

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE

- *claimant*

CASE NO.

UD2043/2009

against

EMPLOYER

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr F. Cunneen
Mr. S. O'Donnell

heard this claim at Dublin on 20th July 2010
and 1st December 2010
and 2nd December 2010

Representation:

Claimant: In person

Respondent: Beauchamps, Solicitors, Riverside Two, Sir John Rogerson's
Quay, Dublin 2

The determination of the Tribunal was as follows:-

The claim under the Unfair Dismissals Acts, 1977 to 2007 was one of constructive dismissal, accordingly it fell to the claimant to make his case.

The claimant commenced employment in the position of a nurse on the 9th June 2008, he resigned on 5th August 2009, on the same day as he passed his probationary period. His employment ended on the 26th August 2009 and he was paid until 15th October 2009.

The claimant maintained his employer constructively dismissed him because of several breaches of contract, a fundamental change to his job, and an intended change to his role and several cases of negligent misrepresentation. He explained that there were breaches of his contract throughout his employment, some of which may have looked like he had accepted but he was basing his case on the "last straw approach". He was employed as a nurse and his goal is to protect patients, family and the community. He claimed that the respondent had forced him to do things that were in

breach of professional regulations and standards of care; hence he was not in a position to perform his duties properly. On one occasion he claimed he had to perform a role he was not trained to do and he maintained that the respondent was intending to extend his role to that of a cardiac technician. His probationary period was extended for additional assessment. He also worked in an unsafe environment due to exposure of radiation.

The respondent's representative outlined to the Tribunal that all the complaints made by the claimant in June 2009 were subsequently investigated by complaints initiated by him to relevant authorities. She explained that these complaints were found to be without any basis and referred the Tribunal to the inclusion of three reports from the authorities in the books of evidence. The relevant authorities had determined the radiation issue raised and all had found this to be baseless. The claimant maintained that the Dept of Health have no jurisdiction over private health care.

The respondents' representative agreed that the claimant was entitled to advance his case and that he had made complaints. However she was not going to allow him to make allegations about other medical professionals. The claimant replied by saying he was not trying to bring issues about malpractice but trying to present his case for unfair dismissal.

He was asked to open in evidence the email, which gave rise to his complaint with regard to excess radiation. The claimant explained he was complaining about his safety. The respondent's representative referred the Tribunal to a report that confirmed that the entire issue of radiation had been reviewed in detail. The claimant confirmed that he had raised a complaint about his terms and conditions of work before he resigned. He did not have documentation of all his complaints as on his last day at work documentation had been taken from him as he was told it was the property of the respondents and he was removed from the hospital before he could finish downloading all of his email. He was not pursuing the radiation risk in regard to the patients but to himself.

During the course of his employment he had raised a lot of issues with his manager and the cardiology manager. The fact that these issues did not get to the formal dispute stage does not mean he had accepted these breaches. The claimant by email had raised a number of issues with the respondent on the 9th June 2009. The Director of Nursing addressed all these in reply on the 11th June 2009. During the course of his evidence the claimant elaborated on these issues and others that had occurred during his employment.

It was explained to the claimant that the Tribunal's role was to look at what his complaint was and whether it was adequately dealt with by the respondent. It was further explained that they could not go into whether there was excessive amounts of radiation, all they could deal with is whether the respondent investigated and informed him of the outcome and he could tell the Tribunal if he felt there was a deficit in the investigation and why.

The claimant explained his issue with radiation. There was inadequate radiation equipment that was meant to protect him during some of the procedures, and measures could have been taken to minimise his exposure to the radiation. They had lead skirts on the left hand side of the table but none on the right. When they did pacemaker and ICD implants they operated on the right hand side of the table. They had monitors on their top part of body and a lead apron to their knees, so when working on the right hand side their lower legs were not protected. At every other hospital he had worked at in Dublin they would have lead skirts on both sides. A series of emails were produced into evidence in relation to this matter; originating from the Senior Physicist of the Department of Radiology, and stated that the levels of radiation exposure to the Cath lab staff are monitored through two badges distributed to each staff member, one for the whole body

and the other for the eye lens. These badges are collected monthly and are returned to the distributor and a report is issued. The email states that "the levels received by the Cath Lab staff thus far are within limits". The claimant could not recall receiving this email, which was copied to all the Cath Lab staff on the 8th June 2009. This email also invites staff to contact the Director of Ancillary and Support Services if they have any concerns regarding the radiation doses in the Cath lab. The claimant did not contact Director of Ancillary and Support Services but he did raise this issue with the Director of Nursing in his email of the 9th June 2009. The Director of Nursing addressed this in her reply and reiterated that the Senior Physicist of the Department of Radiology had found that the radiation doses in the lab were within the accepted ranges. The claimant's manager in her evidence explained that they had one table skirt that is moveable between both sides and she had no issue with the radiation levels.

The claimant also explained that his salary was withheld in July 2008, September 2008, October 2008 and January 2009. On these occasions his salary was not in his bank account. He had to ring HR, which issued him with a cheque, which took many days to clear. On another occasion the respondent had overpaid him. He maintained out of the eight people in his department, some of who were new like him, he was the only one affected. The claimant accepted that he eventually got all pay due to him. The claimant's manager explained that the claimant had come to her in July 2008 saying he did not get paid so she went to the finance department and it appeared that the claimant had incorrectly completed a form needed to complete his payslip that was one digit out. She asked the claimant for the correct number to rectify this. Another time when he did not get paid on time she got finance department to ring the claimant's landlord. Other than these two incidents she was not involved with any other payments.

He maintained that two staff members were given preferential treatment in respect of time spent in the cath lab. He had complained about this several times and had raised it at meetings but did not put it in writing. He was told if he did not do his work he would not get a reference nor his probation. His manager in evidence agreed that the claimant worked in the lab quite a bit but she also spent the same time in the lab as him.

He was accused of not following what he described as a non-existent policy, which was raised at his probation meeting of the 25th May 2009. One incident the claimant recalled was when a procedure was finished on a patient, and the nurse from the ward was not comfortable taking the patient back to the ward as the sheath was still in situ. The nurse from the ward decided to leave the patient there; he agreed to keep the patient. The word "practice" had been used but the claimant said there was no policy to follow in this situation. Also noted at this meeting was the claimant's tendency to be late, the claimant disagreed with this as there was flexibility in his department and he always worked late. The claimant's probation was extended for one month.

On the 5th December 2008 he went to submit his work authorisation documents to HR. On the 15th January 2009 and the 14th May 2009 he received a request to submit them again. He then received a letter on the 8th June 2009 from HR requesting these documents again. This was while he was out sick and since he had made complaints regarding his working conditions. Also while out sick the respondent had sent two couriers to his home for these documents one on the 15th June and he couldn't understand this as they knew he was due back in the following day. He had provided these documents three times previously. As it transpired the HR assistant was on annual leave and had not processed his documentation, and this was outlined to him in a letter on the 10th June 2009. The respondent had no evidence of receiving a copy of the work authorisation document previously, and it was a standard letter sent to all staff in the hospital where documentation was outstanding. His manager did not recall the claimant raising the issue of his work authorisation with her. The

claimant had not made an official complaint in relation to this matter while in employment.

He was called in one day for an emergency where he had to do a job of a cardiac technician. He had not complained about this but the respondent was aware of the incident, as they knew on the day of this emergency there were no cardiac technicians present. The claimant maintained that the respondent was going to change his job to include the role of cardiac technician. These plans had been in the pipeline from May. The Head of Cardiology had mentioned it to him. He was not trained for this. Also on the morning of the 5th August 2009 the day he passed his probation he was in the recovery room when two of the nurses informed him that the Director of Ancillary and Support Services was teaching clinical skills that she had no knowledge of how to do.

He confirmed with her on that day that she was intending to change the role of the nurses to that of cardiac technician. The Director of Ancillary and Support Services, in evidence explained that the claimant's manager had demonstrated this clinical procedure to the staff on a manikin and she was merely repeating what she had seen. The claimant's manager agreed with her evidence, that it was a femostop that she had demonstrated on a manikin, but this demonstration did not take place on the 5th August 2009. The respondents denied there was no such plan to extend the nurses' roles to include that of cardiac technician.

He commenced employment in June 2008 but his probation period was not finished until the 5th August 2009. The normal probation period is six months however his contract allowed it to be extended "for better assessment of your performance". At his probation meeting of the 21st May 2009 he was he was informed that his documentation needed to be more consistent, but no evidence of this was produced. His manager did not believe this was a false view and the claimant had signed the probationary form on which it is noted.

On the morning of the claimant's final probation meeting the 5th August 2009 at about 10.00 am he maintained that his manager and the head of cardiology told him not to disclose the issues with the ineffective dosages of nitrate-based drugs about which he had complained or else he would not pass his probation. His manager in evidence strongly denied that this discussion took place or that she had asked him to suppress information about the hospital. The claimant requested a neutral person to attend his probation meeting to protect his interests, he did not discuss his situation with her, and she was only in attendance to take notes. The respondent nominated this neutral person.

He intended to resign he was just waiting to get confirmation that he passed his probation. His probation meeting was at 13.00 and he had typed his letter of resignation at 12.00 while on lunch break.

Another difficulty he had was being made to work without adequate equipment. On a couple of occasions during a procedures they would not have the proper stents to use, they would have to send the patient back to the ward and bring them down another day. On two occasions he had to arrange equipment to come from a sister hospital. This impacted on the claimant, as he was the one who had to reassure the patient. He could only re-order the stock they used but he could not order what they did not have in the first place. He had spoken to his manager about this and also the Director of Cardiology. When the claimant's manager was giving evidence he asked her if she thought they had sufficient stock of stents, his manager could not recall what they had in stock in 2009.

He was unfairly treated when the remote control went missing in the Cath Lab. He was told by three members of staff that a meeting was held in relation to the remote control going missing and he was accused of misplacing the remote control. This meeting was held in his absence.

The hospital also failed to remove faulty drugs from its shelves. A notice was sent by the drugs suppliers identifying these drugs as faulty the notice was placed in his department but the drugs were not removed. His manager agreed that there had been a recall of a drug but they had taken it off the shelves, however they received a letter from the supplier informing them that there was a shortage of this drug in Ireland and they were to use this drug. There were small risks but they were aware of it. Hence the drugs were placed back on the shelf.

He maintained that up to May 2009 he had to work in an environment that smelt of sewage. Management were aware of this, he had to telephone the maintenance department and showed them where a cracked sewage pipe was. On Monday mornings they were told to pour water down the drains to clear the smell. The issue of a sewage smell was raised in his email to the Director of Nursing on the 9th June 2009 who replied that she had got it looked at again that day, and that sometimes odours emanate from sinks through lack of usage or if foul smelling liquids are poured down the best way to get rid of the smell is to run clean water through. His manager in evidence confirmed from time to time a smell did occur but she had contacted utilities and had got it fixed.

In November 2008 the claimant requested that a reference be provided to Bournemouth University on his behalf. His manager provided it but the claimant came back in March and informed her that they had not received it. The manager completed another reference on the 3rd April 2009. A copy of this was produced in to evidence. The claimant had applied for a LLM intellectual property course and paid a non refundable deposit of £759.00 in Bournemouth University which was schedule to commence in September 2009. He did not start this course and this was deferred until September 2010. The claimant had also applied to Leeds University to do another course on a part-time basis commencing in September 2009. The claimant maintained that he was going to do both these courses on block release and he would use his annual leave to accommodate this. He needed to be in employment to be allowed to register for these courses. For a number of years while working full-time he has always studied part-time.

An email of the 22 May 2009 was produced into evidence. This email was to the claimant from the Director of Ancillary and Support Services asking the claimant to put in writing to her his intention of leaving the hospital in October to pursue his studies. The respondent maintained that the claimant informed them of this intention after his probation meeting of the 21st May 2009. The claimant at first said he did not recall this discussion. However, the claimant replied to this email informing the Director of Ancillary and Support Service while he had discussed his future plans with them that he is under no obligation to give notice of his resignation until it was appropriate to do so. The claimant recalled a conversation he had with Director of Ancillary and Support Services on the 1st of May when he told her he was planning to do a course in Bournemouth University on block release in modules while still working as the rest of the course was work based.

The claimant maintained that he had reverted to the Director of Nursing on the issues in his email of the 8th June 2008 and in or around the 17th July 2008. It was after he had been requested to go to the emergency department as he was still on probation so he was required to have a meeting with her. He had highlighted that he was not happy with the sewage smell, and that the radiation training was not cath lab-specific. The Director of Nursing recall was that she had met with the claimant on the 23rd July 2009 as he refused to go the emergency department. At this meeting the claimant did not raise any concerns in respect of her reply email of the 11th June 2009.

On the 11th June 2009 the claimant had a return to work meeting with his manager (TM) as he had been out sick. A note of which was produced into evidence. One of the questions included in this is whether the employee had any concerns he wished to discuss; it noted that the claimant replied in

the negative. This note is signed by both his manager and the claimant. The claimant in the course of his evidence agreed with this as this questionnaire only related to sickness.

During the course of her evidence the Director of Nursing (SG) explained that they promoted an open culture in the organisation, and actively encouraged staff to raise any incident that causes them any concern. She is a member of the parent company's International Quality Committee. When she received the email from the claimant on the 9th June 2009 she had acted immediately to address his concerns. They had done an audit randomly pulling 20 charts for each of the consultants in this area but nothing untoward was found.

During the course of his evidence the claimant regularly referred to other medical matters, which have and are currently under investigation by the relevant authorities. The Chair outlined to him at the beginning of the hearing that they could not consider or rule on these matters. The respondent's representative outlined to the Tribunal that her client fully co-operated with the organisations which followed up the claimant's complaint and provided the information they sought as these organisations have the statutory powers to do so.

Determination

This was a claim for constructive dismissal, which is defined in Section 1 of the Unfair Dismissals Act 1977 as:

“*dismissal*”, in relation to an employee, means—

- (b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer”

In such a case the onus is on the employee to show that termination of his employment was because of the unreasonable conduct of the employer as a result of which he had no alternative but to resign. The Tribunal must assess the facts, as presented in evidence, in the context of this definition above, and make its determination accordingly.

In his direct evidence, the claimant outlined the reasons for tendering his resignation. These included *inter alia* his view, regarding inadequate protection against radiation, carrying out procedures without appropriate training, inappropriate dosage levels of medicines, environmental issues in the workplace, (i.e. sewage odours in the hospital). According to his evidence the cumulative effect of these factors resulted in his resignation on the 5th August 2009. The Tribunal noted that he did not activate the grievance procedure in pursuit of any of the concerns raised by him

There was no objective evidence to substantiate these claims either from within the hospital itself and or from the statutory bodies to which he reported these matters.

On the 5th August 2009 he was advised that he had successfully passed his probationary period. He resigned his position on that day.

Having carefully considered all the direct evidence together with the considerable volume of

documents submitted by both parties the Tribunal is satisfied that the respondent dealt with the concerns of the claimant in a reasonable way and where necessary had them investigated by a third party. Accordingly the Tribunal find that the claimant did not discharge the onus of proof required under the Unfair Dismissals Act 1977 to 2007, therefore his claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)