

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE  
–**Claimant**

UD1349/2008

against

EMPLOYER  
- **Respondent**

Under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. Pierson  
Mr. P. Trehy

heard this appeal at Portlaoise on 3 June  
and 24 & 25 September 2009

#### **Representation:**

Claimant: Mr. Ed Dwyer B.L. instructed by Mr. Ger O'Donoghue,  
White O'Donoghue & Co. Solicitors,  
Market Square, Abbeyleix, Co. Laois

Respondent:  
Mr. Alan Barry, IBEC, Confederation House,  
84/86 Lower Baggot Street, Dublin 2

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 an organisation providing a service to the HSE in the form of recreational activities to vulnerable at risk young people, at the margins of society, across the island of Ireland. The respondent has twelve projects in the Republic of Ireland and around 30 in Northern Ireland. The claimant was employed as a project worker in one of the respondent's projects in mid-Leinster (PP) from 10 March 2004. At the time of the incidents that led to this claim the claimant was employed in a part-time capacity. Project workers act on a one to one basis with the young people who at risk.

It is common case that there were some difficulties in PP to the extent that on 24 October 2007 the human resource manager (HR) of the respondent met the staff of PP to discuss the dissatisfaction of the project staff about various issues. There were more negative than positive comments from the

project's staff. The claimant did attend this meeting at which topics for discussion were selected at random from the totality of topics provided by the staff.

On Friday 25 January 2008 the claimant and a colleague (PW) accompanied two female minors (TF1 and TF2) on a two-night residential weekend at the respondent's XXXX facility in Northern Ireland. Risk assessments are made before undertaking outings such as this and one of the matters for consideration was that TF1 was known to be sexually precocious as a result of which she had, for a time, been banned from the so called residential. This ban had been lifted some months previously after TF1 had inter alia successfully completed a single overnight stay.

When the claimant's group of four arrived at XXXX there was some confusion about their accommodation and in the event they took up accommodation in a chalet adjoining one in which a group of two project workers and three male young people from another of the respondent's projects (MP) were staying for the weekend. Following their return home on Sunday 27 January 2008 PW was contacted by TF1's care worker (an HSE employee) and told that TF1 had made an allegation of sexual activity between herself and one of the young males from MP. As a result the programme manager with responsibility for both PP and MP initiated informal action under the respondent's disciplinary procedures in order to establish the facts surrounding this serious allegation. The project managers of both PP and MP were tasked with the initial information gathering exercise and to this end they spoke to the claimant, PW, the project workers from MP and four of the five young people, including both females, who had been on the residential weekend. In order to speak to the young people it was necessary to get permission from the HSE. In the case of TF1 this permission came from the social work team leader with oversight for TF1 who is the gatekeeper between the HSE and the respondent for PP. As a result of these enquiries both the programme manager and HR were satisfied that there was sufficient evidence to warrant a formal investigation into the events of 27 January 2008 at XXXX. To this end two project managers, who had no involvement with either PP or MP, were appointed to carry out the investigation with the following terms of reference:

1. To investigate the concerns raised relevant to the alleged incident
  - Pre-planning for the residential by PP and MP staff respectively, including risk assessment
  - The sequence of events which led to the concerns being raised regarding the allegation made by one of the young people following the residential
  - Implementation of work rules and policy
2. To establish whether the concerns were (well) founded
3. To produce a report for the respondent's senior management which addressed the issue outlined above
4. To identify areas for action by senior management which may include recommendations for training, improving processes and procedures any other action considered appropriate

Some time after the initial informal investigation had begun the claimant and the gatekeeper, whose offices are on the same corridor, met in the workplace. The gatekeeper made remarks to the claimant about her "little disciplinary meeting" and suggested, "If I don't see you coming down the

corridor I'll know due process has been followed". On 22 February 2008 the claimant telephoned HR and complained about the gatekeeper's comments. HR told the claimant that she had been made aware of this by the project manager of PP and that the gatekeeper had been apologetic and had not meant to upset the claimant. HR then outlined three options to the claimant:

- Do nothing and accept what had happened
- Seek a verbal or written apology
- Lodge a complaint with her project manager so that this could be forwarded to the gatekeeper's line manager

The claimant wrote to HR on 27 February 2008 to say that she had decided not to proceed with the formal grievance procedure. She, instead, requested a three-way meeting be arranged with the gatekeeper to take place once the investigative process was completed.

The claimant was absent from work on sick leave for a week in early February 2008 and then again on sick leave suffering stress from 28 February 2008 and did not attend work after this date. On 28 February 2008 she attended an investigative meeting under the disciplinary procedure with the two investigators, her trade union representative and an administrator who took the notes of the meeting.

On 14 April 2008 HR wrote to the claimant to confirm that the investigation report was at first draft stage and that confirmation would be sought from those, including the claimant, who had been interviewed that the interview notes were accurate as copies of the notes were to be appended to the report.

On 16 April 2008 the claimant wrote to HR, sending a copy to her project manager, tendering her resignation. The claimant had obtained alternative employment but was unable to assist the Tribunal as to when she had secured this alternative employment. A medical report dated 25 April 2008, submitted on behalf of the respondent as a result of an examination by a company appointed doctor makes it clear that the new employment was due to start in two to three weeks from that date. It is further clear from the medical report that the claimant did not receive the aforementioned letter of 14 April 2008 until 24 April 2008. The project manager wrote to the claimant on 1 May 2008 acknowledging her resignation and confirming that her last day in the employment was to be 16 May 2008. Following a request from the claimant, with which HR concurred, it was agreed to carry on with the disciplinary process even though the claimant had by now left the employment. The claimant wanted to see the procedure through to completion.

On 20 May 2008 HR wrote to the claimant confirming that the investigation into the events of the residential on 25-27 January 2008 had been completed and that, as a result of the investigation, she would be required to answer the following allegations that she:

- deliberately ignored the respondent's rules and thereby endangered the physical well-being and/or safety of herself or others which fell within the category of gross misconduct
- wilfully neglected the respondent's clients, as regards the level of supervision over the young people on the residential, which again fell within the category of gross misconduct
- refused to carry out a reasonable work instruction in regard to risk assessment and mobile phone usage by the young people, which again fell within the category of gross misconduct

The claimant was provided with a draft of the notes of her meeting of 28 February 2008 and requested to check the accuracy of the notes and reply to HR by 6 June 2008. The disciplinary hearing took place on 25 June 2008 and was attended by two programme managers who were the decision makers, one of the project managers who conducted the investigation as presenting officer, the claimant, her trade union representative and an administrator who acted as note taker.

On 7 July 2008 the chair of the disciplinary panel wrote to the claimant stating that, had she still been in their employment, she would have been summarily dismissed without notice. The claimant exercised her right of appeal against this finding and the appeal was heard on 15 August 2008 and was chaired by the CEO of the respondent with two directors assisting the CEO. The outcome of the appeal was that the sanction of dismissal be reduced to a final written warning to expire after twelve months.

### **Determination:**

This was an unusual case in that the claimant resigned from the employment and is claiming to have been constructively dismissed. Yet, following her resignation the claimant participated in the respondent's disciplinary process.

The claimant sought to rely on three grounds to justify her claim of constructive dismissal: -

- The breakdown of her trust and confidence in her relationship with the respondent and, in particular, with PM
- The gatekeeper's statements at the outset of the investigation
- The handling of the investigation

PM did not give evidence to the Tribunal and there is no evidence to contradict the claimant's version of their relationship. However the claimant never raised any complaint under the grievance policy in this, or any other, regard. It is common case that the staff of PP had some issues with the operation of the project. HR's organisation of a team meeting in October 2007 to deal with these issues was an appropriate response.

It is common case that the remarks the gatekeeper made to the claimant at the outset of the process were inappropriate. However, after her telephone conversation with HR on 22 February 2008 the claimant was invited to raise a grievance in regard to the matter. Her response in her letter of 27 February 2008 to HR was to not raise a grievance; rather, she opted to deal with the matter by means of an informal three-way meeting following the completion of the investigation into the XXXX incident. Affording the claimant the opportunity to select her preferred option for dealing with the issue that had arisen was wholly reasonable.

Following the XXXX incident the claimant gave a statement to PM. On 28 February 2008 she was interviewed as part of the investigation into the incident. It is common case that the incident necessitated an investigation. Whilst the investigation report was dated April 2008 the claimant did not receive a copy of it until 20 May 2008 by which time the claimant had submitted her resignation and left the employment. There was no evidence before the Tribunal that the claimant had any problems with the conduct or content of her investigation interview on 28 February 2008. In such circumstances the claimant cannot rely on the investigation report as a ground for her claim of constructive dismissal. It follows that, despite having heard extensive evidence in regard to the report, there is no need for the Tribunal to consider the fairness or otherwise of the report. The

claimant's position was that she had lost trust and confidence in the process adopted by the respondent. This does not sit well with the claimant's stated reason for participating in the disciplinary process subsequent to her resignation. This reason was to clear her name

For all these reasons the Tribunal is satisfied that the claimant failed to discharge the onus of showing that the respondent's behaviour was so unreasonable that it was reasonable for her to terminate her contract of employment. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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