

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:**CASE NO.**

EMPLOYEE

UD1564/09

- claimant

Against

EMPLOYEE

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr F. Moloney
Ms. E. Brezina

heard this claim at Naas on 25th June 2010.

Representation:

Claimant: Mr Philip Mullen, IMPACT, Nerney's Court, Dublin 1

Respondent: Ms Sheila Tracey, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant was employed as a care assistant. She commenced employment in June 2004. She contended that she was sexually assaulted by an employee P on 15th December 2005. She subsequently reported the incident to the Assistant Director of Nursing on 3rd January 2006. The incident was also reported to the Gardai and investigated but was not proceeded with. Following this incident, she suffered from traumatic stress disorder and had to attend for therapy and counselling. She engaged a solicitor and also sought advice from her union representative.

The respondent conducted an investigation. The claimant made a statement to the investigatory team on 22nd March 2006. She was very stressed at this time and was attending her GP. On 19th April 2006 she made comments on the note of her meeting with the investigators. She heard nothing further until August 2006 when the respondent requested that she make herself available for cross-examination by P's representative.

She was not fit at that time to attend for cross-examination and the claimant's husband informed the

respondent accordingly.

She received further letters from the Director of Human Resources (DHR) regarding her being cross-examined by P's representative. By letter dated 10th October 2006 the claimant's husband wrote to DHR indicating that his wife (the claimant) was still unfit to attend for cross-examination but that she would be willing to do so when her doctor deemed her fit.

On 27th November 2006 DHR again wrote to the claimant enquiring if she was able to attend for cross-examination. By letter dated 21st December 2006 DHR sought the claimant's definitive position as to whether or not she was presenting herself for cross-examination as part of the investigation and such cross examination would take place before mid January 2007. The claimant was requested to respond by 5th January 2007. The claimant agreed to present herself for cross-examination and communicated this to DHR by letter dated 5th January 2007.

DHR wrote to the claimant on 10th January 2007 and enclosed a summary of the investigatory team's work to date. Nine employees were interviewed. This was the first time the claimant became aware of this. She was not furnished with any of these statements. There was no further communication from the respondent until the end of March 2007.

The claimant was not aware the cross examination was not proceeding until she received the final report of the investigatory team in late March 2007. She consulted with her union representative who raised objections in the manner the report was finalised and that it was flawed. Subsequently, she referred the matter to the Rights Commissioner for investigation under the Industrial Relations Acts. She requested the matter be investigated by the Rights Commissioner.

The matter was listed before the Rights Commissioner on 13th March 2008 and the respondent sought an adjournment. When it was relisted for hearing on 12th June 2008 the respondent was not present. The matter was again relisted for hearing on 11th August 2008. On the advice of the Rights Commissioner the claimant decided not to proceed and withdrew her complaint.

The claimant contended that she was two and half years in the process and no further on. There was a lack of trust in the respondent and she had lost confidence in the investigative process. She could never return to work. She tendered her resignation on 23rd June 2008.

The claimant's husband told the Tribunal that the incident had affected his wife very badly. She had co-operated with the respondent to the best of her ability. She went downhill after March 2007. They became aware in late 2006 that the DPP was not prosecuting P. They were in Scotland for Christmas 2006 and early 2007 and had never seen the statements taken from the nine employees in advance of the final report. They had lost faith in the respondent. The claimant became aware that P returned to work in late April 2007. The claimant had agreed to cross-examination and this was confirmed to the respondent on 6th January 2007. They realised they had missed the deadline of 5th January 2007. It appeared both that letter and the respondent's letter of 10th January 2007 had crossed in the post and that the investigatory team had then been requested to provide DHR with a statement of their work to date. They spoke to the claimant's union representative following receipt of the final report. The claimant's husband contended that the claimant could not possibly return to work.

Respondent's Case:

An allegation of sexual assault against employee P working in the respondent company was made by the claimant on 3rd January 2006. DHR was made aware of the allegation while he was on holidays. Upon his return from holidays the papers were forwarded to him. P was immediately suspended. Whilst this started as a grievance between one employee against another such was the nature of complaint that DHR opted to deal with it in the disciplinary process. He strongly advised both parties to avail of the staff support scheme.

Two individuals, one a senior physiotherapist and the other a former Director of HR were appointed to carry out an investigation into the allegation. The claimant was on paid sick leave for twelve weeks and was kept on the payroll for a further period. Her sick leave and paid absences equated to 21.25 months.

At an early stage DHR received correspondence from P's solicitor and was made aware that the claimant had union representation and subsequently the claimant engaged a legal representative. DHR was keen that the claimant's illness would not be exacerbated and he needed the claimant to be medically fit to engage in the process. Following the claimant's absence on sick leave for 12 weeks a decision was made to retain her on the payroll for some time.

The result of the investigation had been very comprehensive and a conclusion had been reached in the matter complained of.

When DHR became aware that the claimant lodged a complaint with the Rights Commissioner he accepted her decision. On the first date of the hearing DHR was unable to attend and sought and was granted an adjournment. DHR was not notified of the adjourned date of the Rights Commissioner hearing and communicated this to the claimant's representative.

The claimant's resignation came as a bolt out of the blue. The incident had been dealt with as quickly as possible and in accordance with disciplinary procedures that had been agreed with the unions. When both P and the claimant were being paid while absent the balance of advantage was given to the claimant. He accepted that the period of time was traumatic for the claimant and regretted any unavoidable stress she may have suffered and offered his apologies.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this hearing. The claimant resigned her position on the 23rd June 2008. The claimant makes the case that by June 2008 she had lost all trust in her employer and that she had made her decision to hand in her letter of resignation because she could not go back to the workplace.

In January 2006 the claimant made a complaint to her employer regarding an assault to which she had been subjected in December of 2005.

In response to the complaint made, the respondent immediately suspended the alleged assailant and launched into an investigation. The investigation was conducted by two persons appointed from outside the workplace. The claimant was asked to make herself available for cross-examination on foot of the statement of complaint she had made. Given the seriousness of the allegation this request is not seen by the Tribunal as being unreasonable.

The claimant, who was on paid leave at this time, was deemed medically unfit to undergo the cross-examination. This was accepted by the investigatory body and there followed a period of uncertainty as to whether the claimant would become fit to be cross-examined at any time soon.

In a decision that was not made known to the claimant it seems the request to cross-examine the claimant was abandoned and the investigation proceeded to a conclusion.

The claimant received the final report of the investigatory team in March 2007. The claimant was upset to learn that her complaint was deemed unfounded and in fact the purported assailant was allowed to return to the workplace in April 2007. The Tribunal does not find fault with the manner in which the investigation was conducted. All the appropriate witnesses were contacted, statements were assessed and a decision was reached. The Tribunal cannot criticise the investigatory team's need to balance the rights of the accused and the rights of the victim.

Ultimately this matter comes before the Tribunal as a case of constructive dismissal. The claimant makes the case that the manner in which the investigation was conducted combined with the fact that her purported assailant had been returned to the workplace resulted for her in a complete breakdown of any trust she could place in her employer.

The Tribunal must look at this argument objectively. The onus rests on the claimant to establish her decision to terminate her employment was reasonable in all the circumstances. In particular, the claimant must demonstrate that the respondent has created a situation and/or atmosphere within the workplace whereby it is impossible to ask the claimant to continue working there.

The Tribunal has carefully looked at the claimant's treatment by the respondent. In its evidence the respondent outlined that it had done all that could be expected of it to protect the claimant. For example, contrary to HSE policy, the claimant's leave was fully paid for over 21 months. All communication was done as sensitively as possible. The respondent gave evidence to the effect that the claimant never fully engaged with the respondent during the period of the investigation, which the respondent had gone to great lengths to ensure was conducted independently of the respondent.

When the findings of the investigatory body were made known to the claimant it was open to the claimant to complain to the respondent about the manner in which the investigation had been conducted that is to say to initiate her own grievance as against her employer concerning their handling of the initial complaint and the sanctioning of the investigation process.

It is a well established principle of the employment relationship that where practicable the internal procedures should be exhausted before external bodies be applied to.

Notwithstanding this, the claimant, opted to go straight to the Rights Commissioner. The Tribunal notes that the respondent agreed to submit itself to this process in ease of the claimant's ongoing situation.

On balance the Tribunal finds that the claimant did not establish that her decision to terminate her employment was reasonable in all the circumstances. The respondent's conduct was not inappropriate or insensitive. Looking at all the circumstances objectively the Tribunal does not believe that the respondent's actions gave rise to a breach of trust. The claimant's claim for constructive dismissal under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)