

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee
-Appellant

UD799/2008

Against the recommendation of the Rights Commissioner, **R-060334-UD-07/SR**

In the case Employee v Employer
-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. McAveety.

Members: Mr. R. Murphy
Mr. J. Moore

heard this appeal at Monaghan on 30 January
and 7 April 2009

Representation:

Claimant:

Mr. Paul Boyce, Paul Boyce & Co. Solicitors,
39/40 Dublin Street, Monaghan

Respondent:

Ms. Anne Brennan, O'Meara Geraghty McCourt Solicitors,
51 Northumberland Road, Dublin 4

This case came before the Tribunal as a result of an appeal by an employee (the appellant) against the recommendation of the Rights Commissioner, **R-060334-UD-07/SR** in the case of the employer (the respondent)

The determination of the Tribunal was as follows:

The respondent has operated a nursing home since July 2006. The appellant was employed in the nursing home as a care assistant since 1994 at a time when the nursing home was under different

management. Apart from a disputed note on the appellant's personnel file from 2005, from the former matron of the nursing home, about smoking in the workplace, the employment was uneventful. Throughout the time in which the respondent operated the nursing home the appellant worked two or three twelve-hour night shifts per week along with one nurse and another care assistant. There are some 50 residents in the nursing home.

On the nights of 21 and 22 August 2007 the other care assistant (CA) working with the appellant was an occupational therapy student with whom the claimant had not previously worked. On 23 August 2008, at the completion of her second shift working with the appellant, CA submitted a written account of complaints that she had about the appellant. In summary these were that the appellant:

- was verbally abusive to CA
- was verbally abusive to residents
- refused to help CA lift a named resident from her wheelchair
- mishandled residents while putting them to bed
- repeatedly smoked in the corridors and once while changing a resident's incontinence pad
- used double incontinence pads for convenience
- did not communicate to CA
- gave out to CA for giving an alarm bell to a named resident

As a result of these complaints from CA the group nurse manager (NM) wrote to the appellant on 23 August 2007 informing the appellant that a complaint of gross misconduct had been made against her. She was suspended with pay pending the outcome of an investigation and invited to bring a representative with her to any investigative meeting.

NM met the appellant and her union representative (UR) on 27 August 2007 and NM asked the appellant if she ever provided care for a single floor alone. The appellant denied this saying that many residents would be too heavy. When asked if she ever smoked in the building she accepted that she lit up inside the exit door by the laundry and had smoked on the balconies, but denied smoking on the corridors or in the bedrooms. The appellant denied rough handling of residents or causing them discomfort. She only worked alone with residents who can help. The appellant denied using foul or abusive language to either staff or residents. The appellant was not told who the complainant was at this time but told that she would be given this information if, after further enquiries, there was an issue to answer.

NM interviewed five or six members of staff and got statements from two of them, who did not give evidence to the Tribunal, that they had seen the appellant smoking a couple of times in both the day room and the staff dining room. NM did not interview the nurse who was on duty with the appellant and CA on both 21 and 22 August 2007. On 3 September 2007 NM wrote to the appellant to mention the two further reports of smoking in the building. The appellant was advised that there would now be a disciplinary hearing into the matter. The disciplinary meeting was held on 4 September 2007 and attended by NM, an administrative assistant (AA) who took the notes of the meeting, the appellant and UR. At the outset of this meeting the appellant was told that she would be told who, additionally, had said that the appellant smoked in the building during the meeting.

The appellant conceded that she might have smoked while turning off the bell for a resident whose room was close to the back door. The appellant was then given the details of the three complaints against her. At this point the meeting was adjourned to allow for the involvement of a full-time union official (UO).

The same parties met again on 3 October 2007 with the addition of UO. The points of complaint raised by CA were gone through.

- The appellant denied any verbal abuse towards staff. She further denied ever being spoken to about it.
- Whilst accepting that she may have been a bit abrupt towards the named resident the appellant denied using foul language
- The appellant denied ever being asked to assist CA in lifting a named resident from her wheelchair
- The appellant denied rough handling of residents
- The appellant accepted that some double padding occurred.
- The appellant denied raising her voice to CA but accepted that CA might have misunderstood her sharp tone
- The appellant denied giving out to CA for giving an alarm bell to a named resident but said that she had re-arranged the bell but left it still in the resident's reach

The appellant confirmed that no one had spoken to her previously about any of these matters.

At a meeting called on 10 October 2007 and attended by NM, AA, the appellant and UR matters that appeared on the appellant's personnel file and predated the respondent's management of the nursing home were put to her. The appellant's position was that she had no knowledge of these matters.

On 15 October 2007 NM wrote to the appellant to state that having considered her submission, her personnel file and the investigation into the complaints against her there was no alternative but to dismiss the appellant for a serious breach of trust and gross misconduct. The appellant was informed of her right of appeal to the respondent in this matter. She exercised her right of appeal and that hearing took place on 13 November 2007. In attendance were the respondent, a note taker, the appellant, UR and UO. On 28 November 2007 the respondent wrote to the appellant rejecting her appeal "in light of her conduct which showed a disregard for the welfare of our residents who must maintain our highest priority and the focus of everything we do ..."

Determination:

There is no doubt that the complaint against the appellant was serious in both its nature and its extent. When considering the enquiry conducted by NM the Tribunal was not told who was spoken to and who was not, except to say that the nurse on duty at the time of the complaint was not spoken to. To have reached the conclusion that the appellant was guilty of breach of trust and gross misconduct based on the complaint from CA without speaking to the nurse on duty at the time of the complaint is extraordinary. There is no doubt that the investigation did confirm that there had been inappropriate behaviour on the part of the appellant but the Tribunal is not satisfied that any of this amounted to breach of trust or gross misconduct. In such circumstances the Tribunal finds that dismissal was a disproportionate penalty in this case. It must follow that the dismissal was unfair and taking account all the circumstances of this case the Tribunal awards €8,500-00 under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)