).
[43] Section 9(1)-(2).
[44] The EAT consists of: (1) a chairperson (with at least seven years experience as a Barrister or Solicitor), (2) 43 vice chair-people (these representatives are appointed by the Minister for Jobs, Enterprise and Innovation), and (3) 82 ordinary members (as of the end of 2010 there were 81 ordinary members as one member resigned during the year and was not replaced), who are representatives of employers associations and trade unions. These members sit from 3-5 years. The EAT is also permitted to operate by divisions consisting of: (1) a chairperson or vice-chairperson, (2) one trade union representative, (3) one employers association representative, and (4) a clerk (who provides an administrative support function). Appeals are heard in public unless the Tribunal, on the application of either party and in the exercise of its discretion, decides that the hearing be in private.

dismissal[46]. A case can be presented directly to the EAT (under the Unfair Dismissals Act 1993)[47] or may be by way of an appeal from a Rights Commissioner. Either party can appeal the decision of the EAT to the Circuit Court, within six weeks, with one final right of appeal to the High Court[48].

Where the EAT finds that the employee has been unfairly dismissed the remedies for unfair dismissal include[49]:

(1) Reinstatement to the employee's former position – this remedy is generally only awarded where it is felt that the employee is completely blameless in relation to the dismissal. The reinstated employee is entitled not just to their job back but to any loss of earnings between the dismissal and the hearing;[50]

(2) Re-engagement to that position or a suitable alternative position – on such terms and conditions as the Tribunal decides[51];

It is important to note that these remedies are only available where the relationship between the parties has not been irreparably damaged.

(3) If the employee incurs financial loss as a consequence of the dismissal, compensation (not exceeding 104 weeks remuneration); or

(4) If the employee incurs no financial loss as a consequence of the dismissal, compensation not exceeding four weeks remuneration[52],[53].

In 2009, the maximum two year salary award was given from the Employment Appeals Tribunal in the case of *David Redmond v Esmonde Motors (2009)*[54] for a claim against his employer for unfair dismissal. The EAT awarded €79,100 compensation to the claimant who was formerly an "assistant parts manager" who was then made redundant without consultation and replaced by a "trainee parts adviser". The award reflects the fact that this was not a genuine redundancy and that the employer used the vehicle of redundancy is unlawfully remove an employee.

c. Circuit Court: This Court acts as an appellate Court to the EAT. Additionally, where the employer fails within six weeks to comply with the award of a Rights Commissioner or the EAT, the Minister may take the case to the Circuit Court on the employee's behalf to enforce the remedy obtained.

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[45] Failure to appear before the EAT, when a subpoena has been issued, or failure to present documentation will result in a fine not exceeding €1,270.

[46] The EAT is also empowered to hear cases under a variety of different employment legislation, although cases relating to unfair and constructive dismissal accounted for a significant portion of the work undertaken by the EAT in 2010 (2,157 cases relating to dismissal).

[47] Application is by means of a prescribed form (Form RP 51A). This form includes the employee's full name and address, the name of their trade union representative (if any), the title of the Act under which they are claiming relief, the grounds of the application and the redress sought.

[48] Section 10(4).

[49] Section 7(1)(a)-(c).

[50] This remedy was awarded in six cases of dismissal in 2010.

[51] This remedy was awarded in three cases of dismissal in 2010.

[52] In this regard the employee is expected to mitigate their losses by making every effort to secure alternate employment.

[53] In 2010 the EAT awarded €3,485,898.25 in 217 cases regarding dismissal.

[54] UD188/2009, RP180/2009.

Conclusion:

Although there are no actual statistics available regarding the success rate for claims for constructive dismissal the general view is that this rate is quite low. Colloquial evidence suggests that only one in three claims is successful. This is primarily due to the fact that the burden of proof placed upon the employee is quite high, and is often not met. Therefore, employees are advised that resigning and claiming constructive dismissal should be viewed as a last resort remedy that should only be exercised after all other avenues of resolution have been exhausted and after strict compliance with their employers grievance and disciplinary procedures. Employers are also advised to ensure that they have grievance and disciplinary procedures in place and that they comply with them absolutely, without even minor deviations.