

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD62/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Ms A. Gaule
Ms. A. Moore

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

Representation:

Claimant(s) Mr. Conor Kearney BL instructed by Mr. Ken Smyth, Ken Smyth & Co.,
Solicitors, Suite One, Merrion House, 1-3 Lower Fitzwilliam Street, Dublin 2

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

The determination of the Tribunal was as follows:-

Background

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

Respondent's Case

The administrator and director of the respondent company Sr. M told the Tribunal that the respondent provides care for people with intellectual disabilities. It provides services for people

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

The maintenance department is part of the service. The maintenance personnel work in the bungalows with people with disabilities and undertake maintenance work on different projects. The residents undertake light duties and help maintenance staff. The claimant commenced work as a carpenter with the respondent in 1989 in the maintenance department.

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

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

In cross-examination Sr. M stated that seven senior managers report to her. She could not say who started the altercation and who was the cause of it. She did not dispute what the HR consultant PR wrote in her report. She did not form an opinion that the claimant acted in self-defence and she did not form an opinion as to who was the instigator. It was a situation where a serious incident took place and staff do not have the right to respond. She had no input into the ultimate decision. She was aware that the claimant and MS were not best friends but nothing was ever brought to her attention. If ever anything was brought to her attention she would attend to it. She could not investigate a matter that she had no grounds for.

In answer to questions from the Tribunal asked if she could see from CCTV footage who gave the first blow she replied if she knew for a fact she would have treated it somewhat differently.

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

While MS had gone to the hospital she went to the yard. The claimant was very upset and it took him twenty minutes to calm down. The claimant was concerned for his wife who was employed as a nurse with the respondent. CNM3 told the claimant that he needed to go to the hospital.

In cross-examination she stated that the claimant was on the ground in a state of shock and anxiety. He was very distraught and very shocked. She was the first person to attend to MS and he posed no obstacle in cleaning the wound.

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

In cross-examination she stated that she resides in the USA and comes back and forth to Ireland. She was asked to undertake an investigation by the administration. She did not have an input to the Terms of Reference as follows which were given to her by HR:

1. To establish all the facts around the alleged incident which took place on 27 October 2005
2. To interview others who witnessed the incident or were involved in the immediate aftermath
3. To come to a conclusion/finding in relation to the alleged incident
4. To make recommendations where appropriate that the findings be dealt with under the organisation's disciplinary procedure.

She could not determine who instigated the incident. She made her decision as an outside source. Based on questions asked and the answers she was given it was impossible to determine who started the altercation and how it came about. She was asked to gather information. She came to the conclusion that it was impossible to determine. She was not aware of what the claimant and MS had done in the past. The claimant and his colleague did not follow the grievance procedure. She stated that the altercation and fight that occurred between the claimant and MS on 27 October was gross misconduct. Asked if the claimant complained about JD his supervisor she replied that he

mentioned this. Asked if she was not interested in the issues he had with his supervisor JD she replied that took place prior to the incident on 27 October. She reiterated that the respondent could not determine who started the incident and neither the claimant nor MS never brought a formal grievance. Asked if she was aware of the respondent's bullying and harassment policy she replied no. Asked if she recommended severe disciplinary action she responded she did. Asked why not consult the bullying and harassment policy she responded that she was investigating the incident, which took place on 27 October.

She came to the conclusion that both the claimant and MS were at fault. Both the claimant and MS had the opportunity to discuss it with Sr. M. and other staff and they chose not to do that, they did not want to get anyone in trouble. She adhered to the grievance procedure.

The HR director told the Tribunal that she was informed that an incident had taken place. She knew the claimant and his colleague to see. She drew up the Terms of Reference and she appointed PR to investigate the matter. The claimant and his colleague MS were suspended with full pay. Both the claimant and MS attended a disciplinary hearing and both had representation. Both the claimant and MS provided submissions to her and she decided that they should be dismissed. She sent a letter to the claimant on 10 July 2006 in which she informed him that he was dismissed. The claimant was informed that he could appeal the decision within seven working days. A reference was furnished to the claimant on 24 July 2006, which was truthful. On 11 December 2006 she received a letter from the claimant regarding the reference and what was the point in furnishing him with a good reference when the original reference and a questionnaire did not tally. In a letter dated 12 December 2006 she informed the claimant that she had a call from Fingal County Council to clarify why certain questions regarding the claimant were not answered and she had no option but to tell the truth. She stated that the claimant was dismissed due to a once off incident. Dismissal was appropriate as the finding of the incident was gross misconduct. Both the claimant and his colleague MS admitted assault and both agreed that it was inappropriate behaviour. Both assaulted each other in self defence, if one person were identified as starting it it would be retaliation and a reaction to it.

In cross-examination asked how did PR become appointed she replied that the respondent had a list of names and PR was recommended PR had over twenty-five years experience in HR. She did not ask PR if she dealt with a similar situation previously. PR was to investigate the matter and make recommendations and findings. PR did not recommend a penalty. Asked if it was a penalty she responded she did accept that it was outside the terms of reference. Asked if it was wrong to recommend a penalty when the facts were not known she replied that she did not accept this. She stood over the terms of reference. Asked if she gave PR all available information she replied she gave her statements, the grievance procedures and disciplinary procedures. She did not know why she did not give PR a copy of the employee information handbook and she was not sure if it was relevant. Asked that bullying and harassment was very serious and that there was an obligation on the employer to ensure that bullying and harassment did not take place in the workplace she replied that the incident was not about harassment and bullying. Asked if she was aware that MS was taunting the claimant she replied yes. Asked why the employee information handbook was not given to the claimant she replied that PR dealt with the incident. She agreed that there was a difference between the grievance procedure and bullying and harassment. The respondent had very clear grounds on bullying and harassment.

Asked if dismissal was based on the incident, which occurred on 27 October, she replied it was based on the recommendations of PR. She had a meeting on 23 June 2006 and the purpose of the meeting was to afford the claimant the opportunity to say what he wanted to say. Asked if she

presented the claimant with details of records regarding the supervisor she replied it had nothing to do with the supervisor. The meeting was in relation to the incident on 27 October. Asked that she took a considerable amount of time to come to her decision she replied that she went through the reports and minutes of the meeting. She did not consult with anyone. Asked that she did not consult with Sr. M she replied it was not her decision and the CEO was the overall manager. She did not personally know the claimant and MS. It was a once off incident. Asked in relation to self-defence she replied that it was a reaction to an incident and it was not acceptable. There was no evidence as to who started it. Asked that she had to deal with the lead up to the altercation and that she did not deal with it she replied there was no evidence as to who started it.

Claimant's Case

The claimant told the Tribunal that he was a carpenter for seventeen years. He had previously worked with the respondent company and in October 1989 he was invited to return. He was given a two-month contract. He undertook work in the workshop area and MS was employed there. He introduced himself and JD the supervisor came to the workshop and asked him what he was doing. JD told him that he was the boss. The claimant stated that he was being bullied by JD and could not do anything about it. He found out that MS had a fraudulent union card. The claimant did his own work and undertook his projects. He lost count of the number of times he spoke to JD. In 2005 his relationship with MS was very bad, MS refused to come and work with him, he would slam the door in front of his face and the claimant did not react to this. The claimant went to work and minded his own business

On 27 October he met MS who told the claimant that he was a gunterer and that he was not good at doing his work. The claimant told MS that he was a qualified carpenter. He told MS that he was a "shit stirrer" and MS shouted that he would do him with the unions. The claimant was very upset. He knew that he had called MS's bluff. MS lost the head and he put his hands on the claimant's private parts and he could not get MS off him. The claimant was in excruciating pain, it all happened in seconds, he bit MS who let him go straight away. He was very upset and he called JD the supervisor. JD came to the workshop and the claimant could not walk. Sr. M, the administrator and the CNM3 came to the boiler house. He was in severe pain and he still has pain, his wife who was employed by the respondent was attending a course that day and she had to be contacted. He was given a sick certificate and told to take time off work. He was notified by letter dated 14 November 2005 that he had been suspended. He met PR, the independent consultant and he gave her his version of events. PR listened to him and he felt a great relief after talking to her. At the second meeting with PR he felt that there was a different atmosphere and she was told to adhere to the facts. He made verbal complaints and JD told him that Sr. M knew about it. He complained to JD that MS was taunting him but he did not get any help. JD told him that he could not deal with this and slammed down the telephone

The claimant relayed an occasion when he hurt his back and he could not walk. When he returned to work JD told him that he was not completing an incident report form. The claimant stated that an employee had to leave work due to MS. The claimant told JD that he could not bully him. If JD had dealt with the matter the incident would not have occurred. On 29 November 2005 he received a letter from DG, the Director of Human Resources inviting him to an investigative meeting on 8 December. The claimant was informed by letter on 10 July 2006 that he was dismissed. He appealed the decision to the chief executive officer and he was unsuccessful.

Since his dismissal he has been unemployed. He sent CV's to various companies and he registered with an employment agency.

In cross-examination asked that he called MS a scumbag he replied that he called him a shit stirrer. Asked if he ever wrote a report about JD he replied he did write a report about JD. He was a member of a trade union and he knew DG the HR director. Asked if he ever thought of going to HR he replied he reported it to JD his supervisor. Asked why not go elsewhere he replied he could have gone to GC. He stated that Sr. M and JD had a very good working relationship. Regarding the disciplinary meeting asked if he knew it could result in dismissal he replied yes.

In answer to questions from the Tribunal when asked in relation to moving to Ireland from the UK in the mid 80's he replied that the respondent contacted him and he received a written contract

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

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

Determination

It is clear from the evidence presented and agreed by both sides that the claimant's work performance and work history was heretofore exemplary.

The response of the claimant to the incident in question was completely unacceptable and in the normal course of events would justify a dismissal. However there was a history of the claimant being bullied in his employment generally. Complaints were made and not adequately dealt with and the investigation into the incident completely ignored the circumstances and background to the situation and the respondent's own bullying and harassment policy.

The claimant was dismissed as a result of the investigation of one incident and the Tribunal finds that the dismissal was unfair.

Having regard to the fact that the actual loss is in the region of €50,000 and bearing in mind the extreme nature of the response to the incident the Tribunal awards the claimant a sum of €20,000 in compensation under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

