

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

MN443/2006

UD670/2006

WT215/2006

against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath BL

Members: Mr. G. McAuliffe
Mr. S. Mackell

heard this claim at Dublin on 14th February 2007
and 9th May 2007

Representation:

Claimant(s): Mr. Tom Hogan BL (14th February 2007) and Mr. Conor Bowman BL (9th May 2007)
Instructed by: Mr. Joseph Burke, McCartan & Burke, Solicitors, Iceland House,
Arran Court, Smithfield, Dublin 7

Respondent(s) : Mr. Marcus Dowling BL instructed by:
Arthur O'Hagan, Solicitors, Charlemont Exchange, Charlemont Street,
Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

Giving evidence, the claimant said that on 13 October 2003 she commenced employment with a rest centre for visually impaired men (hereafter referred to as the respondent). It was run by a religious order. She was a care assistant. After a year she got a contract. She signed it in mid-September 2004. She did not think that the contract had a grievance procedure. She was never given any grievance procedure. She was never given an employee handbook. In fact, she was never given anything besides the contract. The day before she left she did a health and safety course. She got no other training. For example, she got no training for dealing with residents.

Asked who had run the respondent, the claimant named a priest (Fr. M) as holding the position of director and a lady (AJ) who “was below him”. There was a staff of about twenty. This included nurses, carers, cleaners and kitchen staff.

The claimant did a number of duties. She bathed men and assisted them at meals. She brought them to the shops and to church. She made beds and cleaned toilets. In doing these general duties she spent time with them and cared for their needs. There were seventeen to twenty residents. Some might come for respite care. They were all elderly men.

Staff changed. At first the claimant reported to the abovementioned AJ (who held the post of matron). Then the claimant reported to each of two other ladies. After initially receiving instructions from AJ the claimant started to use her own initiative. She knew her own routine by then. Residents were free to come and go. They were mobile.

Asked how she had found the job when she started, the claimant said that it had seemed fine. It was her first time to work in a residential unit but she adapted to it. She got on well with the residents.

One of the residents gave a lot of problems. The claimant thought that this started in the winter of her first year but she was not sure exactly when. He would go out at 7.30 p.m.. She would walk him to the door. He would say good night.

Then it would be good night and a kiss. Then there would be “more body language”. Then he would be “leaning in on” her. He did it in front of a camera. That surprised her. She shrugged it off. He started to try to kiss her on the cheek. He was in his late sixties. She told him that she would get her boyfriend to “sort” him out. He did not say anything in response.

This went on for the winter. Some nights this resident ignored the claimant. Other nights he did not. The claimant told a cleaner what this man was doing. The cleaner told her not to mind him. As time went on the claimant confided more in the cleaner. Everyone in the house seemed to accept the way this man behaved.

The claimant discussed this resident with the kitchen staff. She and the kitchen staff “sort of” worked together”. They “sort of” knew what was going on. There were comments from the resident about personal things such as tax on the claimant’s car et cetera. The claimant told all of the kitchen staff about this. She gave their names to the Tribunal.

The kitchen staff told the claimant that the man in question would never change and just to ignore him. They said that he had done this to other girls and that he was like that. AJ was the matron. This was winter 2004. The claimant did not tell AJ. The claimant “just thought that was the way things were”.

The resident’s behaviour “went away for a while” after the claimant mentioned her boyfriend. Then he changed his tactics. It was little things. He would be at the window when the claimant drove up. He waved. First she waved back. Then she stopped. “Accidentally on purpose” he would meet her in the hall. He would ask her why she would not greet him back. Then he stopped knocking on the window. He would follow her around the house. He would be there at 7.45 a.m.. He stared at her. She ignored this. He would ask her questions just to communicate with her. He would try to be near her for the shaking of hands at Mass. She could feel his eyes “burning” into the back of her. She stopped going to Mass.

Asked if she had thought of making a complaint, the claimant said that she had not and that, any time it stopped, she thought it was over. Then it would start again. She told the Tribunal: “ I wondered if it was me. They were all little things. I did not complain to the matron. I was not the only one it was

happening to. He did it to others. Things happened to others that did not happen to me.”

The claimant told the Tribunal that this man could be unclothed when other girls went up the stairs. She herself had never seen him unclothed. She named other girls who had. These girls refused to go upstairs. At first the claimant had to go upstairs on Sunday mornings to make beds. She did it while all the residents were in the dining-hall.

The problems stopped for a while. Summer came. The claimant could not recall which one. The resident would be standing on the road at 7.40 a.m.. She would be the only one coming at that time. Then that stopped. Then problems started again. The residents would have tea after Mass. The man in question would look for a half-glass of milk and a banana. He would want the claimant to wait on him.

The said resident would ask to go to the shops for the claimant but would not give change. Then the claimant stopped this.

The resident listened to the claimant’s phone conversations even when they were personal calls.

Recounting what she described as the last incident, the claimant told of a morning around Valentine’s Day when the resident went to breakfast earlier than he should. He was there hanging around at 7.40 a.m.. She knew that the claimant was waiting for the bell to go. He had been asking her about suspenders for two weeks. The claimant would often shop for men who had no family. The resident asked the claimant if she knew where one would get suspenders. She said: “God, no!” She thought nothing of it. He asked again. She named two department stores as places where suspenders could possibly be got. After two weeks she realised that he meant something else and she told him to “f*** off”. He had asked around a hundred times about suspenders. She just ignored him.

On Valentine’s Day the resident showed the claimant a newspaper picture of a female television star naked with her arms over her chest. The resident brought the claimant to a table which no-one used. He asked her what she thought of the said television star. She just told him to “f*** off” and to “get away” from her. She went to the toilet. When she came out he would not leave her alone. He had left a pair of suspenders on her locker. The girls asked if they should tell the new matron. The claimant felt comfortable talking to the girls about this because they had seen the resident unclothed. She told them that she would talk to the matron. She went that day or the next morning.

The claimant went into the office and asked for her old shift back. She had been given a new shift after someone left. The matron told the claimant that she could have her old shift back. The claimant said that the resident had been annoying her and that she would choke him with suspenders if he kept treating her like that. The claimant said that she was sick of him. She just left the room. That was “the whole thing”. This was the only formal complaint that the claimant made.

The next day the claimant was off. She had to go in for an hour for “health and safety policy stuff”. She went to a doctor who said either to leave or to write a letter to her boss. A friend suggested seeing a solicitor who said that he would write to the respondent. He was very busy. It did not get there on time. She did not send the letter personally.

The claimant told the Tribunal that a person on duty at the respondent home would have to do a report on matters such as whether or not the residents got up in the night to go to the toilet or to put in eye drops. The Tribunal was furnished with a copy of a record dated 15 February 2006 in which the claimant wrote of the abovementioned resident: “A bit cheeky to myself” and “VERY RUDE”. When asked if this was the only entry she ever made about this resident, the claimant replied: “That I recall.” Asked why she had not made another complaint, she said that “maybe” she “could not put it into words”, that she “did not think it would make a difference”, that she “did not want to come back” and that she “just wanted to put something in the book”. She “added it in on the Sunday” half an hour

before she left. She was going on ten days' holidays that Sunday.

Asked about her use of the phrase "good form" in recordkeeping, the claimant said that this was "a common thing written about many men". She acknowledged that the only formal attempt she made to inform her matron was in one conversation. Asked why she had not said more before, the claimant said: "I don't know. Maybe I just wanted to keep my job."

The claimant told the Tribunal that, after she left, the matron rang her and said: "You're due back today. Have you forgotten?" The claimant told the matron that she (the matron) should have received a letter by then. They were on the phone for twenty minutes. The matron understood why the claimant left and said that she had not known that it was that bad. The claimant placed herself under the care of a doctor.

A psychologist the claimant was referred to by the claimant's representative gave evidence. She met with the claimant on May 8th 2006. The claimant told the witness of an incident that was "the straw that broke the camel's back" and that she, the claimant, had "lost it". The claimant had complained to her supervisor, the matron. The claimant had had problems in the past with this person but these problems had been sorted out.

The witness told the Tribunal that the claimant was very stressed. When asked, the witness said that it would have been very difficult for the claimant to put her complaints in writing. She felt that the Manager should have come back to the claimant to discuss her difficulties.

When asked by the Tribunal the witness said that it was not unusual for a person's General Practitioner to advise their patients to put any problems they have in writing.

Respondent's Case:

The claimant's supervisor and matron of the respondent's premises gave evidence.

She said that the claimant had informed her of the "suspenders" incident with a male resident sometime before February 15th 2006. The witness said that she did not think it was a formal complaint, if she had, she would have dealt with it. When asked, she said that, at the time, there was no employee handbook but there had been a safety statement.

On cross-examination the witness stated that she had been on duty on February 15th 2006 as they were short staffed. She read the carer's book and noted the claimant's note concerning a male resident. She located the claimant and asked what she, the claimant, meant by the phrase "cheeky". The claimant replied that she had dealt with it. The claimant later came to the office and brought up the issue of her shifts and the fact she wanted to return to working those hours.

When asked, the witness said there had been another complaint from another female member of staff concerning this same male resident. The witness investigated the matter and the resident named apologised to the staff member. When asked, the witness said she was not aware of any other incidents with this male resident.

The witness stated that she was in college the day the claimant had not arrived for work but had been informed by a colleague by telephone. She contacted the claimant and was told that she, the claimant, was sick of being harassed by a certain male resident. The witness asked why she had not been informed but the claimant replied she, the witness, was too busy. She asked the claimant to come to the respondent's premises to discuss the matter but the claimant said that she would submit a

letter. A solicitor's letter on behalf of the claimant was received on March 14th 2006, which the respondent's solicitor dealt with.

When asked, the witness said that she had investigated the claimant's complaints and spoke to the male resident named. He was very distraught and denied the matter.

Determination:

The Tribunal has carefully listened to the evidence adduced. The claimant was clearly having difficulties with one of the patients. The respondent does not deny that incidents occurred and that they were capable of being interpreted as harassment.

This is a constructive dismissal which means the onus is on the claimant to show that her place of employment has become a place wherein she cannot be expected to function

On her evidence the claimant was clearly very distressed with the situation. However, did she make her situation known to her employer such that her employer could have acted to protect her interests?

In the past her difficulties with other personnel had resulted in a formal written complaint, investigated and resolved. It is unclear why this approach was not taken once again. Ultimately the claimant seems to have made a verbal complaint to her immediate superior in the course of a conversation about a more mundane matter, shift work. The Tribunal on balance accepts that a complaint was made in the course of the meeting on the 15th of February. The complaint may not have been as forceful as a written complaint and may even have been made on the spur of the moment but the Tribunal cannot accept that the claimant's superior was not alerted to the fact that a situation now existed. Further this situation subjectively made the claimant's place of employment a very uncomfortable place to be.

The Tribunal cannot accept that the first inkling the respondent had was a telephone conversation made two weeks later when the respondents rep looking for her.

On balance the Tribunal finds in favour of the claimant. However the Tribunal does find that the claimant failed to formally make a complaint either to the immediate supervisor or the priest in charge. She did not afford her employer the opportunity of rectifying or changing the workplace. What is clear is that the claimant was a valuable and hard working employee and with more communication perhaps the difficulties could have been resolved.

The Tribunal awards the sum of €3,500.00 under the Unfair Dismissals Acts, 1977 to 2001.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 was dismissed. No evidence was adduced in respect of the claim under the Organisation of Working Time Acts, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)