

## Group Briefing

### October 2018

# The bar remains high for employees in constructive dismissal claims

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In both *Kaydee Cosmetics Limited v Elizabeth Blake* and *Cedarglade Limited v Tina Hliban*, the Labour Court upheld the decision of an Adjudicator Officer to dismiss complaints of constructive dismissal.

### BACKGROUND

In *Kaydee Cosmetics*, the Labour Court held that, while the behaviour of the respondent employer was imperfect and its actions at times were 'hamfisted', it fell 'short by a considerable distance' of the bar required for the complainant, a warehouse assistant, to succeed in a constructive dismissal claim.

In this case issues had arisen in course of the complainant's employment which led to the complainant being issued with an informal warning and then a written warning. The written warning was subsequently appealed successfully by the complainant. The complainant was then on a period of sick leave. Further, the respondent's business suffered a downturn and the complainant was laid off for a period. The complainant also raised various grievances which the respondent sought to address by way of a meeting but for various reasons no meeting was held to address the grievances before the complainant resigned. The Labour Court indicated that the key issue in this case was 'the Respondent's behaviour

towards [the Complainant] and not how the Complainant perceived it'. The Court concluded that it was 'satisfied that the Respondent's behaviour was at all times focused on repairing the relationship rather than oppressing the Complainant'.

In *Cedarglade Limited*, the complainant, a part-time sales assistant at the respondent supermarket, had resigned following an allegedly unfair disciplinary procedure. The respondent initiated its disciplinary procedure in light of allegations that the complainant's till had been short on a particular date and, arising from that disciplinary procedure, the Complainant was issued with a verbal warning. The complainant appealed this decision but the appeal had not been heard by the time the complainant resigned from her employment. The complainant alleged that the disciplinary procedure was fundamentally flawed, that she was bullied, harassed and traumatised by the respondent and that her health and well-being suffered significantly as a result. She alleged that she suffered panic attacks, had to attend her GP

and a psychologist regularly and was certified unfit to work due to stress for periods. In such circumstances, the complainant alleged that she had no option but to tender her resignation. The complainant's solicitor had made a formal data access request on the complainant's behalf on the same day the complainant tendered her resignation. The respondent responded by offering the complainant an opportunity to reconsider her resignation. The respondent's position was that the complainant had appealed her verbal warning and such appeal was to take place when she was fit to return to work. The respondent had not been afforded with an opportunity to address

the complainant's concerns by failing to utilise its grievance and/or anti-bullying/harassment policy.

### CONCLUSION

The Labour Court dismissed both appeals and reaffirmed the following principles in constructive dismissal cases:

1. Constructive dismissal arises in very limited circumstances and it requires either a fundamental breach of the contract of employment or oppressive behaviour on the part of the employer such that no reasonable person could be expected to tolerate it.
2. The onus of proof rests with the complainant to establish facts to prove that the actions of the respondent employer were such as to justify the complainant terminating his / her employment.
3. The conduct of both parties must be examined – if a complainant is seeking to invoke the reasonableness test, his/her conduct should also be reasonable.
4. A complainant's failure to make any complaint in relation his/her treatment prior to resignation is fatal to a claim of constructive dismissal.

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