

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD407/2008
against
Employer
under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Mr D. Hegarty
Mr D. McEvoy

heard this claim at Cork on 6th November 2008
and 2nd February 2009
and 3rd February 2009

Representation:

Claimant :
Mr Fergus Long, Ronan Daly Jermyn, Solicitors,
12 South Mall, Cork

Respondent :
Mr Tim Bracken, B.L., instructed by Mr. Michael Bolger,
O'Flynn Exhams & Partners, Solicitors, 58 South Mall, Cork

The determination of the Tribunal was as follows:-

This is a claim for constructive dismissal arising out of a series of events that occurred in the course of the Claimant's employment with the Respondent, the sequence of which commenced on or about the 12th of October 2006.

The Claimant was employed as a care assistant by the Respondent from the 27th of April 2005. Prior to commencing his employment he had undertaken various courses of study in Ireland and the United States, among them the Diploma in Early Childhood Studies in University College Cork. He also had a family background in childcare and care for children and disabled persons held a life-long interest for him.

His work comprised of caring for handicapped males at night in one of several bungalows on the Respondent's campus at (the respondent's address). The protocol was that two care assistants would work together at night in each bungalow and there was always a floating "security man" ("DR") who provided assistance as required in all of the bungalows.

On the 14th of August 2006 a colleague did not come into work. The Claimant notified the section manager ("SM") and the floating security man was instructed to come to the bungalow to assist him in looking after the residents for the night. The DR approached him at approximately 3.00 a.m. while he was cleaning the bungalow and asked him if he would object if he went home. The Claimant declined to permit him to go as he was uneasy about working on his own, notwithstanding this the security man left the unit at approximately 3.30a.m. claiming to be suffering from migraine. He did not return for the remainder of the night.

On the 12th of October 2006 the DR made a complaint in writing to the Respondents alleging sexual misconduct by the Claimant with one of the service users in his care.

As a result of the complaint the Claimant was called to a meeting with the Sector manager ("SM") on the 13th of October 2006.

The complaint was read to him but he was not given a copy of it. He subsequently did however get a copy of a statement made by the complainant. The Claimant was given a letter dated the 18th of October 2006 addressed to the Service Community Leader from the Respondent's Human Resources Manager setting out the procedure that was now to be adopted. The effect was that the Claimant was put off duty with full pay and premia pending an investigation into the allegations against him.

Over the next number of weeks this investigation was conducted by persons duly appointed by the Respondents and was conducted with the co-operation of the Claimant. On the 5th of December 2006 a further meeting was held with the Claimant at which he was informed that the investigators had concluded that there was no substance to the allegation and that accordingly no disciplinary action was warranted against him. This was confirmed by letter of the 13th of December 2006 from the Chief Executive Officer ("CEO") of the Respondent in which the Claimant was invited to return to work and was told that "at the outset" he would not be rostered with the Complainant.

The Claimant was also given a copy of the Investigator's report which runs to some six pages but concludes as follows:

"having investigated the allegation by DR (reported on the 12/10/06 and the 17/10/06) concerning an incident between the service user DK and staff (the claimant) at bungalow 9, (at the respondent's address) on August 14th last, we unanimously are of the belief that it is more likely than not, that no active abuse was perpetrated by (the claimant). We are also of the belief that it is more likely than not that no incident of any concern occurred between DK and (the claimant) on the night".

Whereas the Claimant expressed "enormous relief" initially at the findings he was not satisfied with the wording of the conclusion in the report feeling that it was not an adequate exoneration. He felt that he could not return to his employment without receiving reassurances or guarantees from his employer that he would not be exposed to similar false accusations in the future. He found the entire event unbearably stressful, he sought medical advice from his General Practitioner.

By letter of the 10th of January he formally requested that the "*malicious complaint and breach of*

confidentiality by Mr. D.R. be investigated in full'. His employers appointed an independent investigator to carry out an investigation into his complaint. The Claimant however did not feel sufficiently well to meet with his employers or the investigator until the end of March 2007, at which time he was certified well enough to meet with his employers by his G.P. and he offered the dates of the 9th or the 13th of April 2007 as possible dates for a meeting and requested that the meeting be tape recorded. Ultimately the 10th of April 2007 was fixed for a meeting between the Claimant and his employer but the request to tape record the meeting was declined. In a further e-mail of the 5th of April 2007 the Claimant again sought to have his grievances dealt with in writing and he indicated that Respondent's "*persistence over time in wanting me to attend a meeting with regard to my work issues has only aggravated and continues to escalate my stress*". By e-mail of the 10th of April 2007 the proposed meeting was cancelled and a lengthy letter was sent to the Claimant's Solicitors by the Chief Executive ("CEO") of the Respondents on the 23rd of April 2007.

The investigation carried out into the Claimant's complaints ultimately culminated in DR being dismissed from his employment. The Claimant however felt that he could never go back to his former employment as he couldn't take a chance on the same thing happening again. He could not expose himself to another allegation and was fearful of the unpredictability of the situation and he wanted reassurances from his employer that he would be secure. He felt that if another such allegation was made that his mental wellbeing would not hold up.

Evidence was heard on behalf of the Claimant from his General Practitioner who indicated that he knew the Claimant for 15 years and found him to be stressed, very upset and sleep disturbed. He was overwhelmed by the allegations that were made against him and he found it impossible to reassure him. He felt that the entire matter was having a very detrimental effect on his mental health and relationships. He advised him to move on and he had found that he has improved somewhat since moving on. He felt that it might not have been beneficial for him to attend a meeting with his employers particularly in December 06 and the early part of 2007.

Evidence was also given on behalf of the Claimant by Dr. MH. She had encountered the Claimant while he was a student of hers in the Early Childhood Studies Course in UCC. She knew him between 1998 and 2001 and was very impressed by him. It was unusual for a male to undertake the particular course and she felt that he was enthusiastic, engaging and challenging in his questions. She said that he set incredibly high standards for himself and ultimately got a Second Class Honours Grade 1 Degree. She described him as being meticulous, scrupulous and a perfectionist. She said that the allegation of abuse against someone in (the claimant's) position would be catastrophic, there is a "laser beam" on men in the caring professions in any event and any allegation would be viewed very seriously. She felt that any employer would be put off by even an allegation from which he was exonerated. She said that she met him around the time that all this was happening and was quite disturbed by his mental state when she met him.

The evidence on behalf of the Respondents came from the Human Resources Manager, the Sector Manager and the Chief Executive Officer of the Respondent. The conclusion of that evidence was that the Respondents employed the procedures set out in appendix 4 of the document entitled Policy and Procedure of Prevention of Abuse and Management of Abuse Allegations. The Trust in Care policy document had not been fully implemented and they were in a transient stage at the time of the events surrounding the current case were unfolding. They were satisfied that he was exonerated by the investigation and that the investigation was carried out within a reasonable timeframe. His suspension was necessary because of the nature of the complaint and the involvement of a service user. Once the results of the investigation were obtained they were notified to the Claimant and he

was immediately invited back to work. At all times they wanted the Claimant to come back to work. They arranged for an independent investigation of the Claimant's allegations against DR and this culminated in his dismissal of the DR. It was acknowledged that this investigation took considerably longer than the investigation into the allegations against the Claimant. It was their intention not to roster the Claimant on his return to work with DR and that this would in general have been possible but they could not guarantee that at some time they would not be present on the campus simultaneously. It was their intention however not to roster them together. They did not suspend the security man pending his investigation as the complaint did not involve a service user and in any event the security man was out of work with a certified illness for much of the period during which the investigation was being carried out.

Summary of the Claim:

The Claimant in this case had an allegation of sexual misconduct with a service user made against him. He was suspended pending the investigation on full pay. The investigation took approximately seven weeks and exonerated him completely from the allegations and he was invited to return to work.

The Claimant makes out the case that:

- a. The findings in the investigation though exonerating him were not satisfactory and that his employers should obtain an amendment of same.
- b. He could not return to his employment because his employers could not provide him with a guarantee that a similar incident would not occur in the future.
- c. In carrying out the initial investigation the Respondent did not strictly comply with their own policy in this regard namely "Trust in Care".

Determination

The Claimant in this case claims to have been constructively dismissed by virtue of the actions of his employers. Section 1 (b) of the Unfair Dismissals Act 1977 provides that dismissal includes *"the termination by the employee of his contract of employment with his employer in circumstances in which because of the conduct of the employer the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contact of employment."*

It would appear to this Division of the Tribunal therefore that it must be satisfied that the employee is either entitled; or is acting reasonably in terminating the contract. In order for an employee to meet either of these criteria the conduct referred to in the Act cannot be petty or minor but must be something serious or significant which goes to the root of the relationship between the employer and the employee. Consequently the Tribunal must look at the conduct of the employer and the reasonableness of the resignation by the employee.

In this case the Claimant was accused of sexual misconduct with a care user. This gave rise to a situation whereby the employer had no option but to put the Claimant off duty on full pay for the duration of an investigation. This investigation did not take an unreasonable length of time to be concluded and the employer communicated the favourable outcome of the investigation to the Claimant at the earliest possible date and invited the Claimant to return to his employment.

The Claimant felt that it was unreasonable to expect him to return to work without safe guards with

regard to his future safety being put in place, and furthermore, in the light of their failure or refusal to obtain an amendment to the findings of the investigation committee. The Tribunal is satisfied that it was not within the remit of the Respondent to seek the alteration of the investigation findings nor was it possible for the Respondent to give the guarantees sought by the Claimant with regard to future employment.

The procedures followed by the Respondent though not strictly compliant with “Trust in Care”, were nonetheless fair and led in any event to the exoneration of the Claimant.

Where as it is most regrettable that an honest and conscientious care provider was wrongly accused of serious misconduct nonetheless the Tribunal is satisfied that the Respondent acted reasonably in all the circumstances, furthermore the Tribunal finds that there were not adequate or reasonable grounds for the Claimant to terminate his contract of employment. Consequently the claim must fail under the Unfair Dismissals Acts 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

