

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE– claimant

CASE NO.
UD807/2009

Against

EMPLOYER – respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms E Kearney BL

Members: Mr T Gill
Mr T Gill

heard this claim at Loughrea on 24th March 2010 and 17th June 2010

Representation:

Claimant(s):
Mr Colman Sherry, Solicitor, The Square, Gort, Co. Galway

Respondent(s):
Ms Angela Grimshaw, Peninsula Business Services, Unit 3 Ground
Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

Respondent's Case:

The manager of the respondent company, a nursing home, gave evidence that he commenced with the company two years previously. The claimant had commenced in July 2007 as a pre-nursing student placement. Her hours increased to 21-30 hours per week. There was no induction course at the time, the witness has since introduced one. The claimant was dismissed on January 12th 2009.

The events leading to the claimant's dismissal were as follows. The manager met with the son of

one of the home's residents. The son was concerned as his mother had received a phone call, on the morning of Monday 5th January 2009, asking about hay for sale. He was suspicious that the call had come from someone in the nursing home as his mother's phone had been used the day before to make a call. He said his mother was very distressed and that it was a very serious matter. The manager said he would investigate the matter.

The manager looked at who was working on Sunday and Monday. He spoke to the claimant on Saturday 10th January and asked her if she knew what had happened. She said that she and a colleague had done it. The colleague got the resident's phone number and on Monday, when they were on a break, the colleague had used the claimant's phone, as her number was withheld, to make the prank phone call to the resident. The claimant left halfway through as she was laughing.

The manager later spoke to the claimant's mother who told him that the claimant was very upset. He said she didn't need to come in for her shift the following day. Both employees were at work on Monday 12th January 2009. When the manager spoke to the colleague she initially denied her involvement but ultimately confirmed the claimant's story. She had obtained the resident's number by using her phone to phone her own mobile phone. She was very sorry for what she had done and said that she did it because she wanted to get back at the resident for all the times she had been verbally abusive to her. The colleague resigned immediately.

He spoke to the claimant again and she was very upset. He dismissed the claimant for gross misconduct for her participation in the hoax call. He brought her to the staff room to wait for her mother to collect her. He offered to meet them in a few days in a hotel to discuss the situation.

He informed the Health Board and provided the employees' names to them as requested, but they did not take the matter any further. He informed the resident's son that he had investigated the matter and that the two members of staff were no longer caring for his mother. The witness did not discuss the situation with the resident. He only communicated with her son.

He wrote to the claimant's solicitor later to offer an appeal but it was turned down on the grounds that it would be the witness who would be hearing the appeal. He also offered the Director of the nursing home as a possible hearer of the appeal.

The resident was suffering from early Alzheimer's and was quite difficult to deal with. In August or September 2008 the manager introduced a book for staff to make a note of any incidents with her. He kept the book to monitor the situation for the safety of staff and to see how staff managed the resident. He told staff to accommodate her as she liked things to be just so. He did not tell the resident's son about the book.

It was not the first time the son had called with concerns about his mother. The manager could refer to the book to see what had happened on such a date, such as her refusing to get out of bed, and he could give her son an explanation of what had happened.

During cross-examination the witness agreed that there were four or five entries in the book in 2008 by the colleague stating that the resident had been verbally abusive to her. They stopped keeping the book in early 2009.

He agreed that the claimant did not receive any training regarding caring for the elderly while at the

nursing home. The policy of not carrying a mobile phone while working was a verbally communicated. There was a reference to it in the handbook which was available in the nursing home, but the claimant was never given a copy of it. It was introduced two years previously but it had not been shown to the claimant.

He had interviewed the claimant at 7.30am on Saturday 10th January 2009 after her night shift had finished. He made notes after the meeting. He did not invite the claimant to bring a colleague with her as he was not aware that she was involved before the meeting. The claimant had not received any disciplinary warnings before and there no issues with the claimant's performance prior to this incident. The claimant was dismissed on January 12th 2009, but the manager had made the decision to dismiss her when he completed her P45 on January 11th 2009.

There was an issue with the witness's notes of the meeting as there were discrepancies between his handwritten notes and the typed notes submitted to the Tribunal. An employee had typed his notes while he was present and he had made changes. He explained that he writes out his notes roughly, has them typed up and then goes through them and makes amendments if necessary. The witness was instructed to bring copies of his handwritten notes with him on the second day of hearing.

On the second day of hearing the witness accepted that there should not have been a difference between his handwritten notes and the final typed version.

The witness confirmed to the claimant's representative that on the first day of the hearing it had been established that the witness considered the claimant competent, the phonecalls to the resident were about bales of hay, there was nothing sexual or violent in the content of the conversation with the resident, there had not been a Garda investigation into the incident, there was no video evidence or cameras submitted for evidence and there had not been a H.S.E. investigation.

The witness confirmed that the claimant's colleague, involved in the incident, no longer worked in the nursing home. The witness had provided her with a verbal reference and she began work in another nursing home, suffering no financial loss. When giving the verbal reference to the new employer the witness did not disclose the incident.

The witness agreed that the phone call to the resident had been made by the claimant's colleague. The witness accepted that he treated the claimant differently to her colleague when dealing with the incident and in hindsight agrees that the dismissal of the claimant was wrong. The witness took time to consider his position and then confirmed that the claimant was wrongfully and unfairly dismissed.

The Tribunal heard evidence from the claimant in respect of loss. The claimant told the Tribunal that she commenced working for the respondent in July 2007. She earned a gross wage of €350 per week. Her last day of work with the respondent was 12th January 2009. The claimant has since been unsuccessful in her attempts to secure employment.

Determination

On the second day of evidence the respondent conceded that the dismissal of the claimant was unfair and the case proceeded in relation to quantum only. Accordingly, the Tribunal finds that the claim under the Unfair Dismissals Acts 1977 to 2007 is successful and awards the claimant €25,900 in compensation for loss.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)