

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.
UD2056/2010
MN2002/2010

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. M. Levey B.L.
Members: Mr. L. Tobin
Mr A. Butler

heard this claim at Dublin on 1st May 2012 and 2nd May 2012

Representation:

Claimant(s) : Brian Sugrue B.L instructed by Ms Elizabeth Howard, Howard Synnott Solicitors,
Ballyowen Castle, Ballyowen Shopping Centre, Lucan, Co Dublin

Respondent(s) : Jadel Naidoo B.L. instructed by Elaine Hickey, Eugene Smartt Solicitors,
Newlands Retail Centre, Newlands Cross, Clondalkin, Dublin 22

Preliminary Issue

The point raised referred to the claimant being unable and unfit to work since the dismissal and therefore no loss of earnings suffered by the claimant. The claimant's representative argued that loss is attributed to the behaviour of the employer in this case and was relying on the Liz Allen v Independent Newspapers case. The respondent's representative stated that this case could not be relied upon as there was no parallel proceeding's before the High Court in the Liz Allen case where, as there currently is a personal injuries claim pending in the High Court in this case. The respondent's representative added that the Tribunal could only adjudicate on the dismissal.

The Tribunal considered the submissions made by both parties and in all the circumstances decided to hear the case, however, in the event of finding in favour of the claimant the maximum award would be four weeks gross pay.

Determination

The manager/supervisor (MF) explained to the Tribunal that the respondent is a FAS funded initiative involved in arranging suitable placements and sponsors for employees including training and mentoring. MF has responsibility for forty five staff and was the claimant's supervisor. The claimant was placed as a youth assistance worker when on the 16 March 2009 she was contacted by LON who informed her of an allegation of sexual harassment against JG made by the claimant.

She told how the allegation was taken seriously and she had no choice but to remove the claimant from the area she was assigned as the allegation was made against someone who was employed by a host organisation. The claimant suggested she meet with JG however she could not allow this without being accompanied. The claimant was assigned to a different site with administrative duties until a suitable post became available and there was no objection to the temporary placement. The claimant later withdrew the allegation and the matter was closed.

On the 23 March 2009 she was contacted by MM a representative on behalf of the claimant to discuss the sexual harassment allegation and to discuss transferring the claimant to a more suitable placement or returning to the original placement. Following that discussion the claimant was placed with another association in a role involving meeting with carer groups and co-ordinating meetings. In early April 2009 the claimant indicated that she was not happy with the job and was suffering from depression as a result. At that time she expressed a wish to return to the original placement however as this was where she had alleged an employee of that organisation sexually harassed her she could not facilitate that transfer. The claimant was told that if another placement came up she would be considered. MF acknowledged that the claimant had also sought counselling and this request was facilitated. In June 2009 a letter from the claimant was received and she had copied the letter to a number of other organisations. MF was concerned that the letter was copied to organisations that had no involvement with the respondent. The letter included an allegation of sexual harassment. A response was issued on the 30 June 2009 seeking further information and clarifications.

At a meeting on the 10 July 2009 MF and LON met with the claimant and her representative to establish the dates and times and specific incidents of sexual harassment. It was agreed that she would put together a detailed account of the alleged incidents by an agreed date of 31 July 2009. MF received an email from the claimant dated the 14 August 2009 where she withdrew the sexual harassment allegations and sought a further meeting. As the claimant hadn't come forward with any evidence of sexual harassment or bullying the matter was closed and the claimant was requested to sign a letter formally withdrawing the allegations.

In January 2010 the board of directors decided to hold a disciplinary hearing with the claimant which took place on the 1 February 2010. The board considered the matter and they advised her of her dismissal and right of appeal in a letter of the 19 February 2010.

Following an appeal process which overturned the dismissal and recommended the claimant should be issued with a final written warning the claimant returned to work without any advance notice or agreeing to certain stipulations. A further disciplinary hearing was arranged and the claimant was later dismissed on the 3 September 2010.

MK is satisfied that correct procedure was followed when dealing with the claimant. She denied that removing the claimant from the host organisation escalated the situation. The situation was

unique in that she could not censure the alleged aggressor as he was employed by a different organisation. She denied pressurising the claimant into writing a letter withdrawing the allegations.

The chairman and deputy chief executive (LON) told the Tribunal that the claimant was returning to work on the 16 March 2009 following a period of sick leave. The policy was to meet anyone returning from leave to check their wellbeing and offer support. Prior to that date there were no issues with the claimant. At the end of the meeting the claimant mentioned the alleged sexual harassment and bullying. He was shocked and immediately contacted MK and in his role as a child protection officer he notified the manager (VJ) of the host organisation. He felt a responsibility to the host organisation. When the allegations were later withdrawn and due to the serious nature of the allegations he felt the correct course of action was to get something in writing from the claimant. Later following the disciplinary hearing and with the support of the board of directors the decision was made to dismiss the claimant. With regard to the appeal by CR who overturned the dismissal he received no instruction other than the issuing of a final written warning to the claimant. Having received advice from HR consultants he felt it was reasonable to attach conditions to the claimant returning to work. He wanted the claimant to return to work but required her to sign and agree to the conditions. LON denied calling the claimant a liar and denied requesting her to write an apology to JG. He did not accept that he had failed to engage with the claimant, denied being dismissive towards her and had given an extension on time in order that the claimant provide full details of the harassment and bullying. He received no complaints from any of the union representatives of the claimant on his handling of the case.

VJ a non-executive director of the respondent board at the time told the Tribunal he abstained from the decision process at the time as he was JG's employer the individual whom the allegations of sexual harassment were made against. He was happy with the decision to move the claimant from the site and felt it would be inappropriate to leave the claimant at the same location as JG.

The claimant gave evidence of attending a return to work meeting on the 16 March 2009 with MM, LON and TK in attendance. At the meeting she told them she wished to speak to them regarding remarks made by JG. LON told me not to speak with JG and she was surprised by his response having consulted the respondent's handbook. She was told to return to work which she did remaining calm. MK arrived at her workplace saying "get your stuff- you are out of here". The claimant said she was confused and flustered. MK said she had a duty of care and must remove her to another site. On the 23 March 2009 MK told her she could speak to JG and that she required a written withdrawal of the allegations. MK indicated to the claimant that she had never dealt with a case of this nature before and she drafted a letter to which the claimant contributed some of the wording. The claimant at that stage thought she was returning to the original placement. At the temporary placement there was often no work to do and she would clean the premises in order to stay busy. She felt she was not suited to administration work. A second placement followed and she was given no choice although the work was unsuitable. Around that time she began to suffer panic and anxiety attacks.

Having consulted with her union representative she arranged to meet JG. He was aware of what had happened and he apologised to her for what he had caused. JG admitted he had caused the problem and told her he had admitted this also to VJ. They both agreed that they could work together again and there would be no problem. At a later meeting with MK and LON she pleaded to be transferred and sought counselling. LON said no to the request and told her to

return to work. She wrote to her employer and copied the letter to a number of other organisations as she felt her employer had failed to listen to her concerns. She was silenced and told not to discuss the matter with anyone and this led to further anxiety.

Following her dismissal and appeal she returned to work and understood that her representative had informed the respondent of her return. She received a letter from LON which included two conditions to her return to work. The request to agree those conditions was unreasonable and as a result of not agreeing her second dismissal followed. She did not appeal as she was completely broken and a shell of her former self.

Having considered all of the evidence adduced the Tribunal finds that the dismissal was not unfair. The employer had a duty of care to the claimant in circumstances where she had made a complaint regarding harassment against a colleague not employed by the respondent. She made the complaint on two occasions and failed to carry through on these complaints. It was reasonable for her employer in all the circumstances to request her not to make the same complaint again regarding sexual harassment having regard to the fact that the work environment involved minors. The claimant had the option of a further appeal which was not acted upon and thus she did not exhaust all avenues of redress.

The appeals therefore under the Unfair Dismissals Acts, 1977 to 2007 and Minimum Notice and Terms of Employment Acts, 1973 to 2005 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)