

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD391/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan
Members: Mr. J. Browne
Ms. E. Brezina

heard this claim at Wexford on 3rd June 2008

Representation:

Claimant: Mr. John Mernagh, John A. Mernagh & Co., Solicitors, 5 Church Street,
Enniscorthy, Co. Wexford

Respondent: Ms. Helen Barry, IBEC, Confederation House,
Waterford Business Park, Cork Road, Waterford

The determination of the Tribunal was as follows:

Preliminary issue:

At the outset of the hearing the respondent's representative stated that the claimant's T1A form was lodged to the Tribunal outside the stipulated six-month time limit. The claimant was dismissed in September 2006 but his claim was not lodged to the Tribunal until April 2007. The letter communicating the outcome of the appeal stated that the claimant's date of dismissal was the 21 September 2006.

The claimant's representative stated that the claimant was dismissed in September 2006 but the internal appeal of his dismissal was not concluded until March 2007. The claimant was notified of the outcome of the appeal by letter dated 5 March 2007. The representative for the claimant stated that the claimant waited for the outcome of the procedures of the appeal to be completed before lodging his claim with the Tribunal.

Determination on Preliminary Issue:

The Tribunal noted that the claimant lodged an appeal of the company's decision to dismiss him and that the outcome of this appeal was communicated to him in March 2007. The claimant had lodged his T1A form to the Tribunal on the 16 April 2007. The Tribunal determined it had jurisdiction to hear the case and proceeded to the substantive issue.

Respondent's Case:

Giving evidence the Human Resources Manager (hereinafter HR) stated that the respondent provides services to people with disabilities. The respondent provides services for approximately 200 people on a daily basis. The claimant worked for the respondent as a part-time care assistant. He received a number of three-day training seminars, which covered areas such as dealing with challenging behaviour; occupational first aid and he also completed a course on disability studies.

On the 11 September 2006 HR was informed by the respite Team Leader that an incident had occurred on the 23 May 2006. The Team Leader heard of the incident through a third party who was told of the incident by a member of the public. HR advised the Team Leader to take statements from those reporting the incident. The member of the public had found one of the children in the respondent's care, going towards the road outside of the respondent's residential house.

HR advised the Team Leader to speak to the staff. When the Team Leader spoke to the claimant he denied all knowledge of the incident. The other person on duty on the 23 May 2006 admitted the incident had occurred and that it was not reported. HR led the investigation up to the time the claimant was dismissed. There were two allegations against the claimant and his colleague. Firstly, that an incident had occurred where an eight year old, with an intellectual disability went to the road unsupervised. Secondly, that the incident had deliberately not been reported. HR stated that the respondent's residential house is located on a busy road outside the town. The child involved in the incident has a profound range of learning disabilities and requires assistance with daily tasks. HR considered the procedures that should have been adhered to and found they had not been followed. The reporting of incidents is extremely important, as a risk evaluation can be carried out to prevent such situations from re-occurring.

A meeting was held with the claimant on the 14 September 2006 and he was offered the opportunity to bring representation. The claimant did not have representation at the meeting and he was advised again of this entitlement to this. HR met with the claimant three times in total and each time the claimant was advised of his right to representation. At the meetings the claimant referred to an incident that he thought might be the incident on the 23 May 2006. The claimant told HR that on one occasion a child had made her way towards the gate but the claimant's colleague brought the child back to the house. HR considered this a different incident and that it had not been reported either. The claimant was the only person who denied that the incident on the 23 May 2006 had occurred.

The claimant was dismissed because he denied that the incident had taken place and also because the incident was not reported. HR considered this to be gross misconduct on the claimant's behalf. The employee handbook contains the company's disciplinary procedure. The disciplinary procedure outlines three possible outcomes for gross misconduct. The three possible outcomes are a final written warning, suspension or dismissal. HR and the Team Leader felt that the claimant could no longer be trusted in his position and reached a decision to dismiss the claimant. They informed the claimant that he could appeal this decision to the Chief Executive Officer. The claimant's colleague was also dismissed.

During cross-examination HR confirmed that the respondent's procedures stated "serious misconduct" and not gross misconduct. It was put to HR that there should have been more than two staff members on duty and that the child involved in the incident required one-to-one care. HR responded that the staffing levels were adequate on the 23 May 2006 and that the child involved did not, at that time, require one-to-one care. However, there are now three staff members on duty

because of the level of disabilities the residents have. Neither the claimant nor his colleague brought it to the Team Leader's attention that they felt they were under-staffed. It was put to HR that on the 23 May 2006 the staff member that was due to work was ill. HR confirmed this stating that her colleague who had worked the night shift continued to work into the morning to cover the shift with the claimant.

HR outlined the following reporting procedures; the Team Leader should be advised as soon as possible about an incident or if an incident was of a minor nature it should be logged in the report book. Incidents can and do happen but the reporting of such incidents is extremely important so that the respondent can review its procedures. HR stated that the claimant was dismissed for the non-reporting of an incident. The report book was completed for the 23 May 2006 but it did not include the incident. HR stated that one of the two people on duty usually completed the report book. It was put to HR that the claimant's colleague had completed the report book for the 23 May 2006 and she had also signed the report book. HR replied that the claimant had completed the following page in the report book but the incident was not recorded there either. It was put to HR that the decision was made that the matter was serious misconduct before the investigation was conducted. HR stated that the claimant was advised on the 14 September 2006 that the matter was viewed as serious misconduct.

Answering questions from the Tribunal, HR stated that a previous incident had occurred of a child leaving the house and a risk assessment had been completed after the incident was reported. The Team Leader checks the report book. There are also report forms, which can be completed after a serious incident, or a verbal report can be made to report the incident. The Team Leader checks the report books. HR was asked where it is stated that staff have a duty to report. He replied that there are reporting procedures in place and the procedure is to report the incident immediately. The onus is on the employees on duty to report incidents. Neither the claimant nor the colleague on duty with him reported the incident and they were both dismissed for this.

Giving evidence the Chief Executive Officer (hereinafter CEO) told the Tribunal that he became involved when the claimant appealed the decision to dismiss him. CEO reported to the Board of Directors that the claimant wished to appeal the decision and CEO recommended to the Board of Directors that another colleague could assist with the appeal.

The claimant was not paid during the appeal. There was a delay in carrying out the appeal due to correspondence between the parties solicitors' concerning discovery of documentation. The appeal committee started the appeal in February 2007. They held meetings with the claimant four times throughout the course of the appeal. The claimant's colleague was present for one of the meetings. It was eventually acknowledged that the incident had occurred. Minutes of the meetings were taken and a copy provided to the claimant. The claimant was also given the opportunity to directly question his colleague concerning the incident. CEO also visited the respondent's residential house as part of the appeal. There is a notice on the staff board that the gates to the house are to be kept closed. The closure of the gates is the responsibility of the frontline staff.

The reporting procedure to be followed if an incident occurs is to communicate the incident by either telephone or write it in the report book or report the incident to a superior. The onus to report an incident is on both of the care assistants on duty and they are jointly responsible for liaising with one another. At the meeting with the claimant's colleague the issue of deliberate non-reporting was raised. There was an acknowledgement of this at the meeting.

The appeal committee met with the member of the public who had reported the incident and all

other relevant parties. The appeal committee endorsed the decision of the investigation team and upheld the decision to dismiss the claimant. The matter was very serious as incidents do happen but the respondent's practice is that incidents must always be reported. The respondent also has a health and safety statement.

During cross-examination it was put to CEO that the claimant wanted his solicitor present at the meetings but the respondent disallowed this. CEO stated that the appeal was an internal procedure. The respondent does not allow legal representation but does allow lay representation. It was put to CEO that complaints had been lodged concerning the gates. CEO was aware that such complaints had been logged in the respondent's maintenance book.

Answering questions from the Tribunal, CEO stated that the committee and the staff members composed the health and safety statement. The health and safety statement is provided to staff at their induction. The employee handbook does not contain all documents but highlights to each employee where they can find the relevant documents. Since the time of the incident the employee handbook has been reviewed.

Claimant's Case:

Giving evidence the claimant told the Tribunal that before commencing paid employment with the respondent, he worked on a voluntary basis at the residential house for a year. The claimant later commenced part-time employment with the respondent. He worked 8am-10am and 5pm-8pm; this was later extended to 10pm. The claimant's duties involved collecting a bus and arriving at the residential house at approximately 7.30am. When the claimant arrived at the residential house on the 23 May 2006 he discovered that the colleague due to work the shift with him was unwell and the person from the night shift was continuing to work to cover the shift. When the claimant arrived to the house the gates were open, as they always were. The claimant had complained to his supervisor a number of times about gates on the property and he had also attempted to fix the gates.

When the incident was put to the claimant in September 2006 he had no recollection of it. All his colleague had told him on the 23 May 2006 was that one of the children had gone to the road but that she was fine. At the appeal meeting his colleague said that a member of the public had come to the door of the house with the child and the claimant's colleague had met him at the door. The claimant did not meet the member of the public. The claimant left the house at 10am on the 23 May 2006, brought the children to school in the bus and returned home. He did not write a report in relation to the incident. The claimant recalled that they were short-staffed on the day of the incident; there were two staff members when there should have been three. He reported this at one time to a superior, who told the claimant, they would have to make do with the staff they had.

The claimant was contacted in September 2006 and asked if he knew anything about the incident. The claimant said he had a vague recollection of a child going towards the road but he could not recall what date it had happened.

During cross-examination the claimant stated that he was only aware from his colleague on the 23 May 2006 that a child had tried to get towards the road. The claimant was unaware at the time of the incident that the child had gone up the road or that a member of the public had brought the child back to the house. The claimant stated that the gates to the house were never closed because they could not be closed, as there were no bolts. The claimant believed the sign on the staff notice board concerning the closure of the gates was put up after he had been dismissed.

It was put to the claimant that the course he had undertaken had covered the reporting of incidents. The claimant confirmed this. The claimant stated that he completed the report book in the house once or twice a week. However, the claimant did not complete the report book for the mornings. On one occasion the claimant asked his superior if he should be completing the report book in the morning but he was told that the staff present for the morning completed the report book, not the claimant. The claimant did complete the report book in the evening of the 23 May 2006.

Answering questions from the Tribunal, the claimant stated that there were other incidents in the past that he was aware of and that he had reported. However, he completed any such reports in the evening.

Determination:

The Tribunal having considered all of the evidence adduced by the parties concerning the incident and the circumstances leading to the claimant's dismissal, the evidence of the respondent being that the claimant was dismissed for the non-reporting of the particular incident, the Tribunal is of the view that the responsibility of reporting did not lie solely with the claimant and he was unaware of the incident when it occurred.

The Tribunal is satisfied that the respondent failed to discharge the onus of proof placed on it by the provisions of the Unfair Dismissals Act to show that it was a fair dismissal. It is the unanimous view of the Tribunal that the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. In the circumstances the appropriate remedy shall be re-instatement and the Tribunal so determines.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)