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Former CEO awarded € 1,250,000 compensation for unfair dismissal (IR)

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Summary

Under Irish law, an employee claiming compensation for constructive dismissal bears a high burden of proof. Failure to exhaust the employer's grievance procedure before bringing such a claim to court is generally a recipe for failure. However, a CEO who brought such a claim without first going through the grievance procedure was recently awarded record compensation of € 1.25 million.

Facts

Mr Philip Smith commenced employment with RSA (one of Ireland's largest insurance providers) in 2006 and was promoted to the position of Group CEO in 2007. During the six-year period between 2007 and the termination of his employment, Mr Smith had been offered a number of promotional opportunities within the wider RSA Group, however he turned them down for family reasons.

In November 2013 Mr Smith along with two other senior officers were suspended (with pay) as part of an investigation by RSA into financial concerns relating to the large insurance claims process and motor claims within the organisation. It was alleged by RSA that between 2008 and 2013 there was a practice of under-reserving large losses, which had the effect of artificially improving RSA's business results. In August 2013, it transpired that the motor claim reserves needed to be increased by € 40,000,000 and there were concerns as to why this had not been identified earlier. During the investigation process, Mr Smith resigned from his role as CEO and subsequently claimed he was constructively dismissed in breach of the Unfair Dismissals Acts 1977-2014 (the 'UD Acts').

In summary, Mr Smith's claim was based on:

- the public way in which he was suspended;
- the content of a draft report sent by RSA to the Central Bank of Ireland (Financial Regulator); and
- the coupling together of difficulties with motor claims and separate issues relating to large insurance claims reserves as part of the investigation.

Judgment

Constructive Dismissal – 'Very High' Burden of Proof

Under the UD Acts, where an employee is dismissed by his employer, the onus is on the employer to demonstrate that the dismissal was fair. In a constructive dismissal claim however, the burden of proof is on the employee to demonstrate that his resignation was not voluntary but due to the employee's position becoming untenable and, as the Employment Appeals Tribunal ('EAT') noted, this burden "*is a very high one*".

The EAT confirmed that the test for a constructive dismissal claim is an 'and / or test' as follows:

- did the employer's conduct amount to a significant breach of the employee's contract of employment going to the root of the contract; and/or
- taking into account all of the circumstances, was it reasonable for the employee to terminate his or her contract of employment?

Investigation – Procedurally Flawed

The EAT accepted that procedures relating to an investigation or a disciplinary matter do "*not have to be perfect*". However, it considered whether any failings in the process could lead an employee to believe that the employer was merely "*paying lip service to the process in order to disguise its predetermined result, i.e. dismissal.*"

Confirming that Mr Smith was entitled to the principles of natural justice at an investigation stage, the EAT held that he was entitled to know the precise nature of the matters being investigated. It expressed concern that a letter inviting Mr Smith to a disciplinary meeting was not only sent prior to the finalisation of the investigation report but also contained findings which it would expect

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to see at the conclusion, and "*most definitely not at the beginning*" of the disciplinary process. The EAT also found that one of the investigators should not have been part of the investigation as he had previously been involved in related matters. Therefore, it was reasonable for Mr Smith to be concerned that he would not receive a fair hearing during the investigation.

Suspension

The EAT was highly critical of Mr Smith's suspension by RSA, which was announced on national television just moments after Mr Smith was informed. The decision of the EAT referred to examples set out in the recent High Court decision of Bank of Ireland – v – Reilly[1], where suspension by an employer might be justified:

- to prevent repetition of the conduct complained of;
- to prevent interference with evidence;
- to protect individuals at risk from such conduct; or
- to protect the employer's business and reputation.

In circumstances where prior to his suspension Mr Smith's licence (which was necessary for carrying out his role) was revoked, and he was advised to stay away from RSA premises and not to talk to colleagues about the on-going investigation, the EAT found that it was "*hard to understand why he was suspended when all the possible risks were covered*."

However, it was the manner in which Mr Smith was suspended that the EAT was most critical of, noting that the televised announcement was "*the equivalent to taking a sledge hammer to his reputation, to his prospects of ever securing employment in this industry again… and it sealed his fate with [RSA]*." The EAT found that Mr Smith's suspension was "*in fact a dismissal, disguised as a suspension*."

Failure to exhaust RSA's grievance procedure

The Workplace Relations Commission (previously the EAT) has issued a Code of Practice which states that employers should have a written grievance procedure in place and that a copy of this should be provided to employees at the start of their employment. Generally speaking, an employee must exhaust the employer's internal grievance procedure before resigning in order to be successful in a claim for constructive dismissal. Case law has shown that it is extremely difficult to prove that there was no other option but to terminate an employment relationship in circumstances where the employee did not attempt to resolve the difficulties at a local level through the employer's own grievance procedure.

In this case, Mr Smith did not raise a grievance in relation to RSA's conduct prior to his resignation and on that basis RSA argued that it was unreasonable for Mr Smith to resign when he did. Whilst accepting that an employee's resignation prior to exhaustion of the grievance procedure would "*generally*" be found by the EAT to be unreasonable, the EAT stated that "*each case must be assessed on its own facts*." In these circumstances, the EAT found that Mr Smith was entitled to believe his grievance would not receive a fair hearing and was therefore justified in not engaging RSA's grievance procedure.

Award of €1.25 million – Reflective of Reputational Damage

While the EAT accepted that Mr Smith was responsible for ensuring that practices such as RSA's reserve practice did not develop and continue, the practice was known for a long period of time by "*too many company employees to lay the blame solely at the feet of [Mr Smith]*." This fact contributed to Mr Smith being awarded € 1.25 million.

Commentary

In making the award, the EAT reiterated that the manner in which Mr Smith's suspension was publicly announced entirely destroyed his reputation and his prospects of securing employment in the industry again.

The most significant aspect of this case is the award of €1.25 million made by the EAT in favour of Mr Smith. The amount was the largest monetary award made by the EAT to date and represents close to the maximum award of two years' gross remuneration under the UD Acts. It is highly unusual for the EAT to award the maximum relief available and this case garnered widespread media coverage as a result.

The EAT has no jurisdiction under the UDA to make awards for reputational damage. As such awards made under the UDA are compensation for loss of earnings and are taxable in the normal course.

Following the case, RSA Group General Counsel Derek Walsh stated that RSA was "*astonished*" by the amount of the award made by the EAT, adding that the finding created "*a dangerous precedent*".

It is unclear as yet whether Mr Walsh's prediction will come true, however, it is unlikely. I believe the level of the award was based on the manner in which RSA acted, which actions the EAT deemed were prejudicial and highly inappropriate in the circumstances of the case. The RSA's actions also appear to have had a detrimental impact on Mr Smith seeking alternative employment within the industry. It is unlikely, in my opinion, that this type of award will become the norm in most unfair or constructive dismissal cases going forward.

RSA previously indicated its intention to appeal the EAT decision to the Circuit Court, however, on 12 January 2016 it was announced by RSA that the case had settled and that the appeal would not be going ahead.

1. EELC 2015/35.

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Unfortunately, the details of the settlement have not been made public.

Subject: unfair dismissal

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