

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD425/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. McAveety

Members: Mr T. Gill
Mr P. Clarke

heard this claim at Roscommon on 11 March, 3 June
and 18 November 2008

Representation:

Claimant: Ms. Rachel Meagher B.L. instructed by Ms. Bríd Miller, Solicitor,
8 Castle View, Castle Street, Roscommon, Co. Roscommon

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House,
Victoria Place, Galway

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make her case

The respondent is a provider of a comprehensive range of facilities and services for people with learning disabilities, the service users. The claimant worked for the respondent in their printing facility. She had been employed from January 1995 and until 15 May 2006 the employment was uneventful. The claimant's position is that on that day she was touched inappropriately by a male colleague (MC) when they were in the training room. Whilst others were present, none saw anything untoward. MC was involved in the logistics of moving service users from workshop to home.

The claimant did not complain about this matter until 16 May 2008 when, during the lunch break, she mentioned it to her team leader (TL) in the company of six others. TL then discussed the matter privately with the claimant who, at that time, did not want to take the matter any further. On 17

May 2006 the claimant did lodge a complaint about the incident of 15 May 2006 and then met the human resource manager (HR) on 18 May 2006 to give more detail of her allegations. MC, who denied the claimant's allegations, was then suspended with pay until the completion of an enquiry into the incident by a three-person board of enquiry. This enquiry produced its report on or around 3 August 2006. The claimant, who had continued to work normally, was now on annual leave. On 4 August 2006 the claimant met HR and was given a copy of the report, which found that inappropriate touching had occurred. HR wrote to the claimant on that day to state that MC was being asked to return to work on 14 August 2006. The claimant returned from annual leave on 7 August 2006 but left work after a few hours, subsequently submitting medical certificates and never again attended for work.

The claimant's solicitor wrote to the CEO of the respondent on 8 August 2006 to state that the claimant was most upset and distressed that MC was to return to work. It was further stated that the claimant wanted MC reassigned so that she would no longer come into contact with him. The prospect of a constructive dismissal claim was also canvassed in this letter. CEO acknowledged this letter on 5 September 2006. As part of MC's return to work a new protocol was introduced whereby he was no longer allowed to enter further into the facility than the reception area where other staff members were to either bring or collect service users to or from MC. No formal disciplinary penalty was imposed on MC as CEO felt the imposition of the revised protocol was penalty enough.

The dignity at work policy in place in the respondent provides for mediation to be attempted following the outcome of a formal investigation. The claimant met HR on 19 September 2006 and on 6 October 2006 HR wrote to the claimant to invite her to participate in mediation of the issues. The claimant declined to take part in the mediation as she had a fear of meeting the driver again and wrote to HR along those lines on 10 October 2006.

On 11 October 2006 the claimant's solicitor wrote to HR to again ask that MC be reassigned so that the claimant would not have to work directly with him. Once again the prospect of a constructive dismissal claim was canvassed. On 6 November 2006 HR wrote to the claimant to propose the investigation of the possibility of the claimant changing her working hours, by starting and finishing earlier, so that she would not come into contact with MC. This was rejected in a letter from the claimant's solicitor on 9 November 2006. Following a letter in similar vein sent on 8 December 2006 to HR the claimant's solicitor wrote to CEO on 8 January 2007 giving seven days for the respondent to reassign MC or to face the issue of constructive dismissal proceedings. On 15 January 2007 HR wrote to the claimant's solicitor to confirm that arrangements had been made to reassign MC. There was no further contact from the claimant, other than a consultation with an occupational health advisor on behalf of the respondent, until when the claimant wrote to CEO on 10 April 2007 and submitted her letter of resignation in which she stated that she felt she had been constructively dismissed.

Determination:

The respondent's disciplinary procedure contains within its scope sexual harassment as an example of conduct which may lead to disciplinary action. Whilst MC was suspended for some three months whilst the enquiry into the incident of 15 May 2006 was ongoing this was not a disciplinary measure. As a result of the finding of inappropriate touching against MC a protocol was imposed upon him in that he was restricted to the reception area of the facility from the time he returned to work on 14 August 2006. From January 2007 he was reassigned so that he did not attend the

facility where the claimant was employed. Despite this no disciplinary sanction was taken against him. The Tribunal finds this to have been an unusual inaction on the part of the respondent.

Once the claimant's solicitor wrote to CEO on 8 August 2006 the respondent was on notice that the claimant wanted MC reassigned so that she would no longer come into contact with him. This position was reinforced in several letters from the claimant's solicitor culminating in the one of 8 January 2007 in which the respondent was given 7 days to reassign MC. The respondent complied with this demand on 15 January 2007. The claimant did not return to work and resigned some three months later. In a situation such as this where the claimant has set out her demands for her return to work and where the respondent has, albeit belatedly, met those demands the Tribunal must find it was not reasonable for the claimant to resign and claim constructive dismissal. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)