

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE -Claimant

**CASE NO.**  
UD324/2008

MN298/2008  
WT156/2008

against  
EMPLOYER - Respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. R. O'Flynn B.L.

Members: Mr. M. Forde  
Mr. J. McDonnell

heard this claim at Cork on 14th October 2008 and 30th March 2009 and 31st March 2009

### **Representation:**

Claimant: Mr. John Boylan, McNulty Boylan & Partners, Solicitors,  
26-28 South Terrace, Cork

Respondent: Ms. Elizabeth O'Connell B.L. instructed by Mr. Larry Power,  
Fachtna O'Driscoll, Solicitors, 8 South Bank, Crosses Green, Cork

### **The determination of the Tribunal was as follows:**

#### Claimant's Case:

The claimant gave evidence that she is a qualified social worker. In September 2005 the appellant commenced her employment within the national organisation based in Dublin. However, at a later stage due to a transfer of undertakings she was employed within the Cork organisation (the respondent) and the two organisations became separate entities. The claimant outlined there is one remaining link between the Dublin-based national association and the Cork-based association and that is the clinical supervisor in the HSE. At the time of the transfer the claimant was provided with her written terms and conditions for her employment with the respondent. However, she was not provided with the respondent's Policies and Procedures Manual which includes the grievance procedure.

The claimant worked with children and the elderly with hearing difficulties and she organised support services. Her role was to also offer advice and information to individuals regarding local services. The claimant also worked with other social workers in relation to child protection issues. The respondent employed one other social worker.

In the course of her employment the claimant did not receive any verbal or written warnings. During the

course of her employment the claimant reported to a number of individuals who filled the post of manager. At the time of November 2007, Ms. G was the claimant's line manager.

On 20<sup>th</sup> December 2007 (the last day of work for the claimant before the Christmas period) the claimant and the other social worker were asked to attend individual meetings with Ms. G. When the other social worker returned from her meeting she handed the claimant a letter to read. The letter was dated the 19<sup>th</sup> October 2007 and was written to a Mr. W who had been Acting Manager. The letter was written by a Consultant Psychiatrist and a Clinical Nurse Specialist who were employees of the Dublin-based national association. The claimant could not believe the content of the letter. Part of the letter stated *"it has become clear that the Social Workers with Deaf people currently in post do not have the necessary skills, interest, motivation or attitudes which enable safe and effective professional multi-disciplinary work with Mental Health clients"*

Ms. G told the claimant that she had the same letter for her. The claimant was in disbelief at the outrageous suggestion as outlined above. To the claimant the statement said that she could not be trusted with clients and this undermined her whole profession.

The letter also made reference to a particular client and a case conference that was held the previous year. The letter stated that the patient was high-risk. The claimant told the Tribunal that this particular case was under the care of the other social worker but the claimant had looked after the client for a period of two months. The claimant did attend a meeting concerning the patient but it was a strategy meeting rather than a case conference. The letter stated that an initiative concerning a mental health service would not be possible until staff were in place to work directly with patients/clients. The claimant stated that this statement completely "wrote off" her ability. The claimant stated that she had never received a complaint from a family member of a client.

When the claimant noticed that the date of the letter was the 19<sup>th</sup> October 2007 she queried it with Ms. G. Ms. G stated that she had first spoken with a solicitor concerning the letter and the solicitor had informed her that the claimant and the other social worker should receive a copy of the letter. However, the claimant became aware that a number of people knew of this letter including her Clinical Supervisor and Mr. K who was the Chief Executive of the Dublin-based association. The claimant raised the issue with her line manager as to patients continued to be referred to her, given the contents of the letter. Ms. G replied that it was not a supervision issue but a management issue. Ms. G also stated she was only in the position of manager since the start of November 2007. The claimant protested that it had still taken six weeks to provide her with the letter.

After the meeting the claimant informed Ms. G that she was cancelling her appointments for that afternoon and that she was unable to take any further appointments. The claimant was outraged by the letter and the period over Christmas was very difficult. The claimant scheduled an appointment with a solicitor for after the Christmas period.

The claimant had difficulty concentrating when she returned to work on the 9<sup>th</sup> January 2008. The issue of the letter was raised but not in a meeting. The claimant was made aware that the Human Resources Manager of the Dublin-based association was aware of the letter. The claimant could not understand how this was the case. Approximately seven people were aware of the letter including a manager and there was talk of the letter being brought to the attention of the Board of Directors.

The claimant attended her doctor who stated that she was unfit for work due to work related stress. The claimant's solicitor wrote letter dated the 8<sup>th</sup> February 2008 to the claimant's line manager asking a number of questions on the claimant's behalf. An acknowledgement of this letter dated the 13<sup>th</sup> February was received from the claimant's line manager and it stated that the association would be *"..making an appropriate response to this letter in due course."* The claimant's solicitor also wrote to Mr. K the Chief Executive of the Dublin-based association as the writers of the letter were employees of this association. On the 26<sup>th</sup> February 2008 the claimant's solicitor again wrote to her line manager as

no response had been received. The claimant's solicitor also wrote to the writers of the letter of the 19<sup>th</sup> October 2007 requesting a relevant retraction, apology and an undertaking to compensate the claimant for the loss and damage which she sustained. A response was not received from the two individuals and the claimant's solicitors wrote again stating that proceedings would be issued against them.

On the 3<sup>rd</sup> March 2008 a firm of solicitors wrote to the claimant's solicitors stating that their client was the Dublin-based association. The claimant's solicitor asked the firm to confirm who they were acting on behalf of in the matter.

The claimant received a letter dated the 12<sup>th</sup> March 2008 from Mr. K and the letter was signed off that he was deputising for the general manager of the Cork-based association (the respondent). This was the first official notice the claimant had that Mr. K was now her employer. The letter asked the claimant to attend for a medical assessment on 18<sup>th</sup> March 2008 as she had been absent from work for over eight weeks. The claimant attended for the medical assessment.

The claimant received a further letter from Mr. K dated 18<sup>th</sup> March 2008 and signed Acting General Manager. The claimant was submitting fortnightly medical certificates but Mr. K stated that a weekly medical certificate was required.

Subsequently, the claimant received letter dated 27<sup>th</sup> March 2008 from Mr. K, Acting General Manager, which stated that he was in receipt of the occupational physician's report which outlined that the claimant was fit for work. The claimant was asked to attend for a meeting to discuss her return to work. The claimant stated that the physician's report was sent to Mr. K at the address of the Dublin-based national association which was not her employer.

Through a letter from her solicitor dated the 31<sup>st</sup> March 2008 the claimant tendered her resignation. A response had not been received in relation to her solicitor's letter of the 8<sup>th</sup> February 2008. The claimant tendered her resignation due to the outrageous accusation made against her, the delay in receiving the letter of the 19<sup>th</sup> October 2007, the lack of support and feeling that she was "out on her own". Another factor was the appointment of Mr. K to the post of Acting General Manager within the Cork-based association as he was Chief Executive of the Dublin association of which the writers of the letter of the 19<sup>th</sup> October 2007 were employees. The claimant had received correspondence concerning her submission of medical certificates but had not received a response to concerns raised in her solicitor's letter of the 8<sup>th</sup> February 2008. The claimant felt it was an untenable situation and that she had no option but to resign. The claimant did not have an opportunity to close matters with her clients. A letter from the Acting General Manager dated the 31<sup>st</sup> March 2008 crossed with her solicitor's letter. It enclosed an Absence Due to Sickness policy which the claimant had not previously had sight of.

During cross-examination the claimant confirmed that referrals from the Cork-based association to the Consultant Psychiatrist (one of the writers of the letter of the 19<sup>th</sup> October 2007) came from the claimant and the other social worker. The claimant confirmed that at the time of the 19<sup>th</sup> October 2007 Mr. W the then Acting Manager was admitted to hospital for a number of weeks and that her line manager, Ms. G, was appointed in early November 2007. The claimant did not accept that it was reasonable for her line manager to discuss the letter with the claimant's clinical supervisor and another to get the background as the letter pertained to the claimant.

The claimant confirmed that the letter she received from her line manager Ms. G was an abbreviated letter and that due to client safety her manager had to raise the matter with her. It was put to the claimant that her line manager had to address the matter with the claimant on the 20<sup>th</sup> December due to the suicidal tendencies of the patient. The claimant replied that her letter did not contain these details but it was contained in the other social worker's letter. The claimant accepted that nothing was indicated to her on 20<sup>th</sup> December 2007 relating to a disciplinary process.

It was put to the claimant that on a number of occasions her line manager had asked her to outline her side of the things. The claimant stated that she was asked for a reply to the letter of 19<sup>th</sup> October 2007 but she did not even know how to begin to respond to the letter.

#### Respondent's Case:

The claimant's line manager (Ms. G) from November 2007 gave evidence. She was promoted when Mr. W was absent on sick leave. In early November 2007 she received a letter, dated October 19<sup>th</sup> 2007, from a Consultant Psychiatrist and Clinical Nurse Specialist in the Dublin-based national association stating serious concerns they had with the Cork-based Social Workers. Mr. W recommended she speak to the Director of the medical health team (Ms B) who was also the supervisor of the authors of the letter. They agreed to meet the following week in Cork but due to a personal issue it was postponed until December 17<sup>th</sup> 2007 in Dublin. She also contacted the authors of the letter in November by letter to meet to discuss the matter.

They met and she was given the background to the letter. She was informed of the low level of referrals in Cork to use the new service provided. She wanted to get a detailed background into the case before meeting the claimant and her colleague could not understand why the parties involved did not meet to discuss the situation before the letter was sent.

On December 20<sup>th</sup> 2007 the witness had individual meetings with the claimant and her colleague concerning the letter. She apologised for the delay in bringing the matter to their attention. The claimant was assured that it was not a disciplinary meeting but the matter had to be resolved. The witness stated that she felt the contents of the letter referred more to the claimant's colleague. The claimant was very upset and requested her colleague to attend the rest of the meeting with her. Both Social Workers were informed the witness would reserve her answer on the matter. The claimant could not continue working that day as she was upset and told the witness she would be contacting her solicitor.

When asked she said that she had not contacted the claimant over the Christmas period as she felt the call might be unwelcome. On January 9<sup>th</sup> 2008 the claimant returned to work and they spoke. The witness felt they were making a way forward, she offered external support to the claimant but was informed she had her own supports. She also requested a response to the letter in question but the claimant was unwilling to respond without her solicitor's approval. When asked she stated that she had not informed the Social Workers Clinical Supervisor, located in Dublin, about the letter before the claimant was aware of its existence.

In late January 2008 the claimant returned from a weeks sick leave. The witness contacted her and again offered support to the claimant but was told she had her own. The claimant was absent again on sick leave due to work related stress in early February 2008. During this time the witness contacted the claimant to see how she was and see if they could meet. The following week she tried contacting the claimant on a number of occasions but to no avail. She had no other contact with the claimant and left on sick leave herself in late February 2008 until January 2009.

On cross-examination she again stated it had been a very serious letter of complaint but that it had not directly referred to the claimant. There were no disciplinary issues with the claimant. When put to her about the length of time it took for her to discuss the matter with the claimant and her colleague, she replied that it took time to organise a meeting with the Consultant Psychiatrist and Clinical Nurse Specialist in Dublin. She explained that she had not been able to go into the specifics of the letter with the claimant on December 20<sup>th</sup> 2007, as she was so upset. She agreed the claimant and her colleague had no prior knowledge of the December 20<sup>th</sup> meeting.

When asked she stated her predecessor Mr W had a problem with the Social Workers. She explained that at the time the respondent's Sick Leave Policy was still in draft form.

When asked by the Tribunal she said that the issue of the low amount of referrals by the respondent to the medical health team in Dublin was still not dealt with.

The then Chief Executive of the Dublin-based organisation (Mr K) gave evidence. He was involved in the set-up of the respondent company. In 2007 the claimant and her colleague were transferred from the Dublin organisation to the respondent in Cork. He explained that the Dublin-based organisation and the respondent had the same Board members.

An analysis was carried out and it was highlighted that the hard of hearing community required a special medical health service. One team were set up in Dublin and the associations around the country would refer patients to them if required, including the respondent. In 2005 the claimant referred 1 case to Dublin.

On February 21<sup>st</sup> 2008 he took on the role of Acting General Manager for the respondent. He never had any direct contact with the claimant but had written to her requesting her attendance at a medical assessment on March 18<sup>th</sup> 2008.

On cross-examination he stated that the second Social Worker commenced sick leave soon after the claimant but had returned but had since been dismissed. He said that he had not become aware of the situation until January 2008 and had not appointed the Medical Health Team. When put to him, he said that if he had received the letter concerning him he would have expected support from his employer and would want a meeting to sort it out.

When he received a copy of the letter in question in January 2008 he called a meeting with the Medical Health Team to discuss the matter. They felt the claimant was a very good Social Worker but felt she was under the influence of her colleague. He was appalled at the low referrals when he knew certain people should be on the list. He wrote to Mr W regarding the wording of the letter. But this letter crossed over with both sides legal correspondence. When put to him if he had contacted the claimant by telephone, he replied that she knew he had taken over and his number was on the letter he sent to her on March 12<sup>th</sup> 2008. He assumed she would have returned to work.

When asked by the Tribunal how he knew about the number of non-referrals, he replied that he was aware of operations in Cork.

#### Determination:

Having heard the evidence in the within case on the 14<sup>th</sup> October 2008, the 30<sup>th</sup> March 2009 and 31<sup>st</sup> March 2009, and having reviewed the written submission proffered on the behalf of the Respondent, the determination of the Tribunal is as follows:

The burden of proof in a claim of constructive dismissal rests with the Claimant. It is well settled law that a claimant who alleges constructive dismissal must establish, on the balance of probabilities that s/he was entitled, by virtue of the conduct of the employer to resign from the employment, or, in the alternative, the claimant must establish to the foregoing standard of proof, that the decision to resign from employment was reasonable.

In the within case, the claimant's evidence was such that she had no option but to resign from her employment on foot of the conduct of her employer and the manner in which it dealt with, or failed to deal with, correspondence from Dr. X and Mr. Y, which correspondence was dated the 19<sup>th</sup> October 2007.

It was accepted by the Claimant in the course of her evidence to this Tribunal that Ms. G, her immediate Manager, was correct in bringing the letter to the Claimant's attention (which Ms. G did on the 20<sup>th</sup>

December 2007, which was the last working day prior to the break for the Christmas holidays) and in her furnishing her [the claimant] with a redacted version of the said letter. The Tribunal is satisfied that the fact of disclosure of the letter in itself to the claimant, and the manner of disclosure, are not sufficient so as to render her resignation reasonable.

Witnesses adduced on behalf of the Respondent accepted that the content of the letter dated the 19<sup>th</sup> October 2007 and the opinion expressed therein by its author/s, could reasonably be regarded by the claimant as raising matters, which were of a serious nature. The authors of the letter referenced the skills, interest, motivation and attitudes of personnel employed by the Respondent and cited the impact of same on the safe and effective delivery of services. The Tribunal is satisfied that the letter cited matters, which warranted due and careful consideration, by the Respondent.

It was accepted by the Respondent that the claimant had a clean disciplinary record and matters of a disciplinary nature had not arisen in the course of the claimant's employment.

It is noteworthy that the letter had been in the possession of the Respondent for some two or so months prior to the Respondent seeing fit to make the claimant aware of its existence. Ms. G on behalf of the Respondent gave evidence that the delay was due in part to her being new to the role, having been appointed in early November 2007 given that the manager (Mr. W) was indisposed due to ill-health. Ms. G stated that Mr. W opened the letter in her presence on 2nd November 2007 in his hospital bed, and he handed it to Ms. G. Further, she stated she needed time to meet with the authors of the letter, which she did on the 17<sup>th</sup> December 2007 in Dublin. Further, she stated that she inherited an avalanche of issues when she assumed the role of acting manager. Ms. G stated that she recognised that the issues raised in the letter dated the 19<sup>th</sup> October 2007, were serious.

The Tribunal is satisfied that Ms. G did have direct contact with the claimant in relation to the matter of the letter in the period when the claimant was at work, namely the 3<sup>rd</sup> January 2008 and 21<sup>st</sup> January 2008, being the date on which the claimant absented herself from work on sick leave. The Tribunal is satisfied that Ms. G had three or so telephone conversations with the claimant, in the period 28<sup>th</sup> January to the 25<sup>th</sup> February 2008 during which time the claimant was absent on sick leave. The Tribunal is satisfied, having heard the evidence, that these phone-calls were largely altruistic in nature and purpose, however they cannot be reasonably construed as a satisfactory or appropriate means of addressing either the matters raised in the letter of the 19<sup>th</sup> October 2007, or, the claimant's concerns, or, the correspondence from the claimant's Solicitor dated the 8<sup>th</sup> February 2008 (addressed to Ms. G). The Tribunal notes that Ms. G was herself absent from work in the period from the 25<sup>th</sup> February 2008 until 9<sup>th</sup> January 2009 and consequently had no further involvement in matters concerning the claimant.

The Tribunal regards the correspondence issued by Mr. K on behalf of the Respondent on the 12<sup>th</sup>, 18<sup>th</sup> & 27<sup>th</sup> & 31<sup>st</sup> March 2008 as being largely administrative in nature, in terms of managing and/or regularising the claimant's period of absence, certification thereof and the scheduling of attendance at medical practitioners nominated by the Respondent. The Tribunal is satisfied that the aforesaid correspondence did not constitute a reasonable, appropriate or timely response, to the matters raised on behalf of the claimant and as set out in the letter issued by her Solicitor (addressed to Ms. G) on the 8<sup>th</sup> February 2008 and the situation which then prevailed and concerned the claimant.

The Respondent contends, in the course of a written submission furnished to the Tribunal that the matters raised and put in prospect by the letter of the 19<sup>th</sup> October 2007 were not disciplinary in nature and the claimant was so informed by Ms. G. The Tribunal accepts that this is beyond controversy. It is noteworthy that in the T2 dated the 5<sup>th</sup> June 2008 and submitted herein on behalf of the Respondent it is expressly stated 'a serious complaint of criticism was levelled against the CDA Social Work Service.....CDA was obliged to investigate this complaint in the interest of service-user safety'. By its own admission, whilst the matter may not have been disciplinary in nature, it was expressly stated by the Respondent as far back as June of 2008, that the complaint was (i) serious, and, (ii) warranted investigation. However, the Respondent in the course of its written submission contends

that 'it was a relationship problem which could have been overcome if the social worker chose to engage in the process'. The Tribunal notes that the Respondent has submitted the following, namely; (i) the matter was not disciplinary in nature, (ii) there was a 'serious complaint', and, (iii) the Respondent had diagnosed a relationship problem, albeit minor in nature and one which was capable of resolution (as per the final paragraph at page 9 of the Respondent's written submission). The Tribunal is satisfied that the Respondent did not raise the matter of referrals and/or the relationship of the social workers / referral team with the claimant in a transparent, cogent or appropriate manner.

In the opinion of the Tribunal the claimant was in essence left to her own devices to divine the true and precise nature of the Respondent's attitude to the matters as set forth in the letter of complaint dated the 9<sup>th</sup> October 2007 and matters which flowed from this correspondence. The Tribunal is of the view that the simple expedient of issuing a comprehensive written response to the claimant's letter of 8<sup>th</sup> February was available to the Respondent; they did not do so. Further, it was open to the Respondent to set out the nature of their concerns (in correspondence), such as existed or otherwise, they did not do so.

The Tribunal is not inclined to the view that the Respondent ought not to have raised the matter of the letter of the 19<sup>th</sup> October 2007 with the claimant. Further, the Tribunal disagrees with the contention advanced by the Respondent by way of written submission, such that '*institutions will tip-toe around these issues if they are held up to an impossible standard of perfection in the steps they take in this type of situation.*' Whilst the Tribunal acknowledges that employees must be open to criticism and employers are entitled to bring such matters to the attention of an employee, (including criticism from third parties such as was the situation in the within claim), it is incumbent upon an employer in such circumstances to process such complaint/criticism, in a structured, transparent and timely manner. The Tribunal is satisfied that the Respondent did not act in the manner aforesaid. The Tribunal is also of the view that in circumstances where management regards criticism and/or complaints, as being insufficiently serious in nature, such that the invocation of the disciplinary procedure is neither warranted, necessary or appropriate, then an employee should be notified as to the status of the complaint/criticism, and, in early course by management. In the within case, had the claimant been informed in writing, in unequivocal terms that the respondent did not regard the contents of the letter (dated the 19<sup>th</sup> October 2009) as giving rise to the invocation of the disciplinary procedure, and had the Respondent done so at any time in the period between the 20<sup>th</sup> December 2007 and the 31<sup>st</sup> March 2008 (being the date upon which the claimant tendered her resignation), matters may not have escalated such as they ultimately did.

The Tribunal is satisfied that at material times hereto, a grievance procedure was not in place in the period post the transfer of the claimant's employment to the Respondent, contrary to the provisions of S.I. 146 of 2000 and the Code of Practice on Grievance and Disciplinary Procedures. The Tribunal is satisfied that this constituted a significant omission, which contributed in no small part to the claimant pursuing the ultimate course, such as she did. The practical and real effect of the foregoing omission was further compounded by the fact that the role of acting manager was occupied by three different incumbents (namely, Mr. W, Ms. G, and Mr. K) and in a very short time period, (namely between October 2007 and March 2008), albeit the reason for changes in management personnel was due to illness, which was outside of the Respondent's control. The Tribunal is however satisfied that the foregoing factors, combined with the total lack of a considered response from the Respondent to the correspondence issued by the claimant's Solicitor on the 8<sup>th</sup> February 2008, resulted in the sense of isolation and intransigence experienced by the claimant.

The burden of proof rests with the claimant in a claim of constructive dismissal and each case falls due for consideration and must be so considered on its own facts, merits, or otherwise. In the within case, the Tribunal regards the claimant's evidence as being most credible and compelling. The Tribunal is satisfied by reason of the foregoing and the evidence adduced in the within case, that the claimant's decision to resign from her employment was reasonable in all of the circumstances.

The Tribunal does not regard the claimant's decision to terminate her employment as being premature, having regard to the evidence adduced herein.

The Tribunal is satisfied that the claimant has discharged the burden of proof, required by section 1 of the Unfair Dismissals Act 1977 - 2007 and hereby determines the claimant was constructively and unfairly dismissed from her employment by the Respondent.

Consequent thereon, the Tribunal awards the sum of €34,433.00 as compensation.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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