EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: **CASE NO.**
EMPLOYEE ***(appellant)*** UD432/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE

and

EMPLOYER ***(respondent)***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Ms. A. Gaule
Mr. F. Barry

heard this appeal at Dublin on 6th October 2009
and 27th November and 30th November 2009

Representation:

Appellant(s): Mr. Jim Maher, James Maher & Co., Solicitors, 1 The Bookends, Essex Quay, Dublin 8 (*on 6 October 2009*)

In person (*on 27 November and 28 November 2009*)

Respondent(s): Ms. Claire Hellen, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an employee (*hereinafter referred to as the appellant*) appealing against the recommendation of a rights commissioner (*reference r-061305-ud-08/POBdated 21 January2009*) under the Unfair Dismissals Acts 1977 to 2007.

The determination of the Tribunal was as follows:-

(At the commencement of the hearing, a substantial number of documents were opened to the Tribunal)

Appellant's case:

In her sworn evidence, the appellant explained that from 2003 until July 2005, she had worked as a special needs assistant in a school. In mid July 2004, she commenced employment with the respondent as a relief person. She was made permanent in 2006. For a few months in 2004, she worked in both the school and for the respondent. During this time, the appellant completed a course called Practical Child Care.

The appellant worked for the respondent as a care worker in a special needs residential care home for service users who suffered from a condition called Prader Willi Syndrome. She never received induction or training from the respondent and learned about this condition from the web. At the time, six service users were resident in the care home. The appellant loved her job.

A manager left in late 2004 and another (*hereinafter referred to as AF*) was assigned as a temporary manager. RC commenced in May 2005 as a replacement for AF. The appellant met RC a few days after he commenced employment. She found him to be odd. Two weeks after he commenced employment, two service users complained that money had gone missing from their accounts and on the third week, theft was suspected. The appellant told AF of her concerns aboutRC and her suspicions about the missing money. However, AF did nothing about this. On the fourth week, younger staff members complained that RC was telling them to take money from service user's moneyboxes. He was taking money from the petty cash and saying that he wouldreplace it later. One night when the appellant complained to him that there was a small amount ofmoney in petty cash, he told her to take money from the service user's moneyboxes but she hadreplied that this was stealing. AF knew about the stealing but did nothing about it. There was anatmosphere of fear in the care home. It was months later when the appellant reported on RC to herline manager, AF. By then, RC was doing what he liked. The appellant also had concerns aboutthe management style of RC. AF left the respondent in October 2005 and the appellant re-reportedher concerns as soon as possible thereafter.

When the staff, including the appellant, received a form for completion in relation to their skills, the appellant wrote on the back of it that their care home needed help. AH of the H.R. department telephoned the appellant a week later and they arranged to meet on 18 November 2005. However, on the morning of the meeting, AF, who had left the respondent's employment by this time, came around and tried to prevent the meeting. Regardless, the meeting took place with CS, a support manager. AH also attended as a note taker. The appellant had a number of important things, which she wanted to discuss. She had complaints about the use of petty cash, that same was being stolen, and she had complains about RC. Some six to eight weeks later, RC disappeared and his office was cleaned out. SB subsequently came into the care home to clean the mess that had been left by RC.

Around February 2006, a meeting was organised with staff. This meeting was the only acknowledgement of the hell that staff had gone through with RC. SB asked staff for their first-hand information about RC. This was the first time that senior management acknowledged how bad RC had been. SB asked the staff to put their complaints in writing and when the appellant asked him if there would be repercussions for doing this, he had replied that there would not.

In January 2006, NB-D came as team leader/replacement for AF and two weeks later, KO'S came as a replacement for RC. It was NB-D who first "interrogated" the appellant about her involvement with RC. The appellant had thought that such an approach was not right. NB-D's third question has asked if she – *the appellant* – had reported on RC. In reply, the appellant had stammered about the form and had then cut the conversation off. In trying to find out this information, NB-D

as letting the appellant know that she was a threat, that she - *the appellant* – had reported on the last manager and she would do the same to the new manager.

During the first week as team leader, the appellant and NB-D had spoken about the history of the care house. The appellant had remarked that it was amazing how few of the old staff still remained. NB-D had replied that a complete change of staff would be good. NB-D had also spoken about another new facility opening in another town in Ireland, which was being staffed by new people. The appellant felt that "the knives" were now out for her.

A few weeks later, NB-D reprimanded some staff in front of other staff. The appellant took NB-D aside and told her that there was a protocol when making complaints to staff, that they should be spoken to privately in the small office. NB-D's reply had been that some people did not mind how such things were done.

Agency staff worked without having any knowledge of Prader Willi Syndrome and if they made mistakes, they were blamed. The appellant had approached KO'S about training but he had done nothing. When the appellant approached NB-D about the need for agency staff to be alerted to the difficulties of service users with this syndrome, NB-D had made a mockery of the suggestion. As service users can use violence, the appellant had also suggested to NB-D that there was a need for modified "crisis prevention intervention" (CPI) training.

A few days after the interrogation by NB-D, KO'S came into the small sitting room and sat down as the appellant was leaving the room. He told her to come in, close the door and sit down, and he asked her about RC. She was frozen and wanted to leave. It was not right that this manager was asking her about a previous manager and she had stammered some reply. She said to him that managers now felt under threat from her and "if they can't get [*the appellant*] one way, get her another". KO'S did nothing to reassure her that she was not seen as a threat. His questions were not right so she left the room. She wondered if she should telephone SB and report on KO'S but felt that she could not as she had just reported on RC. Though there was no problem with the management style of KO'S, he and NB-D had only been in the care house a few weeks when they had interrogated her about RC.

The family of one of the service users SM had informed the care house staff that she screamed a lot. This screaming disturbed other service users. When the appellant told KO'S that SM should be told that screaming was bullying and bullying had consequences, he replied that she – *SM* – was just being who she was and that she could not be trained. SM did not scream at anyone in particular but she did attack another service user S. S had said that she was afraid of SM. The appellant reported the attack to NB-D and suggested some ideas as to what could be done about the situation. NB-D's reply had been that the appellant should just come to work and do her job and leave the power to her – *NB-D*. NB-D had been trying to antagonise the appellant so that the appellant would report her. The appellant had also reported the attack on S to KO'S but he did nothing about it.

Clarifying the position for the Tribunal, the appellant confirmed that new managers had arrived in the care home from February 2006 onwards. The relevant incident occurred on 12 November 2006. Up to that point, the appellant had raised a number of issues with managers in relation to the training of the agency staff, the screaming condition of SM, SM's attack on another service user, and CPI training but these issues were not dealt with.

The relevant incident involving SM, S and D (*another service user*) occurred on Sunday 12

November 2006. The appellant was on duty that day from 8.00am to 8.00pm, working with a Nigerian agency worker (*hereinafter referred to as B*). It was normal to get three to four breaks during such a shift.

On this day, SM had come downstairs that morning screaming about three different things. The appellant checked SM's blood sugar level but found it to be normal. After eating her breakfast SM went on the treadmill. S came downstairs then and started watching a baby programme on television. SM started screaming and said that she would not watch this programme. S then went to move to a jigsaw but SM jumped off the treadmill to also go to the jigsaw. The appellant moved between the two service users and asked SM why she was acting in this way. SM replied that she would not watch the baby programme on the television. D then came downstairs and went on the treadmill. SM screamed at him and then went to attack S. When the appellant went between the two service users again, SM kicked her in the shin. The appellant felt that SM was out of control. She told SM to go to her room or she would be grounded. The threat of being grounded did not have an effect on SM who remained standing in the room with her fists clenched. At this stage, SM was attacking two people. The appellant summoned B, who was in the kitchen talking on her telephone, for assistance. When B came into the room, SM was going at S. The appellant told B to stand in front of S so as to protect her. They then decided to physically remove SM to the small sitting room, this being standard practice. This standard practice involves holding a person by the shoulder and pants and frog-marching them out. Dragging or touching a person's body was not part of the practice. This was how the appellant and B removed SM from the room. SM had wanted to go back upstairs but this could not be allowed, as she was so upset. She had written a report of this incident, which was also standard practice. She had previously used this practice of removing someone on three or four occasions. It had previously been done to D by another staff member and an agency worker.

While being removed to the small sitting room, SM fell to the ground on B's side while the appellant was still holding her. In that fall, it was possible that SM hit the ground. B hoisted SM up by her jumper and pants. In the small sitting room, SM stood and screamed and then willingly lay down on the floor. The appellant considered telephoning NB-D who was scheduled to work that day but did not as NB-D was due to arrive in a quarter of an hour. The appellant got B to sit outside the small sitting room door so as SM could not come back out. Everyone – staff and service users – were due to go to the circus that day. When NB-D arrived at the care home, the appellant told her about the incident, and NB-D said that someone would have to stay at the care home with SM and not go to the circus. It was NB-D who stayed back while the appellant and B walked with the three or four service users to the circus, which was three miles there and back. The appellant got on well with B at the circus.

When they returned to the care home from the circus, the appellant noticed that the evening meal had not been cooked. B was leaving at 6.00pm and went off, while the appellant went to the kitchen to cook the meal. After cleaning up after the meal, NB-D asked her to write her report on the incident that had occurred that day. She said that B had already written her report and "now, that's two people accusing you". NB-D had all day to work on SM and while the appellant had been in the kitchen preparing the meal, she had worked on B.

When the appellant arrived to her home that night, she received a telephone call from KO'S. Hedid not tell the appellant how he had come to know about the incident that had occurred that day. She told him that something would have to be done about SM's attacks on S. He said that, in lightof the incident, she should not come into work the next day. She asked him if he was suspendingher and he replied yes. When she asked if this needed to be done, he again said yes.

She then saidto him that they were "going to get [*the appellant*] one way or the other" and that he "wanted to goout on a high" and then she hung up the telephone. KO'S was finishing with the respondent thatday.

B gave a written statement on 12 November 2006 in relation to the incident that had occurred that day. This was the first statement given by her. In same, she wrote in part that the appellant pulled SM by the arm and dragged her on the floor. The appellant denied that she had pulled SM. Inrelation to the interview of 31 January 2007 and the account of the incident that B related, theappellant stated that B's version was not true and that she – *the appellant* – had specifically gone tothe kitchen and summoned B to help her with SM because one person cannot touch a service useron their own. She had gone to the kitchen and told B to get off the telephone, as there was anemergency. A service user would be removed from a room if the life or health of a person was indanger and not simply for shouting.

The appellant's statement of the incident of 12 November 2006 was written at 7.30pm on that day. She had received no breaks that day and had walked a six mile round trip to the circus and back with some of the service users. When she returned from the circus, she had cooked the evening meal. She could have taken a break then. She had not realised that leaving the meal unprepared had been planned by NB-D. She had been in the kitchen cooking the meal while B was writing her statement about the incident of that day. The appellant had worked with B for a year and a half and she had been a lovely girl until NB-D "got to her". Also, as SM has a low I.Q., it was possible to tell her what to say.

The appellant was put off work on suspension for one day on the evening of 12 November 2006 by KO'S, even though he did not have the authority to suspend. While at home on 13 November2006, the appellant received a telephone call from OM – a manager of managers – who invited herto call for a chat the next day at 3.30pm. The appellant had replied that she would accommodateher and had happily gone for the chat the next day. SH – a manager who was taking over fromKO'S – was also present when the appellant arrived. As he had a good sense of humour, theappellant had asked him if he had "the thumb screws" with him and they had all laughed at this. When the appellant sat down, OM had gone behind her desk, taken out a sealed envelope and cameat her with it. She pointed two fingers at the appellant and, while standing over her, had said thatshe had two accounts of her – *the appellant* – dragging SM across the floor. The appellant was in acomplete state of shock, so left the meeting and took the bus home and she went to bed. Theenvelope contained policies on harassment and disciplinary procedures. The appellant did not get acopy of the written statements from OM at this meeting.

Following this, the appellant contacted SIPTU and relayed the "horrendous" story of her treatment. The reply that she received was that "managers don't like the word bullying". She also contacted the Citizens Information Service who gave her the contact for the Employment Rights Service. The person in this service gave her a number to enable her to report what OM had done to her to the Health & Safety Authority.

Subsequent to the meeting with OM and SH, the appellant received a letter dated 14 November 2006 which confirmed her "suspension from duty on full pay with effect from today" and which informed her of what was happening and why it was happening. The letter, which dealt with her in a cold and detached way, also stated that she must not attend her place of work without authority or engage in any activity with the service users, which could be associated with her formal duties. However, the letter did not specify that she should not contact the families of the service users. Though the letter also provided contact telephone numbers if she wished to avail of assistance or

support, the appellant did not avail of them because, having been left alone for so long, this offer was now hypocritical.

At the resumption of this Tribunal hearing on 27 November, the appellant stated that there was no risk assessment undertaken. The only people who supported her were the parents of the service users. Her name was spelt incorrectly despite the fact that she had worked with the respondent for some time. She did not know that she was not to contact the parents of the service users. KO'S had suspended her without authority.

The appellant did not receive the letter dated 13 December 2006 from the respondent regarding her suspension from duty and she stated that this letter was not sent to her. She did not know what KO'S did for three months. She appealed the verbal warning she had been given and was successful. She was then informed that she had to undergo a three-month training period in Bray. She requested CPI training. She stated that an employee was sent for training for three months if they did something wrong.

In cross-examination, the appellant stated that she was the only person to make a formal report regarding RC. Not one person was investigated regarding RC by NB-D and KO'S. SB had stepped in when RC left. During RC's time, people were afraid to speak up. At a meeting, SB made a statement that "this is worse than I thought". The appellant reiterated that not one person was investigated by NB-D and KO'S regarding RC. When she was asked regarding her entitlement to a break, the appellant said that staff forgot about themselves when it came to taking breaks. She did not raise the issue of having no break. It was her decision to remove SM from the large room to the small sitting room. She stated that staff were extremely gentle with service users. It was standard practice to frog-march service users out of their rooms. SM was grounded for a week for her behaviour. She had violently attacked another service user – S. In his interview, KO'S invented a lie and nine months later, KO'S walked in and stated that he could no longer stand by the words attributed to the appellant. KO'S said that there was an incident with SM every day. The appellant stated that something needed to be done about SM's treatment of S.

KO'S never told the appellant what she was being accused of nor did he use the word "dragged". She had asked him if he was suspending her. She went to a meeting on 14 November 2006 for a chat. The word "dragged" was not mentioned. On 12 December 2006, she was being accused of something she knew she did not do. JW union representative told her that the first time she had to be suspended was if she was doing anything against anyone. She had to go through the process. The transcript at the end of January was deliberately butchered.

The appellant realised that one day when she was walking near her home, she met a person who knew about the incident. The respondent knew in January 2007 that she was framed and that she was innocent. She should have been reinstated at that point. At a formal disciplinary hearing on 20 August 2007, KO'S stated that he could not stand by what was attributed to the appellant. The appellant stated that NB-D got two people to lie. Every single rule of suspension was violated. She then developed heart trouble and was ill due to stress. If she went to Bray, she felt it would be seen that she must have done something wrong. She had looked for CPI training for employees. She would have no problem attending training in Bray if her colleagues attended the training.

Regarding service user SM the appellant stated that like all people with Prader Willi Syndrome loved people for two weeks and hated them for two weeks. On 31 January 2007, the respondent knew that the appellant was framed and innocent. She had tried to undo some of the damage that had been done to her.

In answer to questions from the Tribunal, the appellant stated that she made it clear to the respondent that she could not return to Bray as it was a punitive measure. If she did go to Bray, it would be perceived that she had done something wrong.

Respondent's case:

MG told the Tribunal that she issued a verbal warning to the appellant on 7 September 2007 for a number of reasons. She had a responsibility to consider the appellant as an employee and SM as a service user. She was responsible to ensure that the appellant received full training. An employment assistance programme was in place. KO'S (the residential service manager) asked her regarding two issues and SM had a tendency to violent behaviour. The allegation against the appellant had been that she had removed SM physically against her will.

The appellant had advised three other families that she was suspended. After a disciplinary hearing with the appellant, she showed the appellant where she had signed a confidentiality clause. She made the decision to issue the appellant with a verbal warning pending a full investigation. She ensured that the appellant had every opportunity to produce all of the information required. The appellant had told her that she was no longer being represented by SIPTU and that she had a legal representative.

The appellant was then ill and she had medical certificates until 13 January 2008. She telephoned the appellant on 15 January 2008 to discuss a return to work date. There was no contact from the appellant and she had not received a further sick certificate from her. She had to progress the appellant's return to work and she requested the appellant to attend a meeting on Monday 21 January 2008 at 9.00a.m. This meeting would enable MG to outline to the appellant the details of the Bray service and to discuss the planned training schedule. It was MG's expectation that the appellant would then report for work in Bray on Monday 21 January 2008. The appellant requested that her solicitor be in attendance but the respondent explained it was an operations meeting and it was not necessary for a solicitor to be present. She received a response from the appellant's solicitor stating that the appellant would not be in attendance at the meeting scheduled for Monday and would be unable to attend the training which was suggested for 22, 23 and 24 of January 2008. MG sent a letter to the appellant on 25 January 2008 requesting that her to attend a meeting on 31 January 2008. The claimant submitted her resignation on 28 January 2008 and did not did not ask for an exit interview.

In cross-examination, MG stated that the respondent had a full quota of staff in Bray and that the appellant was an extra person and could be easily retrained. The decision to place the appellant in Bray was for her own benefit to support her retraining in a better way.

PMcP told the Tribunal that he was regional manager in the South East. He was chair of the investigation, which GJ, HR Business Partner, and KB Programmes Manager conducted pursuant to the Guidelines for Dealing with an investigation of abuse against a staff member. He met NB-Don 28 November 2006. She relayed to him that she was on duty at 12.25 on 12 November and therewas a lot of noise. The appellant told her that there was an incident between SM and another service user regarding a jigsaw. The appellant told NB-D that SM had hit and kicked her. SM wasupset due to an incident regarding food the previous night. He met with SM on 28 November 2006 as part of the respondent's investigatoryprocess. SM seemed very afraid and had a sense of fear regarding the appellant returning to the service. He made a special effort to inform SM what was

happening. Another meeting took placeon 12 December 2006 as part of the investigatory process. Present at the meeting were the witness,KO'S, unit manager, GJ, H.R. business partner, and KB Programme Manager. He tried to meetwith the appellant on 12 December 2006 but the union representative had not been available. Hemet the appellant on 9 January 2007 along with her union representative – MH. Also in attendanceat the meeting were KB, programmes manager and GJ, H.R. business partner. The appellant gave adetailed account of the incident, which occurred on 12 November 2006. She signed the minutes ofthe 9 January meeting on 16 May 2007. The appellant had parted company with her union representative. A meeting took place on Monday 15 January 2007, and present at this meeting werethe witness, GJ, H.R. business partner, KB, programmes manager, and SM, service user. SM hadtold her mother that the appellant and the agency worker – *B* – had dragged her into the sittingroom. B gave her version of what happened on 12 November 2006. She said that she did not touchor lay her hands on SM. At a meeting on 8 February 2007, another service user – D – stated that on12 November 2006, the appellant shouted at SM and grabbed and pulled her out of the sitting roomand dragged her to the small sitting room and SM could not get up. The appellant was on the leftside of SM and B was on her right side.

A meeting took place on 16 May 2007 at the appellant's request. Present at this meeting were the appellant, JW of SIPTU, KB programme manager GJ, HR, and the witness. The appellant asked if she could tape the meeting and the witness told her that it was not the respondent's policy to do so. The appellant mentioned allegations about other staff. The witness told the appellant that he was not comfortable listening to her bad mouth people who were not present to defend themselves. JW – the appellant's union representative – asked for a ten-minute break. JW then asked what the next step would be. The witness responded that he had hoped that the team would have its work completed by the end of May 2007 and the report would be sent to the Director of Health and Social Care.

The findings of the investigative process were that the appellant had physically removed SM from the sitting room to the small sitting room against her will. The investigation team could not establish the method by which this physical action took place. It could not conclusively establish that B took an active part in removing SM from the sitting room to the small sitting room. B did not report this incident to the team leader until she was asked to complete a report by the team leader at least five hours later. SM had expressed unease to the investigation team about the possibility of the appellant returning to work in the Prader Willi Syndrome residential service. Without the necessary authority, KO'S had informed the appellant that she was suspended on 12 November 2006. There was an inconsistency in the approach of staff when dealing with incidents of behaviours that challenge. The appellant had contacted members of staff, and members of families of service users following her suspension, despite been formally asked not to do so. It was recommended that all staff in the Prader Willi Syndrome residential service receive necessary training including child and adult protection training and CPI training by September 2007. The respondent was to explore if it was appropriate for the appellant continue to work in the Prader Willi Syndrome centre, bearing in mind SM's concerns regarding the appellant returning to the service. Thirty changes were made to the minutes and they were not signed until the 16 May 2007.

In cross-examination, PMcP stated that B was an agency worker and she had not been asked to work for the respondent again. The safety of service users was of prime importance. SM never made a complaint to him prior to this. All he could say was what happened at the meeting and he ensured that SM was kept up to date. The appellant reiterated that she did not receive the letter of 13 December 2006 regarding her suspension from duty.
In answer to questions from the Tribunal, PMcP stated that he was employed for ten years with the

respondent. He could not say how many complaints he had received regarding service users prior to the incident. He then said that he had two complaints in his region in the last three years. The respondent did not have risk assessment forms.

KO'S told the Tribunal that he was residential service manager with the respondent in February 2006 and he was employed in G House. He never initiated a conversation with the appellant about RC. Some staff would volunteer information. NB-D told him that SM alleged that the appellant had dragged her on the floor from one sitting room to another. Statements had already been given to NB-D. He had never heard of an incident of this nature and he knew an investigation had taken place. He was concerned about SM's well-being and the appellant's return to the service. He wanted to ensure that if it was a malicious allegation, then the appellant needed to be protected. It was about 9.00p.m. when he asked the appellant not to come in to work the next day. The appellant then intervened and described to him what had happened. She asked him if he was suspending her and he told her no, but that he asked her not to come in to work in the morning. The appellant told him that if she was not being suspended, she would be in work in the morning. He told the appellant that if that was what she wanted, then he would suspend her. He could not recall the specific words that he said at a disciplinary hearing in August 2007.

In cross examination, KO'S stated that he was brought into the disciplinary hearing for a very short time. He recalled grounding SM for a week but he could not remember the specific incident but he thought it was in relation to her behaviour. He could not recall if PMcP questioned him about the incident with SM. When asked if SM had a propensity to overact, KO'S replied that there were serious verbal altercations. Physical violence was not a regular pattern but shouting would have occurred daily.

SJD told the Tribunal that she was director of policy, service and compliance and was asked to deal with the appeal. Employees have the right to appeal against any disciplinary action taken against them within five working days. MG issued the appellant with a verbal warning by letter dated 7 September 2007, as a result of a disciplinary hearing held on Monday 20 August 2007. She received a letter from MG on 19 October 2007 in which MG outlined her reasons for issuing the appellant with a verbal warning, and SJD sent a copy of the letter to the appellant. She sent a letter to the appellant's representative on 25 October 2007 inviting the appellant to attend a meeting on 13 November 2007 at 12.00p.m. prior to determining an outcome of the appeal process

A letter was sent to the appellant on 19 November 2007 in which was outlined that in the absence of the provision of training to the appellant, that it was appropriate to repeal the verbal warning issued to her on 7 September 2007. The witness concluded that, subject to the appellant's medical fitness to return to work being confirmed, she would be employed in the day services in Bray for a period of three months during which time, all of the appellant's training needs would be addressed. During this three-month period, the relevant managers would put in place a process of re-building relationships between service users, direct line managers and the appellant. The appellant's participation in the process was vital to achieving a successful return to her contractual position in the Prader Willi Syndrome service. During this three-month period, the appellant would receive her salary and her contractual terms and conditions.

A letter giving details of suspension issued to the appellant on 13 December 2006. The appellant stated that she did not receive this letter but the appellant received all other correspondence that was sent to her by the respondent. The families of service users were very surprised when the appellant contacted them. It was not possible for the appellant to return to the service immediately as it was clearly part of the initial disciplinary hearing.

The appellant was certified unfit for work until 13 January 2008. SJD received correspondence from the appellant's representative on 14 January 2008 that the appellant was satisfied with the majority of the information that had been provided to her in a letter dated 7 January 2008 but she – *the appellant* – had some matters that she wanted clarified. SJD replied by letter dated 25 January2008 in which she indicated that the appellant was on sick leave until 27 January 2008 and that theappellant needed to actively re-engage with MG regarding when she would be able to return to work. She had no further correspondence from the appellant.

In cross-examination, SJD stated that she offered everything that was to offer to the appellant and she pursued every single avenue. There was no reason for the appellant not to receive the letter dated 13 December 2006. A separate investigation had taken place regarding RC. As well as training in Bray it would have provided relationship rebuilding for the appellant.

Determination:

The Tribunal has carefully considered the three days of evidence adduced. This matter comes before the Employment Appeals Tribunal on appeal from a finding of the right commissioner dated the 21 January 2009 where the appellant's claim for constructive dismissal was dismissed.

The appellant resigned her position with the respondent organisation on the 28 January 2008. This followed an incident, which occurred some fourteen months earlier on the 12 November 2006. A formal investigation into the incident was conducted and a disciplinary hearing was held, a verbal warning of six months duration was given but this was subsequently reversed on appeal, by way of correspondence dated the 19 November 2007. Though the whole process was somewhat protracted, however neither side can be blamed for any delays, which occurred. It is worth noting that the appellant had been suspended for the period of the disciplinary/appeal process though she was being remunerated.

The Tribunal finds, and the appellant has largely agreed, that there is no substantive complaint to be made about the manner in which the disciplinary procedures were conducted. PMcP conducted a fairly thorough initial investigation and MG allowed a fulsome disciplinary hearing, which gave rise to a verbal warning expected to be of six months duration. As was her entitlement, the appellant appealed this decision and was successful in overturning the disciplinary finding.

What is absolutely clear is that the respondent organisation failed the appellant insofar as she had not had any or adequate training in how to deal with the type of situation or incident which was at the heart of this investigation. The appellant maintained that her actions were proportionate and correct in all the circumstances. She knew the service user in question and knew the service user's history and maintains that her actions were in response to what she perceived to be an escalating situation. There had been no specific formal training given to either the appellant or the staff at large in how to intervene in hostile or aggressive situations between service users. Whatever happened that morning, the Tribunal finds that the appellant acted from the very best of motivation to de-escalate a situation and to calm down a hysterical service user. With hindsight, the respondent suggests the service user should have been allowed to her room and not taken to the small sitting room but the Tribunal accepts that the appellant acted correctly and instinctively in seeking to oversee the calming down of the service user rather than allow her disappear from sight. In summary therefore, the Tribunal finds that the appellant's lack of training was the only reason that the appellant may not have acted in accordance with what her employer might have preferred. To that extent, the appellant was without fault. To be fair to SJD on the respondent's behalf, she

ultimately bore this reasoning out by overturning the verbal warning at the end of the appeal process.

Despite her success in appealing the disciplinary decision, the appellant still felt compelled to resign her position some two months later, in January 2008 and in making the case that her resignation was reasonable in all the circumstances, the appellant is bound to establish, on balance, that her decision to resign was reasonable. The burden of proof rested with the appellant. In considering all the relevant evidence pertaining to the appellant's decision to resign, the Tribunal cannot accept that the appellant acted reasonably. The respondent organisation had every legitimate reason to want to re-introduce the appellant back into the residential unit with the greatest of sensitivity and care. Their request to be afforded a three month lead in period for the badly needed training and upskilling of the appellant, in conjunction with the desire to mediate relationship development cannot be interpreted by the Tribunal as being as objectionable as the appellant suggested. Accordingly, the Tribunal affirms the finding of the rights commissioner and dismissed the appeal under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This ____________________

(Sgd) ____________________
(CHAIRMAN)