

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE –**claimant**

CASE NO.
UD1387/2009
MN904/2010

against

EMPLOYER –**respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Hennessy
Mr. T. Kelly

heard these claims at Clonmel on 17 June
and 31 August 2010

Representation:

Claimant: Mr. Brian O'Shea B.L. instructed by Mr. Eamonn Hayes,
Eamonn Hayes Solicitors, 50 New Street,
Carrick-On-Suir, Co Tipperary

Respondent: Ms. Maire Derivan, Derivan Sexton & Co, Solicitors,
New Street, Carrick-on-Suir, Co Tipperary

An appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was added to this case on the first day of hearing with the consent of the respondent.

The determination of the Tribunal was as follows:

Dismissal being in dispute it fell to the claimant to prove the fact of dismissal

The respondent, which operates a 30 bed nursing home, employed the claimant from some time in November 2000 as a domestic who had experience as a domestic cleaner, care assistant, and kitchen attendant. Neither terms and conditions of employment nor a contract of employment issued to her. The claimant worked on a part-time basis, initially approximately three days a week but from some time in 2004 her hours were reduced, at the behest of the claimant, to around twelve per week. Apart from working on a set part time basis the claimant also assisted and replaced other staff due to their unavailability. At times that included working the night shift. The employment was uneventful until early 2009 when the claimant suffered a non-work related back injury as a

result of which she was off work for the months of January and February 2009.

On her return to work following the back injury the claimant was placed on light duties so as not to aggravate her back injury. This was a temporary measure and by the time of the events, which led to the ending of the employment, she had reverted to normal duties.

The claimant was working on kitchen duties on Sunday 31 May 2009 something that might occur perhaps twice a month. One of her tasks involved the provision jugs of water for the patients. It is a condition of the operating licence of all nursing homes that water be available in all rooms used by the patients. It is common case that on this day the claimant failed to provide a jug of water in the conservatory. The respondent's position is further that the claimant failed to provide a jug of water in the sitting room.

At around noon the staff nurse (SN), who is no longer in the respondent's employ and has since left the jurisdiction, remonstrated with the claimant about the missing jug or jugs of water. It is common case that, initially on SN's complaint, the claimant did not provide the required jug/s of water. The following day on Monday 1 June 2009 SN raised the issue with the assistant matron (AM) of the nursing home. AM then raised the matter with the matron (TM), who is also a director of the respondent, following TM's return from leave on 3 June 2009. TM then began to conduct an investigation into the circumstances of this incident, which appeared to be a system failure, as a result of which she spoke to another nurse who had been on duty on 31 May.

TM telephoned the claimant and arranged to meet the claimant on 5 June to discuss a complaint the nature of which TM did not reveal. At the meeting the matron told the claimant that a complainant had been made against her over the absence of the jug/s of water. It is common case that the claimant acknowledged the absence of the jug in the conservatory and that she did not like the way SN had spoken to her. The claimant's position is that TM told the claimant all she was good for was talking. TM added that this, the missing jug, was a sackable offence and that she had to let the claimant go. The claimant then received her wages and left the nursing home. The respondent's position is that TM told the claimant she was merely conducting an investigation and in view of the infraction of the licence condition TM had to consider how the procedures in place in the nursing home needed to be looked at in order to prevent a recurrence of this apparent system failure. No disciplinary sanction was being contemplated; there was merely an investigation in progress.

The claimant telephoned TM on Monday 8 June 2009, the following day being her next rostered shift, the claimant's position being that she sought to be reinstated, which TM refused and the respondent's position being that the claimant had the option of light duties or of being retrained in the task of setting out the water jugs.

Determination:

TM told the Tribunal there were no notes of the investigation process on which she embarked on 3 June 2009. No evidence was adduced to the Tribunal to show that TM spoke, at any stage, to SN about the water jug incident of 31 May 2009. By the time TM met the claimant on 5 June 2009 the only person to whom she had spoken about the incident was a nurse who, whilst on duty on 31 May, had not been involved in the incident. There is a considerable conflict of evidence between the claimant and TM about both the meeting on 5 June and the telephone conversation on 8 June 2009. On the balance of probabilities the Tribunal prefers the evidence of the claimant in regard to both the meeting on 5 June and the telephone conversation of 8 June 2009. It follows that the

Tribunal is satisfied that the claimant was dismissed during the meeting on 5 June 2009. Such dismissal being without any, or fair, procedure is unfair. Accordingly the Tribunal awards €5,600-00 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal further awards €431-52, being four weeks' pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)