

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

CASE NO.

MN1152/09

UD1140/09

Against

EMPLOYER

- respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr J. Goulding
Mr. J. Dorney

heard this claim at Dublin on 19th April 2010, 8th September 2010 and 11th March 2011.

Representation:

Claimant: Mr. Jadel Naidoo BL instructed by Doyle Hanlon, Solicitors, "Moy House", 44 Belvedere Place, Mountjoy Square, Dublin 1

Respondent: Mr. Declan Wade BL, instructed by Maguire McErlean, Solicitors, 78-80 Upr. Drumcondra Road, Dublin 9

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant commenced employment on 25th November 2005. She was employed as a chef and was in charge of the kitchen. She received her contract of employment in 2005. She got on very well at work and had no issues.

In August 2008 her sister who also worked for the respondent made her aware that HF, who worked as a carer for the respondent, had made an allegation against her. It was alleged that the claimant had sexually assaulted a colleague. Everyone appeared to know about the allegation. The claimant brought this to the company's attention on 10th August 2008 and sought a meeting with the matron at the time, N.McC. ROB was asked to attend the meeting also. N.McC informed her that HF had made a complaint in or around February 2008. New CCTV cameras had been installed in the

nursing home sometime in February 2008.

The claimant deemed the accusation to be very serious, felt disgusted and horrified at the fact that the respondent permitted HF to get away with it. The claimant had worked for the respondent for three years and had been a trusted employee. She had not been informed that the respondent had investigated the allegation against her and she should have been informed accordingly.

She spoke to SB, one of the proprietors on 11th August 2008 and made her grievances known to him. SB said he could not let the claimant know about the allegation, as HF did not want to make a formal complaint. He told her to get over it and that it would blow over.

The claimant was asked to attend a meeting in July 2008 with N. McC and was asked if she recalled anyone calling HF names. She had not. She saw nothing untoward at the meeting.

At the end of August 2008 the claimant went on holidays for three weeks. She felt fine when she was away. She thought with time she would feel better. She did not. She was out sick from October 2008 until she tendered her resignation on 2nd March 2009. She felt she had to resign as she had not been afforded an opportunity to defend herself and the matter was not dealt with in a professional manner. The respondent at no time communicated with her during her illness.

The claimant commenced new employment on 16th March 2009.

Two employees who worked with the claimant had heard rumours of an allegation of a sexual nature made by HF against the claimant. As a result there was a bad atmosphere in the working environment. These rumours had also circulated outside of the workplace.

The claimant's sister who also worked for the respondent told the Tribunal that she made the claimant aware of the sexual allegation against her. While she was aware of the respondent's grievance procedures she chose not to invoke them. The allegation did not relate to her. She contended that HF told lies and created a bad atmosphere in the workplace. She furnished the respondent with a number of the claimant's medical certificates but did not speak with any member of the management team during the claimant's illness.

Respondent's Case:

SB and DS are co-owners of the respondent company, which is a private nursing home. The claimant had been very loyal and trustworthy and worked well as part of the team. She was held in high regard and the respondent had utmost respect for her.

In or around February/March 2008 SB was informed by NMcC, Director of Nursing of a comment of a sexual nature made by HF against the claimant. This comment was made at the foot of a stairwell. HF stated that she did not wish the comment to go any further and withdrew the comment. SB discussed HF's comment with DS. They felt there was neither credibility nor substance to the comment.

Both SB and DS were sorry to see the claimant resign her position.

NMcC was Director of Nursing during the claimant's tenure. She was responsible for the overall running of the nursing home. In April 2008 HF told her that she had been inappropriately touched by the claimant but did not want to take it any further. HF did not want the claimant to lose her job.

NMcC spoke to her superior at that time who in turn told her to talk to SB.

On 11th August 2008 the claimant came into NMcC's office in an agitated state and was very angry. She had heard both inside and outside the nursing home that an allegation had been made against her by HF. NMcC asked ROB to come into the office. She reassured the claimant that the complaint made had subsequently been withdrawn. There was no substance to it. As far as they were concerned there was nothing to the allegation and the matter was closed.

The claimant had no issue with the nursing home and made no grievance against the company. The claimant was angry with HF and said she 'was going to get HF and take legal representation and pursue it'. Her anger was towards HF.

NMcC was aware that the claimant was out sick from work after that. She telephoned and sent text messages to the claimant on occasions. The claimant's medical certificates were mostly left in at weekends. She also spoke to the claimant's sister J who worked in the nursing home and enquired from her as to how the claimant was, J said 'its in the hands of the solicitor'.

NK was Director of Care and she was a support to Directors of Nursing. NMcC informed her that HF had made an allegation of impropriety against the claimant but that HF had immediately withdrawn the allegation.

Following HF's exit interview NK made discreet enquiries with senior care staff. At no stage was the claimant's name mentioned. HF had been very volatile, her behaviour was erratic since Christmas 2007 and she had a chip on her shoulder. She was constantly making remarks about people and nobody like her.

The claimant had not been informed of the allegation made by HF because they did not want to upset her.

ROB joined the company in 2008. She was asked to assist NMcC. The claimant was aware of the company's policies and procedures together with the complaints book. ROB said she had an open door policy.

NMcC had discussed with ROB the allegation made by HF, the substance of it and that HF had immediately withdrawn it.

ROB attended the meeting with NMcC and the claimant on 11 August 2008. The claimant chose not to have a witness present. They reassured the claimant that they were very happy with her work. As far as they were concerned they acted in correct manner with regard to HF's allegation.

ROB spoke to the claimant's partner during her illness and expressed the wish to speak with the claimant. ROB offered medical assistance to the claimant.

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 her employment was because of the unreasonable conduct of the employer as a result of which she had no alternative but to resign. The Tribunal must assess the facts, as presented in evidence, in the context of the definition above, and make its determination accordingly.

Based on the evidence presented it appears that the claimant’s grievance was directed at HF rather than the respondent company. The respondent had carried out a discreet investigation and found the allegation made against the claimant was unfounded. It is difficult to envisage what exactly the respondent could have done other than what had been done by them.

It appears to the Tribunal that the respondent acted reasonably in the circumstances but if the claimant felt that the respondent had not dealt with the matter appropriately, she should have invoked the grievance procedures.

The Tribunal notes that the claimant made no reference in her letter of resignation to the reason for resigning.

The Tribunal considers that the claimant did not act reasonably in resigning without first having substantially utilised the grievance procedure to attempt to remedy her complaint.

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)