

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD1398/2010
MN1344/2010

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: Ms N. O'Carroll-Kelly B1

Members: Mr M. Carr
Ms. A. Moore

heard this claim at Monaghan on 2nd November 2011

Representation:

Claimant: Shane Kennedy & Company, Solicitors, 38 Dublin Street, Monaghan, Co
Monaghan

Respondent: Mr. Vincent Turley, Human Resource Consultant, 1 Black Lane, Latlurcan,
Monaghan

The determination of the Tribunal was as follows:

As dismissal was in dispute the claimant's case was heard first.

Claimant's Case

The claimant gave direct sworn evidence she commenced employment with the respondent as a care assistant in a nursing home on the 13th March 2006. She received no contract of employment or employee handbook at this stage. She worked approximately 43 hours a week normally on day duty. Within the nursing home there were approximately 56 patients and 40 staff.

In November 2009 she was given a written employment agreement dated 19th November 2009 which she did not sign. Shortly after this date she ran in to difficulties. On the 29th November 2009 she was working an 8.00am to 8.00 pm shift when she was upstairs with a client who had leukaemia who requested that she would take her downstairs for the Christmas carol singers. She took the patient down as requested it was about 5.00pm. Next the director of care (hereinafter referred to A) called her into the office. A started to shout at her and informed her that she should have not brought the patient downstairs as she had been in the hospital and there was a bug going. The claimant was shaking after this and upset. At about 7.50pm she had a panic attack and could not stop crying. A came and helped her and drove her home. The next day she went to her GP as she thought she had depression the GP gave her a sick cert for work. She also had to complete a form to receive her illness benefit which the respondent stamped.

She continued to send these sick certs in to the respondent up to December. She went to Poland for Christmas and forgot to arrange for her sick certs to be submitted to the respondent. However she had a friend (hereinafter referred to B) who also worked in the Nursing home so she was able to update her employers with her situation. She did not realise she was obliged to keep her employer informed of continued absence by submitting sick certificates. She returned from Poland in January 2010.

She met with A on the 1st February 2010 as she was willing to return work as she needed the money. She informed A that she would like to return to work and A gave her a new contract dated 1st February 2010. She was surprised at this contract and did not want to sign same. A copy of this contract was produced into evidence.

The claimant recommenced submitting sick certs in to the respondent. The respondent wrote the claimant a letter on the 24th February 2010 which the claimant did not receive as she had moved from this address. This letter advised the claimant whilst they had received sick certs there was no longer any need to supply them with same as she was no longer their employee. After this she sought information from her union. No notice was given to her nor did she receive a letter of dismissal.

Her union wrote to the respondent on her behalf on the 7th May 2010, a copy of this letter was produced into evidence. This letter outlined that at no stage did the respondent indicate to the claimant that her employment was terminated and sought clarification on the claimant's employment status. As far as the claimant was aware the union did not receive a reply to this letter.

The claimant was never given the opportunity to find out why she was dismissed or given the opportunity to explain herself. She had never been informed by the respondent about sick procedures and had received no grievance procedure whilst in their employment.

The claimant gave evidence of loss she has been in receipt of illness benefit since her termination with the respondent. Currently she is still not fit to work.

Under cross examination she explained that she had submitted three sick certs to the respondent from the 30th November 2009 to 21st December 2009 but did not submit another while she was in Poland. She thought it was enough that her friend (B) would inform the respondent of her condition and absence. After her return from Poland she recommenced submitting sick certs but B gave them back to her in March.

Respondents Case

A director gave evidence on behalf of the respondent. He along with his wife (A) established the nursing home in 2004. He deals with the day to day running of the home.

In respect of the contracts of employment, they were audited by HIQUA and it was noted that some of the employees' files were missing employment contracts. These "statements of employment" were re-issued to the staff in November including the claimant on the 19th November. The claimant never reverted back to him in November about her contract. They issue all employees with a staff handbook which contains the procedures for absenteeism. As part of this HIQUA audit staff handbooks were re-issued to all employees in November 2009. Employees were not asked to sign for these handbooks. In and around November 2009 he had a meeting with all staff in respect of new regulations and the handbooks were given out to employees at this stage. At first he recalled that the claimant was at this meeting however he then remembered that he had met with the claimant along with

another two members of staff 2 to 3 days after this meeting as they were not available.

When the claimant went sick she submitted sick certs on a weekly basis up to 21st December 2009 and no other certs were submitted. His wife spoke with B the claimant's friend who informed her that the claimant had returned to Poland and was living there. In January when they were transferring the payroll to 2010 they issued the claimant's P45 and posted it to the address they had on file for her. A copy of this P45 was produced in to evidence the date of termination is 1st January 2010, noted on this is "sent to Revenue and *claimant* 22/2/10" They terminated the claimant's employment based on the information they had to hand at this time. There was no further contact with the claimant until she got in touch through her friend B requesting to return to work.

He referred to the letter received from the claimant's union; he had telephoned the author of this letter and explained what had happened that the claimant had not made herself available to work.

Under cross-examination he confirmed that they had not issued an "employment statement" to the claimant in 2006. He agreed that at the meeting in November with the claimant and two of her colleagues the talk was emphasised on the new legislation. Sick leave and grievance procedures were covered in the employee handbook and in hindsight they should have got employees to acknowledge receipt of hand book.

He did not write to the claimant to enquire as to why she had stopped sending in sick certs as after his initial enquiry he was told she was in Poland and had no address for her there.

In reply to questions from the Tribunal as to why the P45 was dated as issued on the 22nd February 2010 three weeks after the claimant had attempted to return to work he explained that while his book keeper noted that it was sent to the claimant on this date, the claimant's employment was terminated on the 21st December 2009. No letter of termination was sent to the claimant.

The director of care (A) gave direct sworn evidence on behalf of the respondent. She is a qualified nurse and she supervises all staff and their training needs.

She recalled the 29th November 2011; she received a telephone call from the general hospital that a respite resident was positive for the winter vomiting bug. The patient that the claimant had brought down to the dining room was advised of the situation and was told that she would have to stay in her room.

The claimant firstly brought this patient down at lunchtime and she had explained to the claimant at this time that this patient had to be isolated, and the claimant returned this patient to her room. At approximately 4.00pm the claimant brought this patient to the sitting room, she called the claimant to her office and asked her why she had done this. The claimant told her she didn't know the situation but she had explained this claimant earlier in the day. Later on that evening a staff member told her that the claimant was very upset, she went down to see the claimant. The claimant was hyperventilating; she calmed down the claimant who told her that she was very distressed. She spent some time with the claimant and brought her home.

The claimant went sick the following day and submitted sick certs up to the 21st December 2009. When they heard nothing from the claimant she organised somebody to fill the claimant's hours. She organised to meet with the claimant on the 1st February 2010. At this meeting the claimant informed her that she would like to come back to work and

requested part-time hours. She gave the claimant a new contract reflecting this, and read through the contract with the claimant. She asked the claimant to sign this new contract and return it to her. She rostered the claimant to work on the 7th February 2010. The claimant was to confirm her that she was to attend work on this day and return the signed contract. As she heard nothing from the claimant she telephoned her landline and mobile but to no avail and had to roster another member of staff for this shift.

Under cross-examination she explained she had asked the claimant if she was fit to return to work on the 1st February 2010. The employee handbook was previously given to the claimant who was very aware of her entitlements and that sick certs had to be presented to her employer. Witness was under the impression that all documentation had been sent to the claimant's address that they had on file and that the claimant had received same. She had not issued a warning letter to the claimant explaining that her job was in jeopardy. The claimant had previously sent in sick certs when absent.

In reply to questions from Tribunal the claimant presented herself for work on the 7th February 2010 but she had already replaced the claimant on the rota as she had not confirmed her availability to work on this day. The staff nurse on duty told the claimant to contact this witness on the Monday. The claimant did not contact her on the Monday. She began to receive sick certs again after this date.

The Tribunal allowed the claimant to give additional evidence as a number of issues were raised during the course of the respondent's evidence that the claimant did not get the opportunity to address in her case.

Determination

The Tribunal carefully considered the evidence adduced at the hearing. Whilst the respondent assumed the claimant had terminated her employment, they made no contact with the claimant to confirm this. Proper procedures were not followed. The claimant's P45 did not issue until 22nd February 2010. The respondent admitted that the P45 issued arising out of the occurrence on the 7th February 2010.

The Tribunal finds that the claimant was unfairly dismissed and award the claimant €1520.00 the equivalents of four weeks' pay the maximum allowable in the circumstances under the Unfair Dismissals Acts 1977 to 2007. As the claimant was not available for work as she was unfit during her notice period, the claim under the Minimum Notice and Terms of Employment 1973 to 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)