

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1261/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. P. Pierson

Mr. J. Maher

heard this claim at Portlaoise on 11th October 2007 and 4th December 2007

Representation:

Claimant: Ms. Bernadette Fitzsimons B.L. instructed by Mr. Niall Moran, Solicitor and Mr. Eugene O'Connor, Solicitor. Rollestons, Solicitors, Church Street, Portlaoise, Co. Laois

Respondent: Ms. Cliona Kimber B.L. instructed by Mr. Louis Bourke, Solicitor, Arthur O'Hagan, Solicitors, Charlemont Exchange, Charlemont Street, Dublin 2

The determination of the Tribunal was as follows:

Claimant's case:

On or about 17th October in a corridor of the Respondent's building the claimant, the nurse in charge, the cook and C were in the corridor. C grabbed the claimant's elbow and the claimant jerked her hand away. C spilt the coffee that she was holding. The claimant told her to leave her alone. The nurse in charge was going to phone the owners but the cook phoned them. The claimant waited away from the corridor. The claimant left the building before the owners arrived. She felt unwell and went to her doctor. While she was in the doctor's surgery she received a phonecall from one of the owners who asked her why she did not wait for them. She told the owner that she was at the doctors and ended the call as she was upset.

Later on that day the claimant phoned the owner who had called her. The owner spoke to her about a meeting that she was to come to. The claimant told her that she could not be in the same room as C. The owner told her that a complaint had been made against her; that she had frightened the patients. She apologised to the owner and explained to her that she had been upset and had been crying. The claimant agreed to go to a meeting that was to take place on 21st or 23rd October 2006. The two owners and C were present. It was not suggested to the claimant that she bring anyone with her to the meeting. At the meeting C said that her father had been sick and that she had only lightly placed her hands on the claimant. The claimant was intimidated and also felt as if it was she who was in the wrong and not C.

One of the owners tried to change the rosters so that the claimant would not be on the same shift as

C. The owner told her that she was on holidays and would organise it when she returned. The claimant phoned the owner two weeks later and was told that she had tried to roster the shifts but it was not workable as whichever way she changed the rota she would be with C (at some times). This owner also told her that the other owner had allocated her (the claimant's) job to someone else. The claimant did not want to return to work. She gave evidence as to her loss.

Under cross-examination, the claimant explained that she did not inform the respondent of the situation from the outset as she wished to deal with it herself; she opted to deal with it herself, as "we are all human". The claimant agreed that she was familiar with the respondent's policy booklet and with pages 32 to 34 and 35, 36 and 37 of the booklet. When the representative for the respondent told the Tribunal that the solution of placing both employees in two different wings of the building was put to the claimant and because of the complete inflexibility of the claimant it was not possible to change shifts / arrangements, the claimant replied that this never happened and that no options were put to her.

It was put to the claimant that the cook said that C and the claimant both started arguing in the tearooms. The claimant denied this. It was put to her that the cook asked them to stop and that they were "behaving like children" and C could not stop her from leaving and the claimant replied "Nothing like that at all". The claimant denied that she "stormed out". She knew that the owners were on their way in to see her but she could not stay, as she was upset. She spoke to the owner on the phone and initially refused to attend a meeting but then changed her mind. The claimant agreed that she resigned at the meeting. It was put to the claimant that she did not formally complain of bullying and she explained that she did not as she tried to deal with the matter herself.

On the second day of hearing the Tribunal heard extensive evidence from the claimant regarding an accident that she had in June 2006. She injured her back in the sluice room and the incident report that had been filled out by M on her behalf had misrepresented the injury. The claimant denied that this accident had occurred in 2005.

The matron (M) gave evidence. She had commenced working in the nursing home in October 1996 and had become matron in October 1999. She had retired officially in March 2007 but her last working day was 31st July 2006. There was an incident between the claimant and her colleague (C) in June 2006. Another nurse had complained about C and they were no longer working on the same shifts. The claimant had made a complaint on the same day about feeling undermined and threatened by C and that she couldn't work with her any longer. M reported the incident to one of the owners on the 4th July and they met with C in the office to discuss the matter with her. C explained that she had personal difficulties at that time and she subsequently apologised to the nurse and to the claimant.

Respondent's case:

One of the owners (O) of the respondent company gave evidence. She told the Tribunal that she had taken over the running of the nursing home in July 2004 and had been acting as matron since M left in August 2006. She is a qualified nurse and has extensive experience in the area of old age care and psychiatry. She opened the booklet of policies and procedures and explained that it is kept in the office and is available to all staff. All staff must read the booklet and sign that they have read it and any updates to it are treated in the same manner. There was a bullying policy available in 2004 and also a complaints procedure. In October 2005, there was a meeting held with all staff to introduce contracts of employment and the claimant attended this meeting. O had received no complaints of bullying in writing from the claimant and the complaints procedure had not been

invoked. O felt that she had a good open relationship with the claimant and felt they got on very well. She felt that the claimant was a great loss to the business. The first O knew that there was a problem was when she received the notice of the claimant's application to the Tribunal. The claimant had never mentioned anything over the course of her employment.

O kept a diary for recording daily occurrences and referred to a note made on the 20th October 2006. She had left the premises for lunch at approximately 2.00pm and she received a phone call from the senior nurse on duty. The nurse was crying and told her that there was an argument going on and asked her to return to the premises. The claimant and C were arguing and were out of control and the senior nurse was unable to stop them. O returned immediately and spoke to the senior nurse first. The second owner (O2), who had also been telephoned, had arrived. The claimant had left the premises. O2 repeatedly telephoned the claimant and got no answer. When O2 eventually got through, the claimant was attending her doctor's surgery and refused to speak to O2. O attempted to speak to C who was in the waiting room. C told O that the claimant and C had an argument; the claimant had pushed against C and coffee that C had been holding had spilt over her uniform.

On Saturday the 21st October, O spoke to the claimant and was offered her resignation. O told her that she was a valued member of staff and asked her to reconsider her position. She asked the claimant to meet with O2 or herself and discuss the issues. O was anxious to come to a resolution but the claimant was adamant she wished to resign. On the Sunday, the claimant phoned O and said that she had had time to reconsider her position and wished to meet to discuss the difficulties. A meeting was arranged for Monday at 7.30pm. O and O2 were in the nursing home on the Monday and C was also in attendance. When the claimant arrived, O spoke to her alone in a separate room. O listened to her side of the story and explained that she wished to resolve that matter.

The claimant told O that an argument had commenced and then got out of hand. When asked, the claimant told O that there were no previous incidents between herself and C. The claimant said that she found C to be unfriendly, quiet and introverted in herself. The claimant found C difficult to work with. O then asked the claimant if she would attend a meeting with herself, O2 and C. The claimant did so. The four sat down together and O opened the meeting explaining that the incident had been totally unacceptable and the residents had been upset by the shouting. She then explained that if they (the claimant and C) had difficulties working together, that matter needed to be resolved. O offered to find a way to manipulate the rosters so neither of them would have to work together. There would be roster issues for other staff also and give and take was required on both their parts. O told the claimant that she may have to work some evening shifts on a trial basis. Both would have to alter their working patterns so they could avoid working together. The claimant did not accept this and O further offered a change in the claimant's duties for one or two shifts per week which would also enable the two to avoid each other. The claimant refused this suggestion outright. The meeting concluded and O offered to examine the roster and see what was possible. The claimant said that she was resigning and to send on her P45 and holiday pay. O refused to accept it and asked her to reconsider the matter and think about it.

The following Monday (23rd October), the claimant was rostered to attend for work. She did not attend nor did she telephone to explain her absence. This behaviour continued for two weeks and to comply with their regulations, O hired a temporary substitute. O went on holidays and the claimant phoned her on the 2nd November when O was out of the country. O told her that she would look again at the rosters when she returned and she would discuss the matter further with the claimant at that stage. At this stage, O had worked out the roster where the claimant would work 95% of the hours she wanted and be required for one evening per fortnight only. The claimant took the position

that she was only willing to work from 8.00am to 2.00pm and was not willing to change.

O returned to duty on the 10th November and phoned the claimant. The claimant insisted on resigning so O sent her holiday pay, notice pay and her P45 by post. There were no incidents logged as accidents in 2006.

Under cross-examination, O confirmed that she had been informed of the difficulties between C and other members of staff in June 2006. No formal complaint was made and M said she was handling it. When O became matron in August 2006, all appeared to be fine. In October at the staff meeting, the claimant was discussing leave with O and did not say anything about difficulties with C. That was three weeks before the incident between C and the claimant. O spoke to all staff that had witnessed the incident and had made notes of what they had said. She refused to accept the claimant's resignation initially because she wanted the claimant to consider her actions before doing something hastily. O felt that each of them were culpable in the incident and asked the claimant if there was a pattern of behaviour. The claimant denied there was and said that she found C difficult to work with. O interpreted this as being a difficulty between two opposite types of personality. She could not take disciplinary action if no complaints were made. She thought that the claimant would have been open and honest with her. O had to take the incident at face value. She tried every way possible to accommodate the claimant by changing the roster but the claimant was unwilling to co-operate.

The second owner (O2) gave evidence. She told the Tribunal that the claimant and C had always seemed very friendly towards each other. They were both smokers and would often take breaks together. She had not received any complaints of bullying from the claimant. M had informed her of the incident with C where the staff had complained about her behaviour. O2 and M called C into the office and spoke to her. C was experiencing personal difficulties at the time and was concerned that the staff were upset. C apologised for her behaviour and subsequently apologised to the staff members who had made the complaint, including the claimant. O2 considered that to be the end of the matter. After this, C and the claimant appeared to be as close as ever.

On the 21st October, O2 had received a telephone call from the cook at lunch time regarding an incident between the claimant and C. She attempted to phone the claimant but couldn't get through. When the claimant finally answered, she explained that she was in the doctor's surgery. O2 asked her to phone her back when it was convenient. O2 attended the meeting on the 23rd October with O, the claimant and C. She concurred with the evidence that O had given to the Tribunal. The claimant or C could not come up with a satisfactory explanation about what had happened. Neither blamed the other for being the instigator. Both agreed that the coffee being spilt was an accident. O2 told them to cool off and to put it down to having a bad day. The claimant was very upset and kept saying that she was resigning. O2 agreed with O, that the two should apologise to the staff and residents and the claimant refused.

Under cross-examination, O2 said that she and M had spoken to C in July 2006. O2 took the reports as people being concerned for C and not as being a complaint. She was more than amazed that the incident had occurred in October. O2 did not tell the claimant she was dismissed and did not consider the incident to be of that serious a nature.

The cook gave evidence. She told the Tribunal that O and O2 were good employers and treated all employees fairly. She often brought the claimant home in her car and the claimant never mentioned difficulties with M. She had not observed any friction between them. On the 21st October, she was in the kitchen and heard shouting from the dining room. She came to the door of the dining room

and observed the claimant and C having a heated disagreement. The senior nurse phoned O and the witness phoned O2 and asked her to return to resolve the matter. The claimant passed her on the way out the door. The argument was out of the blue as they two had been laughing and talking prior to that.

Determination:

The applicant bears the onus of establishing that she was faced with no alternative other than to hand in her resignation. The Tribunal must find that the applicant's actions were reasonable and that the employer allowed a situation/atmosphere develop in the workplace such that the applicant could no longer reasonably be expected to work there.

The row, which broke out between the applicant and her co-employee C, was without preamble. The respondents were not on notice of any particular strain between these two parties. They had known that C had been in noticeably bad form some three months before.

The row as described by all the parties was particularly distressing and the respondents were rightly aggrieved that two members of their staff should behave in such a way in front of it's vulnerable residents and their families. The Tribunal believes the respondents were within their rights to conduct a full investigation into this behaviour and this could have been done on a formal footing. The Tribunal finds fault with the steps taken by the employer insofar as it invited both the applicant and C onto the premises at the same time and ultimately into the same room to explain themselves. There was an inevitability to this meeting breaking down. The Tribunal believes that the respondent should have allowed the parties to put their case separately and defend any allegations made. The parties should have been given representation and a note should have been taken of the meeting conducted. The Tribunal accepts that the respondent was trying to deal with this matter in an informal way. But perhaps given the seriousness of the incident this was a naive approach.

Ultimately the respondents' hands were tied by the applicant's refusal to invoke the grievance procedure with a complaint against C. The respondent could not therefore look to past difficulties but could only try and sort out any future ones. The Tribunal believes that in so doing the respondents were quite fair in their efforts to try and rearrange the rotas so that the parties could work apart from one another.

The applicant refused to compromise her own shifts both at the meeting and during the course of a subsequent telephone conversation when she had had an opportunity of reflecting on the viability of the offer. The Tribunal finds the applicant to have been at fault in this regard.

The Tribunal finds that the applicant was constructively dismissed but only to the extent that her employer failed to conduct a formal investigation into the row between the parties. In these circumstances the Tribunal awards €900.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)