BY
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Not the way to do Business Class!

In this article, Kevin Callan gives an interesting synopsis of a decision made by an Adjudication Officer of the Workplace Relations Commission in the case of a cabin crew member versus an airline.

A Cabin Crew Member v. An Airline

This is a summary of a decision of an Adjudication Officer of the Workplace Relations Commission ("WRC") of 15th June 2017 and should be of interest to employers on a number of different levels. From the date of the introduction of the Workplace Relations Act, 2015 decisions and recommendations of the WRC do not generally bare the names of the parties, hence the strange looking heading on this case. The media are also no longer permitted to attend and report in the Courts so the main source of case-law is to be found on workplacerelations.ie in the determinations/decisions section.

This case is of interest as it also involves an alleged agreement reached between the employer and the employee of an *ex-gratia* payment if she were to resign. Subject to the employee being made such an offer, she agreed to resign from her employment. The offer was then withdrawn as if it was never made at all and the employer sought to enforce the resignation of the employee minus the payment. The case was heard in June of this year and relates to a cabin crew member of an airline who sought to take a constructive dismissal claim. It is a typical example of how cases, as they are read, may appear to be going in a certain direction and end up with a very different outcome to what the reader might expect.

Background to the case.

The employee entered her employment in 2007 with an international airline. In December 2013, an incident occurred where she alleged that she refused to carry out an unlawful instruction to work beyond the statutory agreed hours, which led to her being disciplined with a written warning. Such a refusal by the employee would be based upon the provisions of The Organisation of Working Time Act, which sets out that an employee must receive statutory rest periods, an eleven hour gap rest period between shifts and not exceed 48 hours on average per six days. In her submission, the employee stated that she appealed the decision and did not receive a reply at all. In 2013, she was diagnosed with a stress related illness and was absent from work from April 2015 to the date of her alleged dismissal in February 2016.

On the 30th December 2015, the employee attended a meeting with the Company's Resource and Attendance manager and a HR representative. The purpose of the meeting was to discuss a report prepared by the Company's Chief Medical Officer, which included an opinion that *"it does not appear likely that this employee will be fit to resume cabin crew duties within the foreseeable future".*

The employee stated that two options were put to her at this meeting; (a) that she would join a resource pool for cleaning and baggage handling positions that might arise or (b) that if her employment ceased by mutual agreement an *ex-gratia* payment could be paid to her. She stated that a figure of €10,000 was mentioned.

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The employee stated at a hearing, that on the 12th January 2016 the HR representative for the employer contacted her by telephone to inform her that an *ex-gratia* payment of €10,000 was on offer. Having discussed the matter with her husband she called the HR representative to accept. She was told there was a letter that she would have to sign which would be posted out to her.

The employee stated that on the 2nd February 2016 the HR representative contacted her asking that she send a copy of her birth certificate to expedite the *ex-gratia* payment which she did, by email and soft copy form.

The employee then stated that in the days following, she received a phone from the HR representative, acting via the airline, saying that the *"Powers That Be"* have decided not to make an *ex-gratia* payment as it would set a precedent.

The representative for the employer accepted that the employee sent an email to the HR representative on the 15th February 2016 tendering her resignation from the Company.

In a more detailed email to the HR representative three days later, on the 18th February 2016, the employee stated that she had no option but to tender her resignation, as after being given the expectation verbally by the HR representative that she would receive a gratuity payment, the airline had reneged on this commitment. She concluded this email by asking that the matter be reconsidered and the *ex-gratia* payment as originally offered be paid.

In summarising, the representative for the employee stated that based on the facts of the case, where an offer of an *ex-gratia* payment was made and then withdrawn, the Complainant's decision to resign was not unreasonable but was induced by the employer's behaviour towards her. He contended that the act of reneging on a commitment, in this case made to an employee who had been absent from work with a stress related illness for some considerable time, was sufficient to meet the test of constructive dismissal and her claim should be held to be well founded.

Decision and Outcome.

The Adjudication Officer was required to give a decision or recommendation as per Section 41 of the Workplace Relations Act 2015.

In setting out the legal requirements, the Adjudication Officer defined constructive dismissal as arising 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 because of the unreasonable behaviour of the employer.

In accordance with Section 1 of the Act, a definition of constructive dismissal that can be relied upon was:

"the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or 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".

In the Adjudication Officers decision, it is specifically cited that it was undisputed that the employee was absent from work with a serious illness and that she was very fragile throughout the period from December 2015 to February 2016. A review of the documentation provided by the employer showed that it adhered to its own procedures for managing employees on long term illness and in that regard, it met its duty of care to deal with the employee's situation in a fair and reasonable manner.

At the hearing, it was disputed by the parties whether an offer of an *ex-gratia* payment, verbal or otherwise, was made by the HR representative to the employee. A letter from the employer to the employee dated the 6th of January 2016, that summarised in detail the matters discussed and agreed at the meeting on the 30th December 2015, made no reference to an *ex-gratia* payment, or any discussion about this amount.

A copy of a contemporaneous note of the meeting of the 30th December 2015 refers to the employee's query about a voluntary severance option. In it, the HR representative was *"to find out if available or an alternative"*. This was found to not tally with the employer's written submission, in which they stated that the HR representative stated at the meeting that voluntary severance was not an option for the employee.

An email to the employee, sent three days after her resignation, was held to be clear and specific that an amount of €10,000 was offered and then withdrawn for or on behalf of the employer.

Based on the facts and the evidence heard, the Adjudication Officer was inclined to accept the employee's contention that this offer was made, verbally, by the HR representative, on the 12th January 2016 and discussed on other occasions. It was further held that the HR representative assumed that he could obtain approval for a termination payment.

The management of the employer was criticised by the Adjudication Officer in terms of the withdrawn offer and also the fact that a resignation was accepted by email with no discussion or period of time to allow the employee to reflect on the situation in her state of health.

The Adjudication Officer however reflected on the burden of proof aspect of Constructive Dismissal which rests squarely on the employee and referenced a decision of the now abolished Employment Appeals Tribunal in such circumstances;

In Murray V Rockabill Shellfish Limited (2012) the EAT determined that:

It has been well established that a question of constructive dismissal must be considered under two headings, entitlement and reasonableness. An employee must act reasonably in terminating his contract of employment. Resignation must not be the first option taken by the employee and all other reasonable options, including following the grievance procedure, must be explored. An employee must pursue his grievance through the procedures laid down before taking the drastic step of resigning.

It was held in this case that the employee had failed to exhaust all internal processes and procedures before resigning including seeking legal opinion or the advice of her Union Representative. The Dismissal was held to be voluntary and as such the employee's claim failed.