

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD1324/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Ms A. Gaule
Ms. A. Moore

heard this claim at Dublin on 15th October 2007
and 24th January 2008
and 25th January 2008

Representation:

Claimant(s) Mr. Mervyn Hickey BL instructed by Mr. Fergal Dowling, Seamus Maguire & Co.,
Solicitors, 10 Main Street, Blanchardstown, Dublin 15

Respondent(s): Mr. Tom Mallon BL instructed by Ms. Lorraine Smyth, Solicitor BCM Hanby
Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Background

Counsel for the respondent outlined to the Tribunal that both the claimant and his colleague AC were employed by the respondent and one had longer service than the other. A matter arose between them and they engaged in a very serious physical altercation. There is a dispute about who started the altercation. Both the claimant and AC were injured, the claimant had a piece of his nose bitten off and AC did that to try and get away from him as the claimant had made a very severe grope on ACs' anatomy. Another employee in the vicinity did not see it; it was not possible to establish who initiated the altercation. Both the claimant and AC were dismissed as a result of the incident.

Respondent's Case

The administrator and director of the respondent company Sr. M told the Tribunal that the respondent provides care for people with intellectual disabilities. It provides services for people including long term residential and day services. People with disability come in for other parts of its services. It is one of the largest services in the Dublin area and it provides a village type environment and nine clients reside in each bungalow. The ethos of the respondent is that people with a disability contribute to society and are entitled to employment and supported employment. The centre has four hundred staff in total including nurses and occupational therapists. It has a unit for people with very challenging disabilities, severe autism and dual disabilities.

The maintenance department is part of the service. The maintenance personnel work in the bungalows with people with disabilities and undertake maintenance work on different projects. The residents undertake light duties and help maintenance staff. The claimant commenced work with the respondent in 1978.

27 October 2005 started out as an ordinary day for Sr. M. She had a meeting scheduled for 2.45p.m. with the senior nurse managers. Just as she was about to sit down with the assistant director of nursing she received a call from the maintenance manager JD. He told her that the claimant and a colleague AC were involved in a fight and that AC had bit the claimant. Sr. M and the CNM3 went to the scene of the incident and on the way she collected a frozen pack from the kitchen and the CNM3 collected dressings from the pharmacy. She believed that someone had been injured and she located the claimant in the workshop. It was apparent that the claimant had received a bite to his nose. The CNM3 asked the claimant if he knew where part of his nose was and he told her it was near the toilet. She asked JS to go to the pharmacy for a sterile bag, she went to the toilet and she got the tissue and placed it a sterile dressing. She then proceeded to assist the CNM3 in cleaning the nose area with sterile water. The CHM3 had contacted the hospital

She located AC in a very distressed state with his head in his hands in another workshop. She telephoned the HR director to ask what should be done regarding the situation. AC told her that the claimant taunted him and that he had received three head butts to the face, nose and jaw from the claimant. AC told her that the claimant had grabbed him by the testicles and said to him "you are no man". AC told her that he had lost it for one second and in self-defence AC bit the claimant on the nose. AC said that the claimant always wanted to put him behind bars. AC was distraught about having to tell his wife. Both the witness and CNM3 felt that AC should go to hospital. A.C's wife was contacted and she accompanied him to the hospital. Sr. M had no further involvement in the matter other than as a witness and an independent investigator interviewed her. She had worked with people with disabilities for thirty-five years and had different roles and titles. In the last eight years she was employed in an administrative role. The respondent's mission statement was the core values of respect dignity, justice in undertaking work with the most vulnerable people. The incident brought a service level to an all time low.

In cross-examination asked where she found the claimant's tissue from his nose she responded in the toilet bowl. As a nurse she would not send people to casualty unless she felt that someone needed to go. AC's wife accompanied him to hospital and it was a very difficult situation, AC was very upset and he complained of injuries. The claimant told the witness that he grabbed AC by the testicles and AC head butted him in self-defence. Asked if she had a view why he did this she replied she had no view on it, she knew it was a serious incident that she had to attend to. Very clear guidelines were in place and the respondent had to complete an accident report of the complaint. The best person to give an account was the person who had the accident. The claimant

had a serious injury and the priority was to ensure that that they got the tissue intact to hospital and get it sewn as quickly as possible. She did not observe any external injuries on the claimant. The respondent had a staff of four hundred and in it's dealing with people with challenging behaviours it had to treat people with dignity and respect and it had to uphold the core principals.

The second witness for the respondent, the clinical nurse manager (CNM3) at the time of the incident told the Tribunal that she now works in Limerick. On 21 October 2005 she was contacted by Sr. M, the administrator and manager and was informed that she was due to be at a meeting on 27 October. She was in attendance when Sr. M received a call from JD, that someone had been injured. She went to the pharmacy for gauze in case of bleeding and Sr. M went to get ice packs. She went to the workshop and AC was sitting on the ground. She asked AC if he was injured, there was no obvious sign of injury and he was very pale and upset. The claimant was injured and she noticed blood on his nose. She asked the claimant what happened to him and he told her that AC had bit his nose and that he was mad. She asked AC if he knew where the tissue was and he told her that he spat it down the toilet. She asked JD to go and get Sr. M and to get the tissue from the toilet. She applied the gauze to the claimant's nose and she contacted the hospital. JD and Sr. M retrieved the tissue and put in a plastic bag. The claimant was taken to hospital. Due to the injury that the claimant sustained there was a large amount of blood.

After the claimant had gone to hospital she went to the yard. AC was very upset and it took him twenty minutes to calm down. AC was concerned for his wife who was a nurse employed by the respondent. CNM3 told AC that he would need to go to hospital.

In cross-examination when asked in relation to the injuries to the claimant and AC she replied that she did not know what happened to AC and he was very distressed. The claimant had severe injuries but he was coherent and calm. The first discussion she had with AC was when the claimant left and she went to the workshop area. After her initial contact with the claimant she was of the opinion that he should go to casualty. CNM3 and Sr. M consulted about going to the accident and emergency department.

The third witness for the respondent PR told the Tribunal she had twenty-five years experience in HR in the Unites States. She was subcontracted to undertake an investigation on the incident, which occurred on 27 October 2005. She was given a note of what had take place. As part of her investigation she met the claimant, the claimant's colleague AC, Sr. M, and JD the maintenance manager. She reviewed the incident that took place and she concluded that serious damage was done to both the claimant and AC. The terms of reference were given to PR by the HR Officer. She provided the respondent with a report of the incident.

In cross-examination she stated that she had twenty-five years experience in HR. She had undertaken a number of external investigations. This was the most serious incident that she had investigated. Asked if she took into account matters other than established facts she replied it was based on the incident reports that were provided for her. A serious altercation took place and there were no witnesses as to what took place. She asked the claimant and AC if they had spoken to the HR director and they responded that they did not want to get anyone in trouble. The claimant said that AC started the altercation. She was asked to determine who had started it. The respondent wanted to take severe disciplinary action against both of them; she was unable to determine who started it. Asked that AC was agitated she replied she did not know. AC decided to stand up for himself and JD asked AC to work with the claimant. Asked that the supervisor, JD was of the view that the claimant and AC did not get on she replied yes. The investigation took some time complete and PFR had to return to the USA for the funeral of a family member. It was impossible

to tell who started the altercation and both the claimant and AC received injuries. Both the claimant and AC did not want to get anyone in trouble and both chose not to follow the grievance procedure.

The HR director told the Tribunal that she was informed that an incident had taken place. She knew the claimant and his colleague to see. She drew up the Terms of Reference and she appointed PR to investigate the matter. The claimant and his colleague MS were suspended with full pay. Both AC and the claimant attended a disciplinary hearing and both had representation. Both the claimant and AC provided submissions to her and she decided that they should be dismissed. She sent a letter to the claimant on 10 July 2006 in which she informed him that he was dismissed. The claimant was informed that he could appeal the decision within seven working days. Dismissal was appropriate as the finding of the incident was gross misconduct. Both the claimant and his colleague AC admitted assault and both agreed that it was inappropriate behaviour. Both assaulted each other in self-defence, if one person were identified as starting the altercation it would be retaliation and a reaction to it.

In cross-examination the HR director stated that the respondent did not always use an independent investigator and it had used consultants previously. She accepted that the independent investigation PR was unable to conclude on the circumstances of the physical altercation. The respondent based its finding on the report of the independent consultant. It was solely on the incident of 27 October that she made her decision. Both the claimant and AC engaged in an altercation in the work place, which resulted in a serious physical assault. What happened between the claimant and AC was unacceptable. Both admitted it was in self-defence, there was no reason for this type of conduct to be allowed and when someone was injured it was never acceptable. She stated that two people fighting in a workplace was gross misconduct and both admitted to assaulting each other. She listened to what the claimant and AC said and they both admitted to assaulting each other. She was not aware that the claimant and AC did not get on but there was only so much an employer could do. She based her decision on the assault, which occurred. If they had invoked the grievance procedure the incident may not have occurred. Asked if she did not take the grievance procedure into account in dismissing the claimant and AC she replied partly. Asked if she was aware that informal contact was made with the supervisor JD regarding the situation she replied no. Asked if she was aware of a separate issue investigation with JD she replied no.

Asked how the claimant was supposed to react to AC she replied that she was not in a position to say how he should have reacted and the reaction was unacceptable. Asked if self-defence was equitable with gross misconduct she replied it was the level of self-defence. Dismissal was not a sanction that the respondent took lightly. She looked at penalties such as transfer and gross misconduct was a dismissible offence and there were no alternatives. Asked in relation to the procedure she replied that she would say that the claimant was aware of how he could submit a grievance. She was not sure when the grievance procedures were issued. Both the claimant and his colleague asked for representation. Asked if it was fair that the claimant was suspended on 14 December and dismissed on 10 July she replied that he was suspended on full pay and circumstances after that delayed the report. She could not say if the claimant had received the disciplinary procedure prior to February 2006.

On 21 July the appeal was heard and it was not upheld. Under the company policy the claimant could not confront the accuser. Asked if the process would have facilitated the version of events, which was the most credible, she replied that was not under the policy and procedures. She stated that she knew enough to dismiss the claimant and AC.

Claimant's Case

The claimant told the Tribunal he was employed with the respondent for twenty-seven years. He was sixty-four when he was dismissed. The claimant stated that a gunterer was a fellow who does bad work. The only altercation he was ever involved in was with AC. He was never subject to disciplinary measures during his twenty-seven years of employment. He did not talk to AC for years and he made the decision that AC was best left alone. The last conversation he had with AC was two to three years ago. On the 27 October 2005 he was in the back of the school and he needed to get more timber. He was working with KD at this time. AC was not working with him on the 27 October 2005, he was in the main house and AC was in the back of the school. He went to the yard to go to the toilet and AC was in the yard. The claimant was first to the toilet and AC followed him and called him a scumbag. AC grabbed him by the two cheeks and said to the claimant "hit me now." The claimant pushed him away and AC grabbed him in a headlock and the claimant grabbed AC by the testicles. The claimant was facing him. He could not push AC away as his head was in his arms and he could not have stopped him any other way. He did not headbutt AC and AC bit his nose and AC called the foreman.

He knew that AC had reported him on two or three occasions. JD the supervisor told the claimant that he had to talk to AC or that he would be of no help to him. He stated that he wound up the claimant. On one occasion AC asked him how he could go on two to three holidays a year and he told AC to get an old woman and marry her and he wound AC up like that. The CNM3 and Sr. M treated his nose. He was suspended on 19 November. He asked the HR director DG for a letter for a counsellor. The claimant went to a solicitor and then changed to a different solicitor as the one that he went to do not seem to be doing anything for him. After a couple of weeks he made a decision to go elsewhere.

He stated that some of the items in the report that PR undertook were inaccurate. He felt that it was unfair that time had elapsed before he made a statement to PR. He was concerned about PR's interview with him and she did not have anyone to take minutes. He was never given a copy of the grievance procedure. He wanted to clear his name. After he was dismissed he sought alternative employment in various locations but he was informed that there was no work available.

In cross-examination asked if he was represented at all times by EB he replied once. He agreed that JD told him that he would have to talk to AC and he did not taunt AC. He was not employed as a carpenter and AC was a carpenter. He did not call AC a gunterer. Asked if AC called him a qualified carpenter he replied that AC called him a scumbag. The claimant called AC a shit stirrer after he called him a scumbag. Asked if he ever taunted AC he replied that he told AC he should meet an older lady to marry. This winding up took place two to three years prior to the incident-taking place. Asked why AC called him a gunterer he replied he did not know. After the incident occurred AC told him to go to a solicitor. He reported AC to the Gardai, a case was brought before the Court and was dismissed. Both the claimant and AC gave evidence at the Court and the claimant did not sue AC for personal injuries. Asked if he was a carpenter he replied he was a woodworker by trade.

GG told the Tribunal that that JD was brought in to work as a member of the crew in or around 1983 and he was promoted to maintenance supervisor. There was a huge upheaval in the late 80's and 90's. He was aware that there was general slagging between AC and the claimant. Everyone was aware of this including the witness and Sr. M was not there. Bullying would not have been reported and it was glossed over as slagging.

In cross-examination he stated that he had a good working relationship with all his staff. Asked if the claimant spoke to him about issues in work he replied that the claimant could be asked to go and work elsewhere when other staff could have done so.

Determination

Having considered all of the evidence the Tribunal are of the view that while there appears to have been complaints made about the claimant and his treatment of his colleague AC no proper investigation was ever carried out to deal with these issues by the respondent. Given that the investigation surrounding the assault incident was limited to the particular incident and that cognisance was not taken of the background circumstances and history surrounding that incident, it placed the investigative officer in an invidious position of not being able to come to a conclusion one way or the other based on all of the history and background. As a result the investigation was carried out in a vacuum and in an improper and unfair manner. Therefore the claimant was unfairly dismissed.

Even though the claimant's loss would be in the region of €35,000 given the nature of the workplace and the inappropriateness of the behaviour in itself the Tribunal awards the claimant the amount of €28,000 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

