

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee

Case No.
UD1165/2006
MN762/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Mr. J. Killian
Mr. D. McEvoy

heard this claim at Waterford on 14th November 2007

Representation:

Claimant: Mr. John P.D. Purcell, Purcell Cullen Kennedy, Solicitors,
21 Parnell Street, Waterford

Mr. Walter Cullen, UNITE, Keyzer Street, Waterford

Respondent: Ms. Deirdre Gavin, IR/HR Executive, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Evidence was heard on behalf of the respondent from the Project Leader, the Regional Administrator and the National Director of Operations. The evidence was that the claimant had been employed by the respondent for eighteen years as an attendant at XXXX in Waterford. This is a hostel for homeless men.

The incident occurred when there were approximately twenty-five residents in the hostel and two attendants on duty. It emerged from the evidence that the claimant had been involved in a physical altercation with one of the service users in the hostel on the night of the 23 August 2006. After the incident it emerged that the claimant had gone home after the incident occurred, and was contacted the following morning by the Hostel Manager. The Hostel Manager seems to have played a central part in the entire matter and the Tribunal unfortunately did not have the benefit of any evidence from her. However, it would appear that the Manager suspended the claimant for the purposes of conducting an investigation into the incident that had occurred.

The investigation was carried out by the Manager and the Project Leader, who having interviewed the injured party, the claimant and the claimant's colleague who was on duty with the claimant on the night of the incident concluded as follows:

“It is clear that some form of aggression was displayed by the service user as is referred to by both the claimant and his colleague, however, given the training that the claimant had received and the procedures that should have been followed by the claimant in such an incident, the manner in which he handled the matter was totally unacceptable.

We find that the claimant subjected the service user of the Society to a physical assault and deem this behaviour gross misconduct under the terms of the Society's Disciplinary Procedure.

The claimant will be summarily dismissed from his position with the XXXX

The Tribunal was told that this report was placed before a meeting of the Regional Board of Management and the dismissal was ratified and the claimant notified on the 21 September 2006 that his employment was terminated with immediate effect. He was advised that he was entitled to appeal and undertook an appeal, which was considered, by the National Director of Operations and the Society's Human Resources Specialist and they upheld the decision of the Board Of Management to terminate the claimant's employment.

Determination:

Evidence was given on behalf of the claimant by himself and by his colleague on the night of the incident. The evidence suggests that on the night of the incident the service user was in an intoxicated state and after an earlier verbal altercation with the claimant and his colleague, came in an agitated state to the office where they were working. Precisely what occurred thereafter is difficult to determine but it is clear that a physical altercation took place between the claimant and the service user and the service user appears to have suffered some minor injuries in the said altercation. The claimant was quite frank in his evidence in relation to the nature of the altercation and it appears that he may have used somewhat more force than was necessary, however the Tribunal is satisfied that the use of a certain amount of force was necessary on the occasion as the service user presented a physical threat to the claimant and to his colleague, and the claimant had only a matter of seconds to decide in how to deal with the situation that presented itself.

In all the circumstances the Tribunal finds that the respondent in investigating the complaint did not place enough weight or emphasis on the physical threat that was presented to the claimant on the night, and finds it difficult to characterise what occurred as gross misconduct. The Tribunal also finds that the penalty recommended and ultimately imposed by them and later ratified by the Board of Management and by the Appeals Board was an excessive sanction in all the circumstances. Consequently, the Tribunal finds that the claimant was unfairly dismissed. The Tribunal finds

however that in using excessive force the claimant to some extent contributed to the situation in that on the night in question he, in his own words, “lost it.”

It is noted that the claimant obtained new employment within four weeks of his dismissal and consequently the Tribunal finds that compensation is the most appropriate remedy in this case and makes an award as follows: the Tribunal awards the claimant the sum of €1000.00 in respect of his claim under the Unfair Dismissals Acts, 1977 to 2001. The Tribunal awards the claimant €3,635.12 being the equivalent of eight weeks gross wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, making a total award of €4,635.12.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)