

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
Employee

CASE NO.  
UD454/2007

Against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr B. Garvey BL

Members: Mr J. Goulding  
Mr. N. Broughall

heard this claim at Dublin on 23rd November 2007  
and 26th November 2007

Representation:

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Claimant(s): Mr. Conor Bowman BL instructed by Mr. Joseph Burke, McCartan & Burke,  
Solicitors, Iceland House, Arran Court, Smithfield, Dublin 7

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

The determination of the Tribunal was as follows:-

### Background

**Counsel for the claimant** outlined to the Tribunal that the claimant commenced employment with the respondent in November 2001. An incident occurred on 5/6 November 2006 while the claimant supervised a visit to a child (hereinafter referred to A). The claimant allowed two extra individuals to visit A. The decision was a reversal of practice. Two people were allowed visit A. The claimant was told that she would have to account for her decision. She was asked by CW the director to furnish a statement. The claimant went to the meeting knowing that this could result in a disciplinary meeting. She prepared a statement of what had occurred. It was indicated by CW the director of the centre that there would be a communication in writing to the claimant. The shop steward SM was contacted by telephone and informed that CW had taken the decision to dismiss the claimant. The shop steward SM was to meet with CW who was willing to deal with the matter. The only option the claimant had was that she could resign and a deal was hammered out which indicated that the claimant would be paid until Christmas, and given a reference and €1000 towards her studies. The claimant had to resign under these terms by 5 o'clock on Friday or be summarily dismissed. The claimant contacted her husband and she had to make a decision. The claimant decided that resignation was the lesser of the two evils and the claimant wrote a

letter of resignation. She received a response to the letter on 13 November from CW. On 28 November 2006 representation was made on behalf of the union. The claimant was constructively dismissed and the option given was resignation and the claimant who was in an invidious position had no option but to resign.

**Counsel for the respondent** outlined to the Tribunal that a very serious incident occurred. The claimant was in breach of a decision and allowed two extra individuals in to visit. By letting in these two extra individuals who could have brought anything in the claimant could have exposed staff to a very serious situation. This was not some minor decision. The claimant made a conscious decision to overturn a team decision. The claimant asked who the two extra individuals were and she was informed that one was A's cousin and the other the cousin's girlfriend. The visit went ahead and two extra individuals were allowed in. The claimant was requested to attend an investigative meeting. Trade union business was conducted in the centre following off the record talks by the unions and HR. No deal was done in advance of the meeting. The claimant resigned and the claimant did not appeal against anything. On 13 November CW the director wrote to the claimant. On 16 November three days later the claimant looked for a reference. On 28 November the director CW wrote to the claimant. On 7 December a letter issued to the claimant. This was a very serious incident and led to without prejudice discussions. If the claimant and the trade union misinterpreted the respondent could not be held responsible. The claimant resigned and was paid until the end of the year. The respondent did its part of the deal and the claimant never resiled from this.

### **Claimant's Case**

The claimant told the Tribunal that she commenced work with the respondent in November 2001. She was a childcare worker and was responsible for children between twelve and eighteen years old. The respondent was a detention centre and as far as she was aware it used to be run by the Department of Education and that has now changed to the Department of Justice. She relayed an incident, which occurred on 5 November 2006. A visit commenced at 7p.m. to one of the residents hereinafter referred to as A. A's two aunts arrived accompanied by two other individuals. A hand over took place at 2p.m. each day and a decision was made regarding who would visit. Four people arrived at the door, two aunts and two younger individuals. She knew one of the aunts very well and the two individuals who she did not know remained in the reception area. The two aunts were brought down to see A. TS an employee had supervised a visit earlier that day and the claimant told him that he could go play football with the children. The claimant engaged with the two extra individuals and ten minutes into the visit one of the aunts asked the claimant if there was any chance that she would allow the other two extra individuals in as they had brought the aunts to the centre. Apparently one of the individuals was A's cousin. The claimant allowed the two extra individuals into the centre under certain conditions for a few minutes. She asked the two extra individuals if they had any contraband on them and they responded no. It was a worry as drugs could be brought in. A was not high risk and visitors were not searched. A was never left alone during the visit and tea was brought in for him. One of the two extra individuals asked the claimant for permission to use the toilet and the claimant showed him to the bathroom in the hallway. She told A that he could not go to the bathroom in the hall and he came back. She wanted to get the two extra individuals off the premises as quickly as possible. She asked SO'N, an employee about A's pocket money and he did not know where it was. She went to get A's pocket money and returned shortly and she gave the money to A's aunt. Then A and his aunt M went for a smoke, they were supervised by SO'N. It was a very busy evening and there was a lot going on. The visit started at 7p.m. and concluded at 7.45p.m.

She then did a towel search of A which meant that a child had a towel wrapped around his waste and jumped up and down to ensure that he had nothing on him. She took every single cigarette out of the box, that was standard procedure and she was very thorough in her searches. When the search was being undertaken A was in the hallway. Things change very fast and one can never decide for all events. The previous week visitors reported at the door unannounced and staff did not know whether to let them in. The manager told her to phone A's grandmother who was the legal guardian. No drugs were found after the visit. The claimant ensured that nothing was brought in during the visit to A.

The claimant reported for work on Tuesday 7 November at 8a.m, she went to her unit and the co-ordinator was not available. EB deputy director came on to the floor, he asked her to go downstairs, and have breakfast and then requested her to go home. She asked EB could they discuss the matter and he told her to go home and that she would get a letter, he asked her to document what had occurred. She left the premises and wrote a report of the events. She then received a letter, which indicated that the incident could result in a disciplinary meeting. The deputy director sent the letter to the claimant on 7 November. The letter was sent by swift post and she was quite upset. The claimant telephoned two shop stewards LC and SM and told them about the situation. She told them a meeting was arranged and they told her they would look into the matter. One of the shop stewards, LC told the claimant that she spoke to EB, the deputy director and that she the claimant was not going to lose her job. The sanction that was going to be imposed was a final written warning or work on nights and the claimant was delighted. The claimant never had a mark on her record. She telephoned SM for clarification and he told her that she was not going to be dismissed, it was either a final written warning or work on nights. Prior to contacting LC the claimant discussed the matter with her husband. She stated that if it was a final written warning it was the lesser of two evils, she had a nine-year-old son. She telephoned a member of her family and friends and she told the team. She attended a meeting with CW, the director, EB, deputy director and both shop stewards and MM who took the minutes. She gave all attendees a copy of her report of the incident; her report was not read out at the meeting. CW shoved the claimant's report aside and CW asked her questions. The claimant was not given a report at the meeting and the first time that she saw a report by SO'N was at the tribunal hearing. She was told five times of the grave concerns and that it was gross misconduct and nothing was mentioned about a warning. The final remark that CW made to the claimant was to expect a letter.

The claimant and the shop stewards were not given the opportunity to talk about the deal at the meeting. She did not receive correspondence from CW requesting the claimant's version of events. CW accused her of leaving a child alone but she never left a child alone. CW did not hear her version of events and there was no exchange of views at the meeting. After the meeting the claimant was devastated. She expected another meeting to be arranged to talk about the deal, as PB the branch secretary of the union was not present at the meeting. The shop stewards informed her that the situation looked very black, she expected a slap on the wrist. She put her hands up and the meeting took a different direction than what she expected. She knew that the situation was serious when the meeting concluded. The claimant was not allowed back to work. All day Friday her telephone rang, the shop steward SM told her that she was dismissed and that CW wanted her gone. She received a call from CW requesting her to come in and discuss her future. CW told the claimant she had made a decision and SM told her that CW wanted her resignation by 5p.m on Friday. The claimant told SM that she could not afford to give up her job. The claimant resigned and was informed that she would be paid up to the end of December 2006. CW told her that she would pay for her college fees until the end of the year. The claimant was in shock. A hand over meeting was due to take place at 3p.m. and there were many staff present. The claimant telephoned the staff and she told one of her colleagues that she

was dismissed.

The claimant's husband told her not to resign, she earned €64,000 per year, she had twenty five years experience in child care, she was good at her job and got on very well with the children. She stated that there are presently no permanent jobs in childcare. She could not obtain legal advice at 3p.m on a Friday and she could not afford not to accept money. She had a deadline to resign by 5p.m. and she e-mailed a letter of resignation to CW. She received €1,000 towards the cost of her course that she was pursuing and was paid up until New Years Eve.

She obtained alternative employment in February 2007 for which she receives €38,000 per year and her salary has decreased considerably. This is a relief position and her hours of work vary each week. Her additional voluntary contributions have ceased.

In cross-examination the claimant stated she had twenty-four years experience in childcare. She was not a qualified nurse. She worked in Canada and obtained experience. The Courts would contact the respondent and then send a child to the respondent for assessment or remand. The Courts had a direct involvement as to who would be detained. The issues that the children had related to discipline and violence. The ratio of staff to clients varied on a regular basis. The centre has three separate units, and six to seven beds in each unit. Five staff were employed to look after six children. When asked if it was fair to say that direct care staff were employed on a one to one ratio she responded it varied. Three shifts were in operation at morning, noon and night. The hand over took place at 2p.m. and 6.45p.m. All care staff attended the hand over and problems were identified at the hand over. The reason a visit could be refused was due to difficulties in the relationship and if it was not in the best interest of the child. The visitor could be carrying contraband, such as weapons or narcotics. The problem was that A did not satisfy the authorities that he knew the name of his cousin. A's mother said it was a cousin and she was not sure of the name. When asked if she had reserved the right to overrule the team decision she responded that decisions were often changed. When asked if it was a valid reason for admitting two extra individuals she responded yes.

When asked if she stated that a number of staff were not aware of her decision she responded TK an employee came back and was on the floor. He was a full time employee and she sent TS, an employee away. She asked SO'N an employee who had only taken up employment with the respondent to go upstairs and get the money which A requested. SO'N did not know where the money was and the claimant then went and got the money. It was put to her that she decided to alter the decision and have two staff present and that she spoke to SO'N about her suspicion, she responded that she was suspicious but she could not recall discussing the matter with SO'N. When asked if two employees supervised four visitors she responded other people were present. The claimant did not supervise the visit. She was suspicious of the two extra individuals and wanted them off the premises. She agreed that she should not have allowed the two extra individuals in. A was escorted upstairs and the claimant was aware that she had done wrong. When asked why she did not pull the pit she responded that everyone came to assist if a child was hurt. When asked that she breached every rule regarding the visit she responded that no drugs were found. EB the deputy director suggested that the claimant should prepare a statement of the incident for the meeting and she complied.

She could not recall the first time she spoke to SM the shop steward and LC told her that she was not going to be dismissed. LC did not tell her that he had reached an agreement. She reiterated that both the shop stewards LC and SM told her she would return to work on nights and receive a final written warning. At the meeting the claimant did not mention anything about a deal, CW made a

reference to gross misconduct. The deal was not raised by either the claimant or the shop stewards at the meeting. After the meeting she knew that the matter was serious. Both the shop stewards told her that the situation looked black. The claimant asked them what about the agreement. She then knew that CW had made up her mind. Asked if she went back to see CW she responded no. SM told the claimant that he would contact PB from the union and the claimant contacted PB after the event. The next day at 3p.m. SM telephoned the claimant and told her that she was dismissed and that CW wanted her gone. When asked if she had a dislike of CW she responded that you are not going to like someone if they sack you. Asked if the deal was that if she resigned she would be paid until Christmas she responded no, that she would expect to hear from CW and she was forced to resign. She e-mailed her resignation to CW within twenty-five minutes and CW reneged on the first agreement. When asked if she resigned by 5p.m. that she would get certain benefits she responded she was gone anyway. Asked what the benefits consisted of she stated that she received a reference from the respondent, was paid until 31 December and her college fees were paid. She knew that if she did not resign that she would leave with nothing.

CW wanted her out due to the incident. She relayed to her team that she trusted SM one hundred per cent. When asked if she sought to withdraw her resignation and if she contacted PB, union representative she responded that she telephoned SM. She did not see the letter that PB wrote to CW on 14 November. She went to SM and she was forced to give in her resignation. On 16 January she sent a letter to CW in which she requested a written reference. She cashed a cheque for €1000 as she needed it for her studies.

When asked about the letter dated 28 November 2006 in which CW made reference to the fact that representation was made on behalf of the claimant by her union and why she did not say this was a lie she responded she did not. When asked why she did not tell her employer she would see her in court and that she had reneged on the deal she responded she needed the money and she was treated unfairly. She did not apply for jobs until February 2007 and she is in a position to take up full time employment.

In re-examination when asked why PB the union representative was not at the meeting she responded that it was the only meeting she was called to and he would normally be present if there was a problem. There was no specific policy regarding visits. The grievance procedure was not invoked at any stage and there was no grievance procedure in place. If she did not resign she would be dismissed. When asked why she did not write a snotty letter she responded that it was not polite or nice.

In answer to questions from the Tribunal when asked if she was not aware of any grievance procedure she responded that she never spoke to her line manager. A grievance initially went through the line manager and then to the deputy director. When asked if she was aware of disciplinary procedures used against an employee previously she responded that one employee attended a meeting with CW and EB and the claimant knew that it was a situation similar to her own. This individual was asked to resign but would not do so and she won her case. When asked if this individual was at a disciplinary hearing she responded that she was not fully aware. When asked in November 2006 why she did not do something about the situation earlier she responded she had to get on with her life. She had to find a job, she was upset, and she knew she had six months to file a claim. When asked if she was told at the meeting on 9 November that she was going to be dismissed she responded no and she was not given a warning. She did not get the minutes of the meeting until four to five weeks ago. She was not told that it was likely she would be dismissed. She felt that the purpose of the meeting on 9 November was to find out what had occurred on the previous Sunday. When asked why LC and SM were in attendance at the meeting

she responded they were there as the union representatives. When asked should PB not have been present at the meeting she responded it was after the meeting with CW, LC and SM. She believed CW remarked to SM after the meeting why PB was not present. The shop stewards represented the claimant in their capacity as union representatives. She asked the shop stewards about the agreement and SM responded that nothing had happened and it was not raised at the meeting. She did not feel confident when she came out of the meeting. She agreed that neither the claimant nor her union representative mentioned it. She agreed that SM told her in a representative capacity that she would be paid until Christmas 2006. She was not told about the disciplinary procedure and she just got a letter.

A witness on behalf of the claimant, SM told the Tribunal that he was a member of the trade union and a childcare worker. In early November 2006 he heard that an incident had occurred in relation to a visit and the claimant asked him to represent her at a meeting in the next few days. During the next few days EB deputy director told SM that he could do a deal, either the claimant be given a final written warning or go on nights. He was not prepared for the meeting and he agreed to attend with LC as a shop steward. His view prior to the meeting was that the purpose of the meeting was to inform the claimant that it was a serious incident. He was concerned during the meeting. He had negotiated deals in the past and he was a representative for twenty years. He did not have any documentation in advance of the meeting. He felt that they had a deal and a further meeting was not suggested. He had mixed emotions after the meeting and he felt that it had not gone well. The claimant was being dressed down and he was playing the game. When he left the meeting he felt it was the last chance for the claimant and he did not think that the claimant would be dismissed. After the meeting he told the claimant that it looked black. He was shocked when he saw the letter that PB wrote to CW the director on 14 November 2006.

At 1p.m. on Friday he received a telephone call from CW the director. CW informed SM that she and EB, the deputy director had come to a decision and were going to dismiss the claimant. CW asked SM to go to her office. He went to work, he had some tasks to attend to and he met CW in her office. CW informed SM that a letter was being sent to the claimant at 5p.m. and the claimant could take the process into her own hands. CW told him that she had offered to pay the claimant until 31 December, SM asked her for more and CW said €1,000. SM telephoned the claimant and relayed this information to her. The claimant was very upset, and she discussed issues on the telephone with him. He was due to commence his shift and there was a certain amount of disarray. SM told the claimant it was better for her to take the deal. He told CW that there was a letter on the way to her from the claimant. The claimant telephoned SM at 4/5p.m. and she was very upset. The claimant had telephoned a number of staff inside and outside the centre. The claimant was being advised not to resign. He told the claimant he could withhold the letter but the claimant felt that she had no option other than to leave. He had been a trade union representative for a long number of years. He found it difficult and felt that the claimant was being hung out to dry, it took him a long time to recover from this. He felt that the claimant was going to be dressed down at the meeting and move on from it. EB did not accept that he had done the deal and he never spoke to EB about this subsequently.

In cross-examination he stated that the matter was a serious incident. He agreed that the decision to overrule a team decision was very unusual but it could happen and he did not know if there was an urgent reason for the claimant to overrule the decision. The team had made the decision and in this case what the claimant did was wrong. As a shop steward he expected it to result in some sanction and it could have been a final written warning. He explained that option to the claimant. He spoke to EB about the deal and no one else was present. He did not go back to EB regarding the deal. It was put to him he did not tell CW that he had a discussion with EB and he responded

that he did not remember that. He reiterated that he was in a state of disarray when he got to the office. He had a telephone conversation with CW regarding the claimant's dismissal and he was 100% certain that CW told him that a letter regarding dismissal was being sent to the claimant at 5p.m. He could not recall discussing with CW if anything other than dismissal was available for the claimant. He then asked CW could she give the claimant a similar deal as another employee. He reiterated that he felt he had a deal but it was a very tight time scale. He telephoned the claimant about 3p.m. and he felt the claimant had not much option. She told him she was going to resign. The claimant leaned on him for advice. He was clear about the deal and he told PB he had a deal and that he did not need to come to the meeting. He telephoned PB at 3.30p.m. on the day the claimant was dismissed. He did not get a copy of the letter, which PB sent to CW. He did not see the minutes of the meeting, which took place on 11 December 2006. PB requested a meeting to take place on 11 December 2007. At the meeting there was no disagreement regarding the resignation or advice given to the claimant. When asked if he had ever made a similar deal with EB before he responded no that he had not.

In re-examination when asked if PB was supposed to be at the meeting on 9 November he responded that he told PB that he did not need to come to the meeting as a deal had been done. If the claimant's job were on the line PB would be at the meeting. When asked if the claimant was supposed to be at the meeting on 11 December he responded the claimant was not invited. When asked about the grievance procedure and disciplinary procedures in place he responded that it was there a number of years ago and it was not readily available. When asked what the normal steps in the procedure were he responded that there was a verbal warning and then a final written warning. SM and LC discussed the conversation they had with EB and he and LC were of the same opinion.

In answer to questions from the Tribunal whether the claimant asked him about the deal and if she was led to believe that a deal had been done he responded that it appeared that the claimant was in a state of shock. The claimant was very angry with the union for the verbal advice and support. He informed the claimant that she was dismissed and he telephoned PB at 3.30p.m. When asked if he told PB to talk to the claimant he responded yes. When asked if there was a huge misunderstanding at the time he responded time was tight, he was due to commence his shift in a different unit and he then had this to cope with. Asked if he regarded what happened as a breach of trust between the union and management he responded he would have to believe so. When asked why the deal resulted in a loss of employment he responded that ten years ago a much more serious offence occurred and the deal did not result in a loss of employment. He attended the local union meeting on 11 December, which was four weeks after the incident. He did not have a copy of the minutes of 9 November at that stage. When asked how serious he considered the incident he responded that mistakes are made at times. When asked his response to CW demanding the dismissal at 5p.m. and if anything could be done he responded that he was in a state of shock, he was leading a shift and he had a large number of staff to deal with. When asked if he was aware of the disciplinary policy of the respondent he responded, not at the moment. He was familiar with the process and he had seen a number of booklets. When he spoke to CW on Friday he was asked what did he say about the EB deal, he responded he did not do anything about it. He did not question CW about the disciplinary policy and the reason that he did not was that it completely floored him.

A witness on behalf of the claimant EH told the Tribunal that the respondent employed her. The day after the claimant resigned the claimant telephoned her after 3p.m. She told EH that she was dismissed. EH asked the claimant what did she mean? The claimant told her that she was being made to resign. EH got a shock and she would have told the claimant not to resign and EH was not sure what she told the claimant. She was not asked to submit a report by either CW or EB before the claimant left. She was good friends with the claimant and she knew what was going on.

In cross-examination EH stated that in relation to the incident she had her suspicions, which she brought to the hand over. When she asked A about his cousin he was very vague. When asked if a decision was ever overruled she responded it was rare but it could happen. The claimant felt under pressure by the two aunts who played on her emotions a bit. It was put to her this was not a valid reason and she responded that it was the claimant's decision. The claimant told her that she would get a final written warning or work on nights. She was shocked when the claimant resigned and she thought that she advised the claimant not to resign. She was a member of a trade union. Asked if she did not think it appropriate to telephone the union she responded she was sure that she discussed it with colleagues.

In re-examination she was asked if CW contacted her in relation to her attendance at the tribunal and if she was paid for her attendance she responded that her manager approached her the previous day and Monday was her day off.

The third witness for the claimant LC told the tribunal that she had worked in the centre for a number of years and she had been recently appointed shop steward. She first became aware of an incident on Tuesday pm. She was in the canteen and met SM who spoke to her about the incident. EB, deputy director asked SM could he have a word with him. SM returned and he told LC that he had spoken to EB about the claimant. EB spoke to LC and SM and he told them that he needed to talk about the stress the claimant was under. On Wednesday she went to EB's office and she asked was the claimant going to be dismissed. EB told her that it would not come to that and that the claimant was coming in to a meeting to admit what she had done was wrong and that the claimant was getting a written warning and going on night duty. EB attended the meeting with SM, LC, CW, EB and MM took minutes. CW took the claimant through the incident and asked her what happened. CW took her through the process. CW wanted to know why the claimant had made the decision. CW told the claimant that trust and confidence was the issue. The claimant said that it was an emotional decision and that she made it in front of a family member. CW told the claimant that it was gross misconduct. The impression LC got when she went to the meeting was that it may result in the disciplinary process. She felt going to the meeting that the deal was done as the claimant took responsibility for what she did. She spoke to EB and she thought she had a conversation with CW. CW said that she would weigh up the options. LC did not think that the meeting had gone well and did not think that the outcome was going to be what CW had stated.

In cross examination she was asked if after the meeting she thought that there was a deal she responded yes but things had changed after the meeting. Asked why neither she nor SM went to EB after the meeting was over she responded she was off shift until the next Monday. Asked what made her think that things were different she responded that CW had said it was gross misconduct. When asked if CW gave no indication that there was a deal done and if she had any further involvement later in the week she responded no. She attended the meeting with PB and CW. The purpose of the meeting was to clarify what EB had said. The union did not take issue with the centre about the matter.

In answer to questions from the Tribunal if she was surprised that the union did not take issue with the centre about the matter she responded how do you get into a situation about who was telling lies. She knew in her own mind what had happened. When asked if she was surprised that the issue was not raised at the meeting she responded she was horrified to think that the claimant was represented on that basis. If she turned the clock back she would not have believed EB. When asked what her relationship with EB was she said EB was the deputy director, she reported to a team leader, then another manager and EB. The first meeting was part of the ongoing process and



procedure, a fact-finding meeting to find out what happened. This was standard practice. She did not receive notice of the meeting in writing, CW asked her to attend the meeting with SM. The claimant received a letter on 7 November 2006 from EB, deputy director to attend a meeting, which may result in disciplinary procedure. CW said that she would make a decision. It was her understanding that the claimant would receive a written warning. When asked how many times that CW mentioned gross misconduct at the meeting she responded that she could not remember. It was put to her that she dealt with the second most senior person in the organisation she responded that she was fully convinced there was a deal, she spoke to EB and SM spoke to EB. When asked if anyone at the meeting indicated that the claimant could lose her job she responded no. The claimant had spoken to her earlier in the day and she and SM told the claimant what EB had told them. No one indicated to the claimant the prospect of losing her job.

### **Respondent's Case**

The first witness who was subpoenaed by the respondent PB told the Tribunal that he was branch organiser of the Dublin Health Services. He was a full time union official for the respondent and dealt with a number of people including the claimant. SM alerted him that he had serious issues concerning the claimant and that he was working at local level with EB the deputy director. He was informed about the meeting a couple of days beforehand by SM. SM told him that the matter would be resolved at local level. He let SM deal with the matter and he received a message from SM on Wednesday. He was confused, as the matter had been dealt with. The claimant would be issued with a warning and possibly be placed on night shift. He was told that the deal was not honoured and SM informed him on Friday that an agreement had been reached that the claimant would resign her post. PB believed that an amicable solution had been agreed in relation to the problem and he was advised that the claimant would receive benefits, some monies would change hands and the members agreed it. He queried what happened to the previous deal and he was surprised that the position had changed. He spoke to both shop stewards post agreement. He requested a meeting with the director CW and he wanted to ask EB deputy director as to how the shop stewards got it so wrong. He asked pertinent questions at the meeting and there was a total conflict in the process and in what his shop stewards were saying. EB deputy director was adamant that nothing was agreed. He asked if management operated as a team and if EB was mandated to speak to officers and he was informed no.

In cross-examination he was asked if there was a process in place for a disciplinary meeting he responded that there are standard procedures for dealing with it. If someone was called to a meeting they should be made aware of the gravity of the meeting. In relation to a disciplinary meeting the decision rested with the most senior person and a board. Asked if the board had any role he replied that if he wanted to appeal it could go to the chairman of the board. When asked in relation to the appeal he responded the decision was not appealed. He previously attended disciplinary hearings and members were disciplined for various matters and they never warranted a dismissal. He was contacted by the shop steward that a disciplinary meeting was arranged. He took advice from members regarding issues and if no grounds were put forward he would challenge it. It was never suggested to PB that he should attend the meeting on 9 November. When asked when SM made the deal with EB he responded that was problematic, SM contacted him on Tuesday and he told him what was going on. PB offered to attend meetings but he was told he was not required. He believed SM understood that he had reached an agreement with EB. As head of the union branch he was not invited to attend any meeting. If the claimant's job were on the line he would have expected to be in attendance. He felt that a deal was done and the claimant's job was not on the line. When asked if there was an alternative to resignation he responded a person may find themselves dismissed. He spoke to SM on Friday, he had deep concerns and he offered

to contact the director CW to get the situation suspended. SM told him between 3.30 to 4p.m. that the member was satisfied with the outcome. When asked in relation to the process in the respondent he said that it was obliged to have a meeting first. It was an opportunity to state what the position was and in some cases there were no further meetings. He would expect any documentation to be made available. If there was a disciplinary process he would expect it to be in writing. If the issue was gross misconduct the member should be informed of the gravity of the situation.

He was aware the allegation that was made against the claimant was of a serious nature and a breach of protocol. He was aware of what occurred at the meeting, which SM, LC and the claimant attended. SM informed him of the issues as best he could. He believed that management treated it as a very serious matter. He would have expected the claimant to be aware of the gravity of the situation. He wrote to CW on 14 November 2006 and he requested clarification of some of the issues. The claimant was given a choice to deal with the issue outside of the process. The choice was reach agreement with the guidance of a shop steward or enter into the disciplinary process. He spoke to the claimant on the Monday or Tuesday after she resigned. The claimant did not tell him the circumstances of her resignation. The claimant asked him "why did he not represent her," she told him that she was not represented by the shop stewards. He told her if she wanted to re-engage in the process she could do so. When asked if the claimant was let down by the union he responded that he did not understand the position and he offered to intervene. When asked why he was not at the meeting he stated that he offered to intervene and he was told that it was too late by the claimant. In his opinion it was never too late to withdraw a dismissal. When asked why he was not at the meeting when required he responded that the claimant contacted him and he tried to find out what happened. When asked if he contacted EB, he responded that if the shop stewards believed what they were told when they met EB that maybe someone may have misled his two representatives. Asked what he believed he responded that he could not say if EB told lies. His concern was that what EB had said was accurate. If a shop steward told him they had a deal there was no reason to disbelieve them and SM believed that the deal was done. When asked if SM told him on Friday about the ultimatum he responded the word ultimatum was not mentioned. When asked if the deal was concluded by 5p.m. he responded that he was concerned about how things turned out. He discussed with the claimant the manner in which she exited the organisation.

In answer to questions from the Tribunal he stated that he offered to again intervene in the matter. He offered to make contact with CW. SM told him that the claimant was satisfied with the outcome of the process. He was unclear what the claimant wanted to do and as far as he was concerned he was prepared to engage with the organisation. On Monday/Tuesday the claimant told him she was not happy. When asked if he outlined to the claimant that he could have done something he responded that the resignation could be withdrawn. He was certainly interested to know how the deal came about. When asked if the claimant ever told him she was taking the matter elsewhere he responded no. The shop stewards informed him that the claimant was going to take the matter up elsewhere. He had limited contact with EB, this was the first time that this type of business took place.

The deputy director EB of the respondent company told the Tribunal that he held this position for thirteen years. A team discussed visit issues and both teams made the decision. Every case was judged on its merits. In the case of child A he had a problem with drugs and graffiti. As a result of enquiries made to A he was unsure who the two extra individuals were on the day and the claimant overturned the decision that a team had made. Visitors put staff under pressure but a decision was made. The initial conversation indicated this matter was serious; he had a conversation with SM and LC as to how best could they deal with the matter. He told employees to

give the truth and give management an alternative. This could result in a final written warning or work nights and serve a different job. He did not see it as disciplinary. The claimant had spent some time on nights and was very successful in dealing with children. He never did a deal with LC and SM and he did not have the authority to do so. He did not relay the conversation he had with SM and LC to CW the director. CW asked him to fact find and gather information. He was absent on Friday for some time and he received a telephone call on Saturday/Sunday from CW that the claimant had resigned.

In cross-examination he was asked the process adopted when the respondent embarked in the disciplinary process he responded that the purpose of the meeting was to enable the claimant to put forward her reasons for overriding the decision that the team made. He read the claimant's report during the meeting and he did not ask her about it. The claimant at all stages said it was her decision to overturn the decision. The claimant stated that she knew that she had done wrong and she went ahead and did it. Prior to the meeting he knew that it was gross misconduct. When asked why his letter dated 7 November 2006 addressed to the claimant did not outline the seriousness of the matter he responded it was a fact-finding matter. When asked in relation to the process and when did he think the decision was made he responded that he thought the respondent would write to the claimant and get statements, it was quite clear it was going to be a disciplinary and gross misconduct.

Regarding the decision the claimant made in overturning the decision he stated that there was always a duty manager or a call manager on duty. When asked if there was no evidence to suggest that contraband or drugs were found in the unit a day or two after the visit he responded yes. The purpose of the first meeting was for the claimant to explain the situation and why she took €40 from A's pocket money. When asked if he expected another meeting he responded that there was no decision that a disciplinary would follow. He thought he would be going to a disciplinary meeting and was still getting the facts together. He had a report from a team leader, PK, he had the claimant's statement and he looked for a statement from an employee SON. He received SON's report prior to the Tribunal hearing and he had asked for it on a number of occasions. When asked who was going to make the decision regarding the disciplinary meeting he responded himself and CW. He had a verbal report from PK in advance of the meeting. When asked why not present PK's report at the meeting he responded that he could not answer that. When asked why the statement from TS was not there he responded the claimant's statement was the only statement that they were concerned with. When asked if it was going to be a disciplinary hearing would he be in attendance he responded yes. When asked if he had a conversation with LC and SM he responded that SM told him that he initiated contact. When asked what was his purpose in approaching SM he responded SM was not on official duty, it was off the record.

It was for the claimant to explain what happened and to tell the truth and there was a possible suggestion that she could be assigned to work on nights. When asked if there was a deal done by SM he responded that he could not do a deal and he had never done deals. He could have said that the claimant could work on nights as she had previously worked nights. He could have said that a final written warning was one of the options and it was a very serious matter. He never made an agreement with a member of a union. He did not make a deal with his staff and he could not pre-empt what was going to happen. He reiterated that no deal was done and CW asked SM was PB going to the meeting. The meeting was to hear the claimant's version of events. When asked what would happen if the claimant pulled the pit he responded that four or six staff would be called to assist. When asked what was wrong with not pulling the pit he responded that the claimant managed to get the two individuals off the premises. When asked why it was suggested at the

meeting that the claimant should have pulled the pit he replied it was for her own protection. The claimant put herself at risk and no one knew who the two individuals were. The pit could be pulled on a daily basis and it would have been a help to the claimant if she pulled the pit. The claimant handled it well and she documented what occurred in the statement. He was asked what process he relied on in relation to the disciplinary process he responded he was not there when the claimant received it and all staff were given the policy. It was not provided at the meeting, he understood all staff would have known the process that was in place. The present director has revised them again and the board of management signed them and as far as he is aware this has been done.

It was his understanding that the hearing was disciplinary and that the matter was very serious. He received a call from CW that the claimant had resigned. After the time that the claimant resigned on Friday he had no contact with CW as he was out of the office for a large proportion of this time. He had a meeting on Thursday, on Friday he had other business and he was in work on Friday morning. On Friday afternoon he was away for personal reasons. Asked if all reports were considered he responded he had an account from PK. The respondent had the claimant's report and there was no formal meeting, there was no excuse for the claimant doing something wrong. When asked if he considered reports he said no because he was getting reports together and there was no formal requirement to go through the reports once the claimant had resigned. When asked if he expected to be sitting in judgement he responded he was not too sure what his approach was, management and he could work together. It was a matter for the union and management to work together on a day-to-day basis. At no time was he trying to negotiate a deal. When asked if he told the two shop stewards how serious things were he responded that he was not aware of discussions. He believed that the two shop stewards would have advised the claimant to speak the truth. It was not his role to defend a union member. When asked if he felt he was hung out to dry by CW he responded there was no deal at any point. He was aware LC was a new shop steward and CW explained the way it was going and that it was a very serious matter. He was surprised at the union's reaction. When asked how did CW come to a decision without talking to him he responded that he did not know.

In answer to questions from the Tribunal he stated that it was normal for the director to attend a disciplinary hearing and it may go to a full disciplinary and it was usually two meetings.

The director of the respondent CW, told the Tribunal that she had been appointed to this position three years ago and she outlined to the Tribunal the various roles she had prior to taking up this position. She had responsibility for children and staff. Children were sent on remand to the respondent by the court system. She reported to the board of management twenty-four hours a day. A decision was made by a team to allow two aunts to visit A. A query arose about another individual who wanted to visit A. A was not familiar with the individual and the team made a decision not to allow the visit. CW was not part of this decision. A was known as a drug user and was also admitted on charges of graffiti. A visit was stopped if a child was not familiar with a visitor due to the risk to the child and to staff. The child would have to have some relationship with the visitor and there may be an issue with drugs/instruments. In the interest of staff a decision was made by the hand over team on 6 November. If an individual arrived at the centre under the influence of alcohol the visit would be stopped. There may have been one or two occasions when visitors arrived under the influence of alcohol. She did not have a recollection of a reversal of a decision ever been made. EB, the deputy director was not authorised to do a deal or an agreement. EB had never done a deal with a shop steward and he did not tell her prior to the meeting that he had done a deal.

A meeting took place on Thursday, in attendance were the claimant CW, EB, SM and LC and MM

who took a note of the meeting. The only other person in attendance would be a branch secretary. The meeting was an exploratory meeting and LC who was a shop steward was very new to this role. The purpose of the meeting was to talk to the claimant about an incident and CW had very strong views about the incident. At the end of the meeting she informed the claimant that she would be in touch with her and she asked EB to gather information and move on to the next stage, which was a disciplinary meeting. She waited for reports to come back and she had a view that it was a very serious breach. She vaguely recalled having a discussion with LC and SM. She asked SM could he come to her office on Friday afternoon and he came in between 2 to 3p.m. The reason she called SM was to talk to him off the record that this was a very serious situation. Her recollection was SM came to her office and she told him the situation was serious. SM asked her if anything could be done and CW told SM that the claimant could take the process into her own hands and she could resign her position. SM told her that this was very serious and could there be a deal. She told SM that there was a deal done in the past with the union. She would certainly honour something in the line of a previous deal. SM was aware of the details; he was involved in the other case at the time. She told SM to pay the claimant until Christmas and the organisation would give her €1000 for the purpose of continuing her education. She did ask SM if he had a mandate for the claimant and he responded that he did. She told SM to go away and talk to the claimant and establish what the situation was. It was her understanding that he had permission to negotiate on the claimant's behalf. He told SM to go and talk to the claimant. CW mentioned 5 o'clock as the deadline and that she would honour it. She later received a letter of resignation from the claimant. She remembered that SM asked her if she CW would accept resignation. She had two reports on the incident from other employees and it was her intention to proceed with the disciplinary procedure.

She had engaged in several disciplinary processes and a meeting was always preceded by an investigative meeting. There was no misapprehension from the trade union and shop stewards as what was likely to happen. She did not have any contact from PB the branch secretary of the union at this time. She would get involved in negotiations if the resignation was withdrawn. SM never came back to CW after the claimant had tendered her resignation. The claimant looked for a reference after she resigned. She did not receive a response to a letter that she sent to the claimant at her home address. On 14 December she received a letter from PB. On 16 November the claimant requested a reference and the previous year the respondent paid for the claimant's period of study. The respondent supported the claimant in her education and it had a policy to support staff. She told SM that she would continue to support her in her studies. The claimant cashed the €1000, which she received. The reference, which was furnished to the claimant, was signed by EB the deputy director. She did not have contact from the union seeking to withdraw the resignation or alter the arrangements that were put in place. She had no contact with the claimant after that.

In cross-examination she stated when she spoke to SM there was no decision made. She called SM for an off the record meeting and she knew the situation was grave. At the meeting she asked the claimant to speak regarding the situation. When asked regarding the original minutes she responded her previous secretary had left and she was not sure if the minutes were there. She went back to the respondent last Friday but she could not find the minutes. She last saw the minutes about a year ago in an office folder. She had two reports from PK and TS and she did not have the reports at the meeting with the claimant. She had received a report from the claimant and she said she would go over the report. She put the claimant's report to one side. She asked the claimant to take her through events and she read the report after the meeting. Asked if there were any inaccuracies between what was said she responded she was trying to establish the facts. When asked if there was a difference between what the claimant gave her and the reports she responded

she did not think so. CW took her own minutes, which were notes to herself. She told SM that this was a grave situation and may look like dismissal. SM asked could anything be done. She had discussions on the telephone with SM and she asked him to come to the office. When asked why she said that the claimant had the option to resign by 5p.m. she responded SM did not question 5pm. EB was out of the office on Friday afternoon. She asked EB go gather reports. Asked why she waited a year she said the claimant had resigned. She asked SM if he had a mandate to negotiate on behalf of the claimant and he told her he had. When asked if she had known that EB had approached SM in the canteen would she feel it appropriate she responded it could not have been part of disciplinary hearing down the road. When asked what would she have done if the claimant said she was not resigning she replied she would have been part of the disciplinary meeting. When asked if she knew EB made an approach to SM and believed it inappropriate for him to have been part of disciplinary process she responded this is what she now knew. If the claimant said she was not resigning the respondent may have had a different disciplinary meeting. Asked when she and EB were going to make the decision regarding the disciplinary hearing she responded she would gather reports. When asked why she did not telephone EB regarding his approach to SM she responded there was no reason to do so.

In answer to questions from the Tribunal when asked what time SM started work she responded at 2p.m. She telephoned him not knowing whether or not he was in or out of the building that day. When asked if she had any discussions with EB at the conclusion of the meeting regarding telephoning SM she stated she asked EB to gather reports and that they were needed in written format. EB was present at the meeting on Friday afternoon. When asked if there was a reference about drugs and instruments in relation to the claimant she responded no drugs were found after that evening. SM negotiated on behalf of the claimant and she dealt with SM and it was not normal for her to approach the claimant herself.

### **Closing Submissions**

**Counsel for the respondent** in closing submissions stated that this was a case where there was a conflict between SM, LC and EB about what was intended. What is significant is whether or not a deal was done. Whether EB intended to do a deal, there was no evidence to support a deal. No reference was made to the deal at the meeting, which was held on 9 November. SM said that the situation was looking black and SM did not involve the trade union official. A union official would never give a deal if the situation was "black". No one said to the employer you have reneged on the deal and there was no evidence to support a deal. The union talked about a misunderstanding and some four to five days later there may have been a misunderstanding about management's intention. There was nothing to say otherwise about the next stage in the process. The meeting on Thursday was a preliminary meeting,

The claimant resigned, she accepted the money and she did not send back the money. The claimant expressed anger to SM. An agreement was reached which the claimant was not entitled to go behind. Where an employer says resign or you will be fired, that is a dismissal. A very serious incident occurred which was so serious that SM tried to negotiate a final written warning. The incident, which occurred, exposed staff to a very serious situation and the claimant contributed 100% to the dismissal by her actions.

**Counsel for the claimant** in closing submissions stated that there are two main parts to the incident, which gave rise to the claimant's decision and the disciplinary process. To allow a disciplinary hearing about the events of the 5 November one must look at all the circumstances and events, which gave rise to overturning a decision. There was an absolute conflict of

evidence regarding two separate scenarios. The claimant said that the two shop stewards informed her that they were approached by EB and a deal was offered. Both LC and SM were clear that a deal was done and the claimant put her hands up. Both shop stewards were clear that the sanction was a final written warning or work on nights. It is absolutely a crucial part of the evidence. EB gave evidence that he approached both SM and LC and told them that the matter was very serious and that the claimant was to tell the truth and it may result in dismissal and the circumstances were very grave. EB admitted that there was talk about the claimant working nights. Both SM and LC came away from separate meetings with EB and were of the understanding that if the claimant accepted responsibility for the incident she would not be dismissed. It was possible that EB agreed with this and relayed it to the claimant. The shop steward SM spoke to PB, the trade union representative on 8 November prior to the meeting. At the meeting CW spoke about a lack of trust. At the meeting LC and SM were absolutely clear that a deal was done. PB wrote to CW on 14 December. SM told PB that a deal had previously been done. It was not clear to SM until late in the day that the deal was not on.

CW said that she invited contact and nothing else. CW made the decision with EB that the claimant was going to be dismissed. Both SM and the claimant were aware on Friday that if she did not resign by 5p.m. she would be dismissed. EB tried to help the claimant before CW approached the claimant's representative.

The process by the respondent was so flawed that it was non-existent. At no stage before Friday was the claimant told her job was on the line and that the sanction was going to be dismissal and the claimant was treated appallingly.

### **Determination**

The Tribunal are of the opinion that a potentially serious incident occurred on 5 November 2006. The reasons, causes and results were not fairly or fully reviewed as the claimant was under the impression that a deal was done and her shop stewards were under the impression that a deal was done. The director was not aware of the claimant's position, misunderstood or otherwise and was presented with a full confession with appropriate remorse. This "clinical review" meeting consequently became a disciplinary hearing, for which the claimant had received no warning.

However the claimant was compliant with both parties using the meeting as a disciplinary hearing, in order to allow the process of fulfilment of the deal. Given this unfortunate situation all subsequent actions were unfair to both parties. The claimant claimed late in the day that there had been a mutual view taken by the employer and the unions to put the matter behind them. The dismissal was unfair and undue pressure was put on the claimant to resign by the employer and the union. It is not credible that the 5p.m. deadline was part of proper disciplinary process.

The Tribunal invokes the remedy sought by neither party and re-engages the claimant with immediate effect the period 10 November 2006 to 26 November 2007 to be suspension without pay and a break in service under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)



