

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

Employee

**Against**

Employer

**under**

**CASE NO.**

UD829/2007

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr R. Murphy  
Mr A. Butler

heard this claim at Dublin on 21st January 2008, 9<sup>th</sup> April 2008 and 10<sup>th</sup> April 2008.

**Representation:**

Claimant : Dr. Ciaran Craven B.L., instructed by Mr Michael Crowe, Daly Lynch Crowe & Morris, Solicitors, The Corn Exchange, Burgh Quay, Dublin 2

Respondent: Mr. Peter Ward B.L. instructed by Mr. Ciaran O'Mara, O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4

The determination of the Tribunal was as follows:-

**Background:**

The claimant was a member of care staff. While feeding a client on 4 July 2006, and in the presence of two care staff, he slapped a client three times during tea time. The two care staff working with the claimant at that time reported the incident to management. The claimant in his own account of what happened admitted that he had slapped the client. This precipitated a full investigation. The respondent has a procedural agreement in place, namely, The Trust in Care Policy. An independent person and two senior members of staff of the respondent were appointed to investigate the allegation and they formed the Investigation Committee. The claimant's union representative did not appear to have any objections. Terms of Reference were drawn up.

The claimant objected to the composition of the Committee, as it was not clear to him what the allegation was. The respondent revised the terms of reference and the two senior members of management stepped down and the independent person remained as the sole investigator. The claimant accepted the revised terms of reference.

The investigator dealt with the incident that occurred on 4<sup>th</sup> July 2006. During the course of the investigation several staff members including the claimant were interviewed. The investigator also held separate meetings with the claimant's legal team and the two complainants. A report produced by the investigator found the claimant guilty of gross misconduct. It appeared the claimant did not contradict the report.

The Director of Staffing conducted a disciplinary hearing. His conclusion was that the claimant was guilty of gross misconduct and he had no option but to terminate the claimant's employment. This was open to appeal. The Chief Executive dealt with the appeal. She read through all the documents and concluded that the correct decision had been made. It was a serious allegation and a fair decision to dismiss the claimant. The claimant contested the investigator's original finding.

### **Respondent's Case:**

The Executive Director of Staffing gave evidence. He was in this post for the past 7 years. A report of an alleged incident involving a 12 year old client in a wheelchair which occurred in Bungalow 7 on 4 July 2006 was presented to him by the Director of Residential Services. He had not witnessed the incident. He read the reports from the two complainants and the claimant's response to the allegation. He then spoke to the Chief Executive and it was decided that this warranted an investigation into the allegation. The Chief Executive secured an independent person who together with two senior members of the hospital formed the investigation committee. The investigation was conducted pursuant to the National Trust in Care Policy for the Health Service.

The initial meeting to enquire into the alleged incident was to have taken place on 10<sup>th</sup> July 2006 but the claimant was not available. The claimant's union representative was informed and agreed to the appointment of investigation team. The alternative date for the meeting was arranged for 18<sup>th</sup> July 2006 but that had to be cancelled as the claimant became ill. The claimant was ill from 18<sup>th</sup> July 2006 to 31<sup>st</sup> October 2006. The claimant was suspended with pay upon his return to work after his illness. The claimant qualified as a registered nurse in intellectual disability on 5<sup>th</sup> July 2006. A letter dated 12<sup>th</sup> October 2006 offered the claimant a permanent full time position with the respondent effective from 5<sup>th</sup> July 2006.

In a letter dated 10<sup>th</sup> October 2006 the respondent received correspondence from solicitors acting for the claimant regarding the committee of investigation, terms of reference and matters concerning the claimant that the investigation committee would enquire into.

When the claimant recovered from his illness he was invited to attend a meeting with the investigation team on 7<sup>th</sup> November 2006. The claimant was not available on that date. The claimant's solicitors wrote to the respondent indicating that the claimant's legal team would accompany the claimant to such a meeting when the investigation team reconvened and offered available dates.

The meeting was set down for 15<sup>th</sup> November 2006 and in advance of that meeting the claimant made a submission, on which he intended to rely, through his solicitors and the

respondent's solicitors replied to the claimant's solicitors on 20<sup>th</sup> December 2006.

The Executive Director of Staffing indicated that the respondent drafted new terms of reference for the investigation. He said there was an objection to the respondent's two members being involved in the investigation and that the respondent nominated the independent person as the sole member of the team and the two other members stood down. The claimant said he did not know of what he was being accused.

On 2<sup>nd</sup> March 2007 the claimant met with the independent person conducting the investigation. On 9<sup>th</sup> March 2007 the claimant's legal team met with the investigator and the two complainants. When the investigator completed his investigation an invitation was extended to the claimant or his legal representatives to meet with the investigator to make any further contributions to the investigation.

Towards the end of March 2007 the investigator furnished his preliminary report into the alleged incident in Bungalow 7 on 4<sup>th</sup> July 2006. The claimant's solicitors wrote to the investigator with certain concerns.

Upon receipt of the investigator's report, the Executive Director of Staffing invited the claimant to a meeting on 18<sup>th</sup> May 2007 to afford him an opportunity to make further submissions prior to a final decision being made in the case. The Executive Director of Staffing, his solicitor, the claimant, the claimant's legal representatives and the Executive Director of Staffing's secretary (in her role as note taker) attended this meeting. Counsel for the claimant asked the Executive Director of Staffing if he had come to any decision. The Executive Director of Staffing said he had not yet made his decision.

Counsel for the claimant outlined the claimant's history and the issues of concern. He handed over four written references from staff members and offered seven people to give character references. Two people spoke about the claimant but the Executive Director of Staffing insisted that he hear all of the seven witnesses. Counsel for the claimant contested the finding of the investigator. He felt no action should be taken against the claimant. The claimant had been ill on the day of the incident.

The Executive Director of Staffing took all the entire documents relating to the alleged incident home that evening, Friday, 18<sup>th</sup> May 2007 and spent the weekend reading them. The following Monday his conclusion was that there was one result and that was to terminate the claimant's contract. He took into account the investigator's report, the two witnesses descriptions of the event, the slapping of the client by the claimant three times, the final submissions made by Counsel for the claimant and decided the claimant should be dismissed for gross misconduct.

Under cross-examination the Executive Director of Staffing said he knew the claimant well. He interacted with the claimant when the claimant was a union shop steward in the period 1987 – 2000. The Executive Director of Staffing reported to the Chief Executive and management. He had ongoing contact with the Chief Executive. The respondent only recognised one union. He explained that staff were always encouraged to further their careers and that the hospital was justifiably proud of them. He agreed the claimant had been popular. The Director of Residential Services informed him that he had received reports from two complainants of an alleged incident in Bungalow 7. He knew a decision had to be made to inquire into the alleged incident. He spoke to the Chief Executive and she agreed that an investigation committee should be set up pursuant to the Trust in Care Policy. This investigation committee would comprise of members of management and an independent person. This was communicated to representatives. The claimant's union representative didn't indicate that he had a difficulty.

Agreed terms of reference were drawn up. The Executive Director of Staffing said he had not furnished the claimant with the terms of reference. The Executive Director of Staffing said he was not party to the investigator's report. He had no involvement in the investigation. When he received the final report he entered into correspondence with legal representatives. On 18<sup>th</sup> May 2007 he met the claimant and his legal representatives and this meeting lasted approximately two hours. It was his practice not to take notes at meetings, his secretary always took notes. He believed these notes were accurate. He did not ask any questions. He felt it was better to concentrate very intently on what was being said at the meeting. His conclusion was based on the hand-written notes, the investigator's report, the reports from the two staff members and the four written references presented. He said the claimant admitted to smacking the client although later he retracted his statement. The claimant had said to the client that he was going to smack him and then slapped him three times. Before making his final decision the Executive Director of Staffing gave consideration to everything that had been presented including the mitigating factors. The only result that he could come to was to dismiss the claimant.

The Executive Director of Staffing gave weight to the mitigating circumstances. He considered every one of them. Because of the severity and gravity of the incident, the fact that the claimant had accepted and retracted his statement, the Executive Director of Staffing believed at the end of the day the incident warranted gross misconduct on the part of the claimant.

The Executive Director of Staffing told the Tribunal that two to three investigations had been carried out within the company. The union was always approached before the setting up of any investigation and they never had any objection. The respondent's protocol was that programmes were in place to deal with difficult situations between staff and clients.

The Chief Executive gave evidence. She was in this role for seven years. It was she who determined the claimant's appeal. She was in receipt of a written submission from the claimant. She asked for the file, read through the paperwork and the grounds of appeal. She re-read it two days later and reconsidered everything. She took her time and reflected fully on all the matters raised. She asked herself what were her responsibilities. She weighed up everything and felt that the trust between herself and the claimant no longer existed. It was her duty to ensure that clients are in a safe environment. There were a series of mitigating circumstances. The claimant had accepted he had slapped the client but then he changed his evidence and tried to implicate others. At no stage during the incident in question had the claimant indicated that he had been unwell. She upheld the decision to dismiss the claimant.

Under cross-examination the Chief Executive said it was the first appeal presented to her under the Trust in Care Policy. As there was an adverse finding against the claimant the matter had to be referred to her on appeal because of the seriousness of the incident in question. The claimant's behaviour was very serious and a sanction had to be taken. She felt it was proportionate to what was alleged and found. She considered slapping to be a very serious offence and that the claimant had admitted after the incident that he could be sacked for this. She had read through all the correspondence on the file including the investigator's report. She reported the incident to the social worker who in turn reported to the HSE. The clinical team communicated with the client's parents about the incident.

## **Claimant's Case:**

The claimant commenced employment with the respondent on 2nd February 1981 and originally in the capacity as Care Staff. He applied to the Chief Executive to commence a degree course in intellectual disability nursing, was successful and qualified as a staff nurse on 5<sup>th</sup> July 2006 with a 2.2 honours degree. During his training he worked at weekends with the respondent.

On 4<sup>th</sup> July 2006 while he was a fourth year student nurse he worked in Bungalow 7 with two care staff. It was on this date that an incident happened and an allegation was made against him. Subsequently an inquiry found against him. The finding was that he was guilty of gross misconduct. Looking back the claimant very much regretted the incident. No complaints or allegations were ever made against him during his career with the respondent. The claimant said he never retracted the initial statement he had made about the incident. He had been unwell on the day of the incident as he had been for the previous four months. He had been attending the doctor in the hospital.

On 18<sup>th</sup> July 2006 the claimant was to appear before an investigation team but was unable to attend because of ill health. He went to the doctor and was subsequently admitted to hospital the following day and underwent major abdominal surgery.

The claimant acted as shop steward for the care staff for 12½ years. He never encountered difficulties. He said he was aware of one dismissal as a result of an allegation back in the early 1990s but he had no involvement in that case. On the night of the incident he was employed as a student nurse. He was subsequently offered a permanent contract and this was backdated to 5<sup>th</sup> July 2006.

Under cross-examination the claimant said he did not contest the investigator's report. The claimant's understanding of serious behaviour was that a serious incident had occurred in Bungalow 7 and that he did not deny it. During the course of the investigation, the claimant withdrew the word "slapped" and said that he had come into contact with the client. The report indicated that the claimant had pointed the finger at another worker.

The claimant accepted the findings of the independent investigator.

The claimant told the Tribunal that he had been feeling ill that day and had brought it to the attention of management. He was asked if he could survive the day and he felt he could. He had worked in several areas within the hospital and was only working four weeks in Bungalow 7. The week that the incident had taken place had been particularly difficult as one five year old child had been continually crying and this had knock-on effects. There were four people in the room when the incident happened.

The claimant secured employment after his dismissal but was let go after a week. He understood someone informed his new employer about the incident in his previous employment. Since August 2007 he is employed by a nursing agency. He has no financial loss.

A Senior Nurse Manager gave evidence. She had known the claimant for over twenty years and had worked with him intermittently. She said that the claimant was known for building good relationships, was strong-willed in the essence of care and dependable. She had been aware that there was an allegation against the claimant. Her reaction to the investigator's finding was that the investigator had based his evidence on probability. In her experience the claimant was not capable

of causing physical harm.

Under cross-examination the Senior Nurse Manager said she had accompanied the claimant to a meeting with the Director of Community and Residential Services on 6<sup>th</sup> July 2006 and was aware that the claimant used the word ‘smacking’ and spoke to the claimant about the use of this word.

A Clinical Nurse Manager Grade 2 gave evidence. She had known the claimant since 1981 and had also worked intermittently with him. She explained that they worked with clients with severe challenging behaviour. Regularly they (the staff) were slapped and had items thrown at them. She rated the claimant as being cool, clear and collected.

The Manager of a holiday home used by the respondent for holidays for clients in the west of Ireland gave evidence. She had run this home for the past six years. She had known the claimant for 28 years and she trusted him with her life. He was a good friend of hers.

### **Closing submissions on behalf of the Respondent**

Counsel for the respondent said the incident was tragic which led to the termination of the claimant’s employment. It had been dealt with the utmost seriousness and the utmost care had been taken on how to address the situation. The exercise had been tedious. The terms of reference had been re-configured and it was a very unfortunate case. During the course of the claimant’s meeting with the Investigation Committee he had altered his position. The claimant had pointed a finger at a co-worker. It had not been easy for the two members of the care staff to report the incident and they found it stressful and knew the consequences for themselves and the claimant. They did not take lightly what they had witnessed. The investigator’s findings were that the claimant had smacked the client three times and this was gross misconduct. In the aftermath of the incident the claimant had said he could get sacked for this. The decision to dismiss the claimant and whether to uphold the Executive Director’s decision was not taken lightly.

The Tribunal was directed to an extract from the book ‘Dismissal Law in Ireland’ and in particular to the function of the EAT.

“The EAT must not assume the mantle of an employer regarding the facts in any case before it. Its function is to decide whether, within the so-called band of reasonableness of decision-making, an employer’s decision is not unfair. The notion of a band of reasonableness was first endorsed by the Court of Appeal in *British Leyland UK v Swift*. The court found that there is a band of reasonableness within which one employer might reasonably dismiss an employee whilst another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. A dismissal is unfair if no reasonable employer would have dismissed, but it is not unfair if a reasonable employer might reasonably have dismissed.

It is possible for different responses to be made by an employer in a given set of circumstances. Each of the responses may in its own way be perfectly reasonable. Because of the fact that there are a number of possible responses the EAT should not substitute its view for that of the employer concerned. As Donaldson LJ said in *Union of Construction and Allied Trades and Technicians v Brane*:

‘It is a very sensible approach for Tribunals to put themselves into the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, ‘Would a reasonable employer in

those circumstances dismiss?’ However, Tribunals must not fall into the error of asking themselves the question, ‘would we dismiss?’, because there is sometimes a situation in which one reasonable employer would and one would not. It is sufficient that a reasonable employer would regard the circumstances as a sufficient reason for dismissing. The statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that *all* reasonable employers would dismiss in those circumstances.’

In *Bunyan v United Dominions Trust* the Irish EAT endorsed the view that:

“the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business would have behaved.” The Tribunal therefore does not decide the question whether or not, on the evidence before it, the employee should be dismissed. The decision has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded’.”

### **Closing submissions on behalf of the claimant:**

Counsel for the claimant said that the allegation against the claimant was serious and there were serious consequences. Certain procedural remedies were availed of but unsuccessfully. The claimant had an unblemished record. During his time working with the respondent his service was impeccable and flawless. The claimant had been ill on the day the incident took place and he informed management of his illness. Counsel referred to the manner in which the finding was reached. “Did the finding justify dismissal and was dismissal justified?” He said the Executive Director of Staffing was unaware that the claimant had been ill on the day of the alleged incident. Regard should have been shown to the mitigating circumstances. There were dramatic consequences for the claimant who was a professional person.

### **Determination:**

The Tribunal carefully considered the evidence adduced at the hearing. The respondent has an exceptional duty of care to the vulnerable clients in its care and it properly investigated an allegation of misconduct against the claimant. The claimant had worked for the respondent for more than twenty years and during that time he had shown himself to be caring and dependable.

The Tribunal finds that the conduct of the claimant was not of such gravity as to constitute gross misconduct and that the sanction of dismissal was excessive in light of the circumstances existing. The Tribunal finds that the respondent acted in an inconsistent manner by offering the claimant a new contract of employment while engaged in the disciplinary process that ultimately led to the claimant’s dismissal.

The Tribunal unanimously finds that the respondent acted disproportionately in dismissing the claimant. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the Tribunal orders that the claimant be reinstated.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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





