EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD1348/2008

- *Claimant*

against

EMPLOYER

- *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Hennessy
Mr F Barry

heard this claim at Portlaoise on 15th April 2009
and 29th July 2009
and 30th July 2009
and 22nd October 2009
and 23rd October 2009
and 18th December 2009
and 21st December 2009
and 22nd December 2009
and 3rd March 2010
and 4th March 2010
and 25th May 2010
and 26th May 2010
and 15th February 2011
and 6th April 2011

Representation:

Claimant: Mr Ed Dwyer BL instructed by Mr Ger O'Donoghue of
White O'Donoghue & Company, Solicitors,
Market Square, Abbeyleix, County Laois

Respondent: Mr Alan Barry,
IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

Mr David Keane,

IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

Ms Caoimhe Scolard,
IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Background

A girl (referred to hereafter as X) had admitted to having full unprotected sexual intercourse when aged fifteen years and two months with a young male in the respondent's premises in Northern Ireland. This incident occurred in January 2008, when the age of consent in Northern Ireland was17 years of age. The girl involved in the incident was an Irish national ordinarily resident in Ireland.Since then the Sexual Offences (Northern Ireland) Order 2008 Number 1769 became operational on2nd February 2009 and has lowered the age of consent in that jurisdiction to 16 years of age. Theage of consent was, and remains, 17 years of age in Ireland.

The respondent is an agency which cares for young persons by way of providing youth projects in Ireland. The respondent also operates a residential facility (hereafter referred to as R) in Northern Ireland. The claimant had been employed by the respondent in one of its youth projects in the South. X was a client of this project and the claimant had been in charge of X at the time of this incident which occurred while X was on a residential weekend away in the respondent's premises in the North.

The Tribunal enquired as to whether or not this incident of underage sexual intercourse involving a minor had been reported to the relevant authorities. According to the respondent the incident had come to light when X had admitted having sexual intercourse to a member of staff of the HSE run facility in which X ordinarily resides. The respondent stated that the HSE was the relevant reporting agency in Ireland and therefore the HSE was aware of the occurrence of the incident. The Tribunal did enquire and failed to obtain an adequate response when it asked if the incident had been brought to the attention of the relevant officials within the HSE and not merely to the attention of the HSE personnel in the residential facility. The Tribunal also pointed out to the respondent that the incident had occurred in Northern Ireland and not within the jurisdiction where the HSE could be regarded as the appropriate reporting authority. The Tribunal specifically asked if the incident had been reported to the relevant authorities in Northern Ireland. The respondent was unable to say if the HSE had brought the incident to the attention of the relevant reporting authority in Northern

Ireland. It was only on pressing the point that it became clear to the Tribunal that the respondent itself had taken no steps whatsoever to bring the claim by a minor that she had been the victim of the statutory rape to the attention of the relevant reporting authorities in Northern Ireland nor had the respondent taken any steps to ensure that the incident had been brought to the attention of the relevant section of the HSE.

X normally resided in a residential facility run by the HSE. The respondent had been engaged by the HSE to operate a youth project in a town in the South, hereafter referred to as P. X was a client of the respondent's project in P. The respondent employed the claimant at the project in P and the claimant had a particular responsibility for X within the project. The claimant was also required by the respondent to bring X on the residential weekend away in the respondent's facility in Northern Ireland. The claimant was required to provide one-to-one supervision for X throughout the weekend including on the journey to and from R. The claimant is female and was in her late twenties at the time of the incident. The claimant was accompanied by another female employee of the respondent at the project in P, referred to hereafter as AL. AL was required by the respondent to provide one-to-one supervision of another young female client from the project in P and all four females were to share the same chalet in R on the weekend away. The residential facility in R comprised of a number of chalets. The respondent also operated a similar project in another town in the South hereafter referred to as M. Also present that weekend was a group from M consisting of three young male clients under the supervision of two adult male employees of the respondent.

Claimant's Opening Statement

The claimant, a social care worker, lodged a claim on 5th November 2008 under the Unfair Dismissals Acts, 1977 to 2007, after an employment with the respondent that had commenced in 5th September 2005 and ended in October 2008. The claimant alleged that she had been constructively dismissed. For the claimant it was alleged that there had been unfair procedures in the disciplinary hearing and appeal and that there had arisen thereby and also on other grounds an absence of mutual trust and understanding in the relationship of employer and employee justifying the claimant in not returning to work such that the employment had been terminated by way of constructive dismissal.

Respondent's Opening Statement

The respondent contended that the claimant had not been dismissed by the respondent from her

employment, either constructively or at all, but rather that the claimant resigned from her former employment with the respondent such that she had no claim under the Unfair Dismissals Acts, 1977 to 2007. The respondent argued that the claimant had been the subject of a fair and procedurally sound disciplinary process. The decision to dismiss the claimant made at first instance was appealed by the claimant. For the respondent it was claimed that it was a mark of the fairness of the employers disciplinary procedures that the claimant succeeded in having the decision to dismiss overturned at the internal appeal. The claimant was ultimately issued with a final written warning. The respondent argued that the reduction in sanction from dismissal to placing the claimant on a final written warning demonstrated the effective and independent role of the appeals procedure. The claimant went on sick leave and refused to return to work. The respondent stated it would call evidence of its efforts to facilitate the return of the claimant to work. The claimant never returned to work despite the respondent's best efforts. It was the respondent's case that the claimant resigned in mid-October 2008. The respondent claimed that it had behaved appropriately at all times throughout the disciplinary procedure and at no material time did the respondent's conduct justify the claimant's decision to refuse to return to work.

Written Submissions

This was a lengthy case heard over a prolonged period of time and both parties made extensive written submissions to the Tribunal subsequent to the final day of the hearing. Given the large amount of oral evidence heard and the number of issues raised it may add clarity to this determination to provide excerpts and/or summaries of their submissions at this point. The Tribunal does not intend to deal specifically in this determination with those elements of the written submissions that merely reiterate well accepted and general principles of law but will instead focus primarily on those points most germane to the particular facts of this case.

Submissions on Behalf of the Claimant

For the claimant it was accepted that this is a constructive dismissal case and that the burden of proof rests on the claimant to show that she was dismissed. The claimant's case is that she was forced to resign from her employment because the conduct of the respondent entitled and/or made it reasonable for the claimant to terminate her contract of employment.

The claimant was justified in leaving her employment on the basis of the conduct of the respondent which included:

1 The failure of her line manager to deal adequately with certain issues such as overnights, the mobile phone policy and the conduct of risk assessments.

2 The failure of her superiors to resolve the claimant's complaint about her line manager's behaviour and the fact that no progress was achieved in respect of her complaint even up to the occurrence of the incident involving X.

3 That initially following the incident involving X the claimant was not told that she was under disciplinary investigation.

4 The respondent failed to clarify at the outset which part of the disciplinary procedures was being applied.

5 The investigation team failed adequately or at all to analyse and/or take account of the true position in respect of key ingredients in the said investigation such as

(a) the so-called mobile phone policy,

(b) the use of risk assessments and failure to take account of the claimant's hazard risk assessment,

(c) the method of booking overnights in R,

(d) the line manager's role in respect of these matters,

(e) the residential proximity of the male and female teams and in particular the fact that the supposedly-allocated chalet would have involved no less proximity,

(f) the reported inadequacy of the chalet in R,

(g) the level of supervision of the females especially TL and the fact that the level of supervision was consistent with the instructions given to the claimant,

(h) the fact that little or no account was taken of the male supervisors' knowledge of the male and female contact at the females' bedroom,

(i) the fact that night supervision was not required of the claimant,

(j) the complete failure to pass on the said knowledge to the claimant,

(k) the relative leniency with which the male supervisors' behaviour was treated.

6 The failure to interview any further personnel (including the claimant's line manager) as part of the disciplinary investigation process.

7 The inclusion of a hostile and highly prejudicial report from RG dated 3rd March 2008 as an appendix to the Disciplinary Investigation Report.

8 The fact that the claimant was not given an opportunity to agree the minutes of her investigation interview before the commencement of the formal disciplinary process.

9 The outcome of the investigation process as a result whereof disciplinary charges were effectively laid against the claimant. This went considerably beyond the remit of the investigation team or the more senior personnel who gave them their terms of reference.

10 The disciplinary charges laid against the claimant were of the highest level possible and amounted almost to accusations of criminal behaviour.

11 One of the charges was one not mentioned in the disciplinary handbook.

12 An extreme level of personal blame was attached to the claimant notwithstanding the finding of general organisational flaws as identified in the investigation report.

13 Despite the flawed nature of the investigation report the formal disciplinary hearing upheld all the charges which had been laid against the claimant.

14 The formal disciplinary hearing introduced further evidence in its findings which had not been put to the claimant in breach of fair procedures and in particular the principle *audi alteram partem*.

15 The formal disciplinary process did not afford the claimant an opportunity of agreeing the record of her evidence before the disciplinary hearing. This also breached fair procedures again and in particular *audi alteram partem.*

16 The appeal decision was flawed in being unclear and in not exonerating the claimant from any of the very serious charges laid against her. In addition the appeal decision misapplied the available disciplinary procedures to apply an incorrect sanction upon the claimant.

For the claimant it was accepted that an employee claiming constructive dismissal is also expected to have acted reasonably and that in the context of this case the primary issue raised against the claimant is that she did not avail of the respondent's grievance procedures. However, it is not absolutely necessary that the employee invoke the grievance procedures and the claimant relies on Allen v Independent Newspapers where it was held to be sufficient that the employee advised her superiors of her concerns.

There was no independent reason for the claimant to invoke the grievance procedures as the claimant had contacted her superiors about her difficulties with her line manager and this had led to the meeting on or about 9th November, 2007. It was the claimant's case that the issues raised by her in this process were still ongoing at the time of the incident involving X on or about 25th and 26th January, 2008. The claimant believed that her complaint regarding her line manager had become subsumed into the disciplinary investigation and procedures which were initiated in the wake of this

incident.

The claimant sought compensation as per the submission made on her behalf by her accountant.

Submissions on Behalf of the Respondent

For the respondent it was submitted that "There are various definitions of constructive dismissal that we can call upon, each with its own particular wording. But the central thesis of each definition is that in order for a claim of constructive dismissal to be successful, the claimant must show, that the behaviour of the employer was so unreasonable, so reprehensible, that they had breached a fundamental or implied term and condition of employment to such an extent that any reasonable person, could not be expected to tolerate the situation a moment longer." The Tribunal rejects this claim that the breaches of fundamental terms of a contract of employment by an employer must reach a level of intolerability before the employee may exit the employment by way of constructive dismissal. Once there is a fundamental breach of the contract of employment the employee may elect to repudiate in accordance with ordinary contract law principles and the Tribunal does not accept that an employee must endure all breaches of fundamental terms of the employment that the employee is capable of tolerating and for as long as the employee is capable doing so.

The respondent noted that the overwhelming majority of the evidence presented by the claimant related to the investigation of the incident that occurred in R in January 2008 and that the claimant, under cross-examination, accepted that the incident was extremely serious and warranted investigation.

The respondent asserted that "the investigation rightly concluded that the claimant receive a final written warning". The Tribunal notes that this is factually incorrect and the investigation reached no conclusion as to sanction but instead concluded that there was sufficient evidence to recommend the claimant be the subject of three charges of gross misconduct. It was only at the appellate stage did the respondent ultimately reduce the sanction from dismissal to giving a final written warning.

In the course of its submission the respondent summarised the facts and the procedures employed by the respondent. When the HSE notified the respondent about the incident involving X the claimant's line manager O'B informed SC, the programme manager and SC instructed O'B to take statements from the staff members involved, being the claimant and LN from the project in P and

from GL and from BR from the project in M. The respondent also spoke with the children who were on the residential weekend away in R. The respondent submitted that it " undertook this investigation for a number of reasons, most of which are obvious to the ordinary person. A young girl, a minor in the care of the claimant had engaged in an unlawful sexual act. This was something, which had very serious implications not only for the young person involved, but for the project employees and the company. There were clear and obvious legal implications for the company and potentially criminal implications for the parties involved. It was right and proper that the company carry out an untoward incident investigation. Moreover, we have seen that the HSE's national guidelines for childcare required that the company immediately undertake a thorough investigationof the circumstances surrounding the incident".

The Tribunal rejects the respondents characterisation of the incident as one in which a young girl had engaged in an unlawful act. The young girl is alleged to have engaged in an act which is perfectly lawful for the female participant. The evidence presented to the Tribunal indicates that X, a young girl in the care of the respondent was the victim of a serious criminal offence for which she bears no culpability according to the laws of either Ireland or the United Kingdom in which jurisdiction the offence appears to have been committed. The Tribunal notes that the alleged perpetrator was a young male whose supervision and control was the duty of the respondent. The Tribunal is simply astonished that the respondent seeks to attribute criminality to the victim.

The Tribunal finds that at no stage did the claimant ever dispute the importance of investigating the incident, the claimant cooperated with the investigation and the claimant stated in evidence positively her acceptance that the incident ought to be investigated. The Tribunal rejects any implication that the claimant objected to the incident being investigated. The Tribunal notes that in its summary of events the respondent omits the fact that the HSE carer for X first reported the incident to the claimant as the appropriate person within the respondent and that it was the claimant who triggered the wider response of the respondent when the claimant reported the incident immediately to her line manager.

The Respondent's Summary of the Conclusions of the Investigation Report

The respondent decided that the incident involving X warranted an investigation under Stage One of its disciplinary procedures and appointed CN and CP to investigate. CN and CP interviewed 13 persons. In its submission to the Tribunal the respondent summarised the investigation as finding

with regard to the claimant:

"1 That the claimant had failed to adequately prepare for the residential

2 That whilst on the residential the claimant had failed to adequately supervise the young people

3 That the claimant had failed to follow the mobile phone policy, which by her own admission at the disciplinary hearing she was familiar with the contents of. In allowing the young person in question, Ms OS, to have access to her mobile phone during the residential weekend the claimant breached company standards

4 That she failed to review the original risk assessment she says she carried out, a fact that is in dispute. Evidence shows that as the circumstances on the residential changed no further dynamic risk assessment was carried out which is an ongoing requirement based on the respondent's child protection and safe care policies and professional judgement. It hasalready been established through cross-examination that the claimant had knowledge andtraining on both policies.

5 These shortcomings on the part of the claimant played a significant role in allowing for the serious incident, which led to sexual relations between two respondent clients one of whom was underage on the night in question. I trust that the EAT appreciate the seriousness of this matter for the children involved and the reputation of the company."

Arising out of this report a disciplinary panel was formed. The respondent chose DN to lead the disciplinary hearing, because she was a programme manager, and possessed the necessary training and experience to come to an informed opinion as to whether or not the claimant had failed in her duties over the course of the weekend.

The Disciplinary Process

The respondent claims that the disciplinary process was fair in that:

1 The claimant was made aware in advance of the meeting that she was entering into a disciplinary process. She was made aware of the allegations against her as well as being provided with a copy of the investigation report in ample time to allow her prepare.

2 She was advised of her right to representation and indeed was represented by Mr CL (IM trade union) throughout the process (up to and including the appeal meeting at which stage her appeal of the decision to dismiss was successful. The sanction was reduced from one of

dismissal to final written warning.)

3 The allegations were put to her.

4 She was offered the right to respond and her union official was permitted to make representations on her behalf.

5 She was afforded a fair and impartial hearing.

6 She was afforded a right to appeal the decision and availed of same.

The respondent submitted that the essential elements of natural and constitutional justice as outlined in Statutory Instrument 146 of 2000 were clearly evidenced in the respondent's disciplinary procedures and were strictly adhered to throughout this process.

The disciplinary panel determined that the claimant should be dismissed. The claimant was informed of this decision in a letter of dismissal and advising her right of a right to appeal. The claimant availed of the appeal.

An appeal hearing was convened by CD who was the chief executive officer of the respondent. CD and two fellow directors of the company heard that appeal and determined that while the breaches of the respondent's policies and procedures were extremely serious, the disciplinary sanctionshould be reduced from dismissal to a final written warning because there were no previousdisciplinary warnings on file. The appeal failed on two grounds but was successful on one. Thefinal written warning was issued in accordance with section 3.3 of the company's disciplinary procedures.

The Claimant's Relationship with her Line Manager

The claimant gave evidence of a poor working relationship with O'B her line manager. Therespondent submitted that the claimant had "failed to provide any evidence in support of theseunfounded allegations, and has failed to describe any behaviour to substantiate her claim that herrelationship with her line manager was intolerable". In the course of her evidence the claimant referred to the use by O'B of post-it notes. The respondent was produced the post-it notes that weredenied that the content of these notes constituted any form of improper behaviour by O'B. Therespondent did acknowledge there had been some employee relations issues of a more generalnature in P which had arisen in the past and claimed these were resolved to everyone's satisfaction at a meeting in October 2007. This meeting was facilitated by ST who

travelled to the project at Pand undertook a staff debriefing where a number of issues were discussed. This meeting culminatedin an action plan devised by all parties in attendance and which was to be monitored by SC, theprogramme manager. The claimant confirmed in evidence that she had undertaken this exerciseinvolving both management and staff members. The claimant accepted that ST had asked at the endof that day if there were any other outstanding issues and the claimant agreed that she had not andthat no further difficulties were raised at that time. The respondent submission that it hadreasonably concluded that there were no outstanding issues.

According to the respondent in submissions "The reality is that there was no deterioration in the relationship between O'B and the claimant. Certainly, the claimant never raised a grievance either informally or formally regarding her relationship with her line manager. It is a fact that the claimant never approached the regional manager, SC, to lodge a grievance relating to O'B. It is a fact that she never approached ST in human resources to lodge a grievance. It is simply a fact that even though the claimant was aware of the respondent's grievance policy that at no stage did she seek torely on it by lodging a formal grievance. The company asserts that the claimant's knowing of theexistence of this policy and her rights thereunder coupled with her failure to invoke it, in addition toher having access to appropriate management who she could have approached if there was in fact apoor working relationship and once again her not choosing to do so, all point to the fact that therewas no such poor working relationship in existence."

The respondent noted that the claimant was actively seeking alternative employment some months prior to her decision to resign and submitted that the claimant chose of her own accord to resign her employment.

The Tribunal accepts the evidence of the claimant that she had a poor working relationship with her line manager O'B and considers the fact that the claimant was seeking alternative work consistent with her claim that she was unhappy with the manner in which the project at P was being managed. The Tribunal notes that the respondent accepted that there were issues in P which merited the intervention of ST and the Tribunal finds that these issues included matters concerning the way inwhich O'B managed the project at P. It is common case that the claimant did not invoke the respondent's grievance procedure but the Tribunal is satisfied that the claimant regarded her difficulties with O'B were being raised by other employees of the respondent at this

meeting. TheTribunal had the opportunity to hear and observe the claimant and has formed the view that theclaimant is a young and relatively unassertive individual and finds that the claimant simply letothers take the leading role in making these grievances known to the respondent. The respondentorganised this meeting for the purpose of attempting to resolve what were essentially employeegrievances in a non-accusatory manner outside of the standard grievance procedures of therespondent. In circumstances where an employer provides an alternative to the grievance procedureand an employee avails of that alternative then the Tribunal can regard the failure of the employeeto avail of the grievance procedure acceptable and not inconsistent with constructive dismissal.Where the grievance is shared by a group of employees and is being pursued by the group then theTribunal considers the grievance is being pursued by each member of the group. Similarly, wherean employee has a grievance which is shared by other employees and the employee knows that thesome of the others are pursuing that issue then the Tribunal may failure of the employee to avail ofthe grievance procedure acceptable and not inconsistent with constructive dismissal.

Grievance Procedure and Constructive Dismissal

In the respondent's submission "in order for a constructive dismissal claim to succeed an employee must first demonstrate that they have attempted to resolve their difficulties through the company's internal procedures". The respondent relied upon Conway v Ulster Bank and MBNA v A Worker wherein the claim failed because the employee initiated a formal grievance procedure but did not appeal the result therefore failing to exhaust the internal grievance procedure before resigning.

It was an uncontroverted fact of the case that the claimant did not use the respondent's grievance procedures. However the Tribunal does not quite accept that the claimant did not make any concerns known informally.

Determination

In its written submission to the Tribunal the respondent stated that "A minor had potentially been the victim of a statutory rape, while in the care of the claimant. On the weekend in question the claimant was acting in *loco parentis* for a young person who was at that time already in the care of the state." The Tribunal does not accept that "potentially" is the appropriate term; if the reports of the young persons are accurate (and no attempt was made by either to cast doubt upon the accuracy of the central claim by the young people involved) then it appears that the girl has actually been the

victim of a statutory rape.

What is of greatest pertinence to the case that falls to be decided by this Tribunal is the submission by the respondent that X was in the care of the claimant. The Tribunal finds explicitly that at the time when X was the subject of a statutory rape she was not in the care of the claimant as the claimant was asleep and off duty. The Tribunal finds that the girl X was at all material times in the care of the respondent company, both during the day and throughout the night, and that it was the respondent who was failing in its duty to act in *loco parentis*. The members of this division were at first bemused to hear that despite the respondent employing four adults to look after five young people two of those young people could manage to have full sexual intercourse. A reasonable person knowing little else about this case might expect that such an event could not occur without gross negligence by someone. The Tribunal has formed a clear view of where the blame lies; it lies with the respondent.

The uncontroverted fact of the matter is that the claimant was scheduled to work from 8am until midnight and the statutory rape of X occurred while the claimant was fast asleep in a separate room from X's sleeping quarters. It is common case that X sneaked out in the small hours of the morning to another chalet where consensual sexual intercourse occurred. It was known to the respondent that X had behavioural issues, which included sexualised behaviour, and did not reside with her own parents. It is common case that X was known to the parties to be ordinarily resident in a HSE facility and the claimant gave evidence, which the Tribunal accepts, that X was subject to waking night supervision while in that facility. The respondent holds itself out to be a specialist provider of expert care for young persons to the public health sector in the United Kingdom and in Ireland. It was the decision of the respondent that it was appropriate to bring X on a weekend away to the facility owned by the respondent at R in Northern Ireland where there was no waking night supervision and all four employees were scheduled by the respondent to work from 8am until midnight such that no adult was expected to be awake to supervise any of the children.

The respondent required the claimant to maintain close supervision of X for up to 16 hours per day of the weekend and the respondent then sought to attribute blame in the highest degree to the claimant for an event that occurred during the claimant's rest period. The sexual intercourse occurred in another chalet which was the responsibility of the respondent's employees from M, the alleged perpetrator of the statutory rape was a young male for whom the employees from M had

particular responsibility and while the two male employees were asleep in an adjacent room to the *locus* of the incident. It is a notable feature of the case that the two male employees were subject to lesser disciplinary charges and at least until the appeal stage, a lesser sanction that the claimant. The Tribunal finds that this discrimination between the treatment of the employees from P and from M lacks sufficient rationality.

For the claimant it has been argued that respondent's procedures were defective and therefore the dismissal was procedurally unfair. Counsel for the claimant has submitted that the claimant was not told that she was under investigation with sufficient immediacy. The Tribunal understands this point to relate to the fact that the claimant was asked to make statements in writing which were laterrelied upon respondent at the disciplinary stage and the claimant was not warned that the statementmight be so used. The Tribunal holds that an employer is entitled to require from an employee allrelevant information in the employee's possession obtained in the course of the employmentrelating to incidents occurring at work without the necessity to first warn the employee of thepossibility that the information might be used in disciplinary proceedings against the employee.Counsel for the claimant submitted that the respondent failed to clarify at the outset which part ofthe disciplinary procedures was being applied. The Tribunal accepts that the failure to identify which disciplinary process is being applied by the employer can have the potential to prejudice anemployee's defence. However it is it a matter of fact in each case whether or not the failure actuallyprejudiced the employee's defence and in this case the Tribunal is satisfied that any disadvantage tothe employee was minor and rectified in the course of the process such that the procedures were notunfair in this respect. Counsel for the claimant submitted that the inclusion of what was describedas a "hostile and highly prejudicial report" from RG dated 3rd March 2008 as an appendix to theDisciplinary Investigation Report made the proceedings procedurally unfair. The Tribunal does notexpect an employer to apply the rules of evidence as if it is a court dealing with a criminal matteron indictment and exclude evidence from consideration because it is more prejudicial thanprobative. This is not to say that the law of evidence is to be entirely disregarded; it is perfectlyreasonable when considering the rights of any individual to look to any other area of the law insearch of guidance by analogy. The Tribunal is more concerned with whether or not the employerallowed itself to be prejudiced by consideration of such evidence rather than insisting that theemployer applies an exclusionary rule. The law of evidence can be a fruitful guide to the weight tobe given to such evidence. . Counsel for the claimant submitted that the failure to interview anyfurther personnel (including

the claimant's line manager) as part of the disciplinary investigationprocess was also a procedural defect. The Tribunal as a general principle does not regard defects inthe investigation stage to constitute defects in the disciplinary process. The Tribunal has longregarded the investigatory process to be distinct from the disciplinary process in that the right to fairprocedures pertain to the disciplinary process and that there is no right to fair procedures at the investigatory stage per se. The Tribunal finds that the dismissal of the claimant was not unfair procedurally for the failure to gather this evidence.

The Tribunal holds that an employer is not obliged to limit itself to bringing against an employee only those disciplinary charges mentioned in the disciplinary handbook where no such limitation has been specifically provided.

The Tribunal holds that an employer is not obliged to give an employee an opportunity to agree the minutes of the investigation interview with the employee before the commencement of the formal disciplinary process. It is better practice for an employer to allow this as the employee is in a weaker position when asserting later that the minutes are inaccurate if the employee has not availed of an opportunity to correct them earlier. The failure of an employer to allow correction of the minutes can reduce the probative value of the document.

The Tribunal notes that the investigation report asserts that there was sufficient evidence to recommend the bringing of disciplinary charges and specifies what they were and asserts that they were at the level of gross misconduct. It is unusual but not unprecedented as a matter of industrial relations procedures for an investigation report to go so far but the Tribunal does not regard this as a basis to find the dismissal unfair. Even where an investigation report goes considerably beyond the terms of reference of the investigation team this does not constitute an unfair disciplinary procedure per se.

Ultimately the respondent reduced the disciplinary sanction from dismissal to placing the claimant on a final written warning. The Tribunal finds that the claimant was fully justified in concluding her employment at that point having regard to the very grave nature of the findings, the unfairness of having them upheld, the fact that she had exhausted the respondent's disciplinary process and the extremely vulnerable position the claimant was to be placed in whereby she could have her employment terminated for any further matter however minor. The Tribunal finds that the poor

working relationship the claimant had with her line manager was not the whole or main reason for the termination of the employment nor was the level of difficulty with the line manager sufficient in and of itself to justify a constructive dismissal. The Tribunal also finds that the failure of the respondent to progress to a conclusion the workplace issues also fails to justify a finding of constructive dismissal on its own. Prior to the occurrence of the incident involving X the claimant had become unhappy in her employment and was interested in exploring other opportunities for reasons which the Tribunal believes to be connected to the poor relationship with her line manager and the failure of the issues in her workplace to be resolved to her satisfaction. The Tribunal finds that these earlier difficulties which had motivated the claimant to seek an alternative source of employment did not justify a claim of constructive dismissal in themselves but may well have been an additional and exacerbating factor in her mind where the claimant could be dismissed for any minor matter as found by a line manager in whom the claimant had limited confidence and whose only protection would be reliance on a disciplinary process which had by then so badly failed the claimant. The Tribunal finds that the termination of the employment relationship was at least mainly, and probably wholly, for reason of the ultimate disciplinary finding. The Tribunal finds that the other issues predating the X matter had probably become superfluous at the end.

The Tribunal notes the letter of summary dismissal dated 7th July 2008 from the respondent to the claimant informing her of the outcome of the disciplinary hearing and stating that "the Disciplinary Panel upholds all the allegations against you and believes that this effects (sic) beyond repair thetrust and confidence placed by you by [the respondent]." The Tribunal also notes the statement inthe letter dated 15th September 2008 from the respondent to the claimant that "You have now exercised your right of appeal under [the respondent's] Disciplinary Procedure and this decision is final." The Tribunal finds that the grievance procedure was a separate process from the disciplinaryprocess, that the grievance procedure was not available to remedy the disciplinary matter and thatthe claimant did not leave the employment of the respondent until after she had exhausted all relevant and available remedies.

The respondent claimed that the claimant chose of her own accord to resign her employment for reasons that had nothing to do with the incident in R. The Tribunal rejects this characterisation. The respondent did not retract its assertion of an irreparable breach of trust which is a well established basis for a constructive dismissal in itself.

The Tribunal found the claimant to be a credible witness and where there was a conflict in the evidence between the claimant and witnesses for the respondent the Tribunal prefers the evidence of the claimant at all times.

At all time throughout the hearings before this Tribunal the respondent has sought to blame the claimant for the failure to protect X from statutory rape which appears to have occurred while the minor was in the care of the respondent at its premises in R. This attempt had a number of separate elements all of which are rejected by the Tribunal.
The respondent actually went so far as to claim that the claimant was in some sense on duty and had a duty of care to X between the hours of midnight and 8am notwithstanding the fact the claimant was asleep after having worked a sixteen hour day beforehand. Remarkably the respondent argued that since it paid the claimant an overnight allowance the claimant was still responsible for supervising X throughout the night. The Tribunal regards this is a ludicrous argument indicative of the lengths to which the respondent is willing to go to push blame down to the lowest levels within its hierarchy and to scapegoat its employees for its own mismanagement. The Tribunal holds that an overnight allowance is a payment to an employee in consideration of the employee residing overnight while off duty in a location specified by the employer rather than one chosen by the employee.

The Tribunal heard considerable evidence and was provided with maps and other materials in support of the respondent's contention that had the claimant followed the booking procedures exactly and used the chalet allocated to her rather than the one she did use then X would not havebeen in such proximity to the chalet with the boys and therefore the sexual intercourse would nothave occurred such that the claimant was to some extent culpable. The chalets were in pairs eitherside by side or above and below each other. The group from P ended up in one of an adjacent pairwith a chalet occupied by the group from M. It was only upon enquiry from the Tribunal that therespondent admitted that chalet allocation had been made by the respondent without any attempt toput distance between girls and boys. Furthermore the respondent admitted that it did not even knowat the hearing if there were other boys in the chalet adjacent to the one initially allocated to the girlswith whom X could have equally well have had a tryst. The Tribunal regards this entire line ofevidence to be a shameless attempt to misallocate blame to the claimant. The Tribunal accepts theclaimant's evidence in relation to the difficulties she encountered regarding the accommodation andfinds that she acted reasonably at all times.

The disciplinary hearing and appeal both found that the claimant "... had deliberately ignored [the respondent's] rules and thereby endangered the physical well-being and/or safety of yourself or others ..." and that she had "... wilfully neglected [the respondent's] service users" and that she "...had refused to carry out a reasonable work instruction". The Tribunal recognises that these areextremely serious findings for the reputation of a qualified social worker who was working as acarer for children and have the potential to blight her young career. The Tribunal finds that all threedisciplinary findings are unsubstantiated by the evidence available to the respondent at the timethese disciplinary findings were made, are irrational and are to a great extent perverse to theevidence.

The respondent sought to blame the claimant for what occurred that night by alleging that failures by the claimant preceding the incident were causative of the incident and to defend by clear implication its own reputation by making the case that had the respondent and her colleagues done as they were supposed to do the incident would not have occurred.

The respondent alleges that it was a rule of the respondent that clients (as the young persons are referred to by the respondent) were not to have access to their mobile telephones and had the claimant enforce this rule then the incident could not have occurred. The Tribunal rejects this theory that young teenagers cannot meet to have sexual intercourse without making an appointment by telephone. The Tribunal notes that the respondent considers it reasonable and appropriate that young teenagers under their control be allowed to smoke cigarettes. The Tribunal also notes that the respondent had clearly instructed its employees to allow clients privacy in their bedroom and the employees were only enter the clients' bedroom to a minimal extent. It is clear from the statements taken from the young people that the meeting for later on that night was arranged by the young males on a smoking break standing outside and conversing through the bedroom window of the young females. It was the evidence before the respondent that the mobile telephone was not the means whereby sneaking out later was arranged and the respondent had persisted in advancing an allegation against the claimant in the teeth of the evidence. One of the young males made a statement of doubtful reliability claiming that the mobiles were used after the both groups had been sent to their respective bedrooms asking the girls to come over but that they did not come as requested. The Tribunal notes this emphasis on the role of the telephones by this young male in hisstatement was in response to being pressed being pressed on the topic by the

respondent's investigator. On the evidence before the respondent it is clear that the girls slept passed the appointed time and when they woke up later they met the boys in the old fashioned way, withoutthe use of a mobile telephone, by climbing out of their window and walking over to the boys' bedroom window and climbing in. The Tribunal also finds as a matter of fact that there was no ruleor instruction by the respondent directing the claimant to deny clients access to their mobile telephones. On the contrary the document put in evidence before the Tribunal and relied upon in thedisciplinary process by the respondent states that "As a protective measure no young person is tohave access to their personal mobile phone whilst; (a) in any residential facility run by [the respondent] (including all youth villages) unless staff has given an individual young person permission to do so." This policy statement by the respondent quite clearly implies staff memberscan allow a young person access to their own mobile . The evidence at all times before therespondent is that the claimant did not allow X access to her mobile phone, took it from her, that itwas out of charge and the claimant only agreed to place it on charge for X to use when X wenthome and that X took possession of the phone without the knowledge or consent of the claimant. The respondent's conclusion that the claimant acted "wilfully", "deliberately" and actually "refused" is perverse to the evidence.

The Tribunal notes that the claimant had concerns about the manner in which the respondent managed residential weekends away and she had acted upon her own initiative to produce a risk report stating her concerns about the unsuitability of some young people for being taken there and had specifically recommended that there be waking night supervision provided for them and/or that the bedroom windows be alarmed. The risk report was communicated to the respondent long in advance of the incident and the respondent chose to disregard this warning. Had the respondent taken any of the steps recommended by the claimant the incident probably not have occurred. The Tribunal rejects the claims that there was any relevant failure to carry out a risk report by the claimant.

The respondent claimed before the Tribunal that when the two female adults brought the two female children away for a weekend to the one chalet each female adult should have submitted their own risk report in respect of the one girl for whom each had a particular responsibility and that the claimant by relying upon the completion of a risk report by her colleague in respect of the group had failed to do her duty to carry out a risk report. The Tribunal notes that the respondent made this

claim before the Tribunal, withdrew it and later resurrected it. The Tribunal rejects this characterisation as tendentious and has read the risk report and as best as can be discerned it appears that the document it was to be completed as it in fact was by one person on part of the group.

The respondent argued that the claimant and X should be regarded as a group for the purposes of the completion of the risk report. In order to complete the risk report for the pair on the form provided to a satisfactory standard the respondent claimed to expect that the claimant should have stated in the form that X was sexually precocious and was at high risk of engaging sexual activities and then the claimant should have asked X to sign this form herself. It is clear to that the claimant was aware of the risk and the Tribunal considers perfectly reasonable that the claimant would not have put such a statement in writing before a young girl and asked her to sign it.

The respondent alleged that there was a failure to complete a so-called "dynamic risk report" when the claimant altered chalet to be in one adjacent to a chalet with boys. Since it was always possible that boys could have been in the adjacent chalet to the one allocated or at least within walking distance the Tribunal sees no material change that would have necessitated the making of such a report. The claimant was well aware of X's interest in boys and had previously dealt with these risks in the report disregarded by the respondent.

The Tribunal notes that the claimant sought to mitigate her loss but that the respondent communicated sufficient of the adverse disciplinary matters to the prospective employer so as to be the probable cause of preventing the claimant obtaining that position. The Tribunal finds that the claimant adequately discharged her duty to mitigate loss. The Tribunal further finds that the claimant contributed to her loss by her own behaviour in a nil sum.

The Tribunal notes that the claimant had applied to job share and that this application had been granted. In doing so the respondent stated that the change would be permanent. The claimant acknowledged that the job sharing arrangement would be permanent and sought an outline of the alterations to her conditions of employment prior to the commencement of this change on 1st January 2008. The respondent failed to provide a contract of employment setting out any alterations. Nonetheless the claimant commenced working half her usual hours and this arrangement continued until the claimant took sick leave from which the claimant did not return. It

appears to the Tribunal that there was in any event no material change to the claimant's terms and conditions of work other than the halving of her hours and her pay. The Tribunal finds that theclaimant by her conduct had accepted a permanent change to a working week of half the number ofhours. The gross weekly remuneration was agreed between the parties as being €393.96 per weekfor the reduced week of 17.5 hours working.

The Tribunal has carefully considered the submissions of the respondent as to the likelihood of the claimant being made redundant had she not been dismissed. The Tribunal does not limit itself in assessing the loss arising from the dismissal to the likely future duration of her employment with the respondent and does not express any view as to how the hypothetical selection for redundancy has been carried out in the written submissions. The Tribunal in considering a level of award that is just and equitable has also had regard to the likely future impact on the total future lifetime earnings of the claimant given the grounds for the dismissal and the likely disruption to her career path.

Having carefully considered all the evidence adduced and submissions made the Tribunal determines that the claimant was constructively dismissed. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal awards compensation in the sum of €40,971.84 to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)