

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE – *appellant*

CASE NO.
RP360/2011

against
EMPLOYER - *respondent*
EMPLOYER - *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms C. Egan B.L.

Members: Mr T. Gill
Ms H. Murphy

heard this appeal at Galway on 1st June 2012

Representation:

Appellant(s) : Ms. Dawn Carney, Sheehan & Co, Solicitors, Augustine Court, St Augustine Street, Galway

Respondent(s) : Mr Alan Flanagan B.L. instructed by O'Reilly Thomas & Co, Solicitors, 8 North Quay, Drogheda, Co Louth

Respondent's Case

Witness for the respondent (SMcC) gave evidence that his mother had suffered a stroke in September 2002. In respecting her wishes not to be cared for in a nursing home, he in conjunction with his family, employed the claimant to care for their mother in her own home from 10am to 10pm daily. His mother was bedridden and cognitively impaired. He stated that it was a hugely distressing time for the family but felt that his mother was happy that she was being cared for in her own home. The claimant got on well with the respondent's mother and there were no issues with her work performance. Her ability to do the job was never in question.

The Tribunal heard further evidence that sometime in 2009 the family discovered that the balance on their mother's bank account was consistently being reduced. Upon investigation the family identified telephone charges of over €4000 during the course of a two and a half year period. Some of the calls were over two hours in duration and included international calls to Saudi Arabia, the Philippines and Malaysia. There were extensive national calls and

calls to mobile phone numbers. The calls to the mobile phone numbers amounted to approximately €2300. The Tribunal heard evidence that their mother was incapable of using the telephone. Family member (DMcC) gave evidence that she challenged the claimant about the matter. The claimant admitted that she had made the calls which had been paid for from their mother's bank account without permission. It was agreed that an amount in the sum of €4236 be deducted from the claimant's wages over a period of time to repay the monies owed in respect of the international calls. The issue had seriously undermined the family's trust in the claimant but the witness stated that they could not remedy the situation immediately as there was no alternative carer. Up to that point the claimant had access to their mother's laser cards and these were now removed from the claimant by the family. Their mother's bank account recovered after the removal of the laser cards. The family did not pursue the monies owed for the national and mobile calls at that time because they did not wish to exacerbate the situation. The witness went on to state that while the claimant was on paid maternity leave, she called to the respondent's mother's home and it was discovered that the claimant had been making further phone calls without permission.

The Tribunal heard further evidence from the respondent that their mother returned from a Christmas break to her home on 29th December 2009. The Tribunal was told that the claimant was on duty that day until 10pm. (DMcC) gave evidence that she received a call at approximately 7.15pm from the security company, which monitored the alarm system at her mother's home, informing her that the security alarm had been activated. She immediately called to her mother's house and found her mother alone. She then called the claimant and remonstrated with her and left her in no doubt that she had abandoned her duty. Her trust in the claimant had now been totally undermined and the family had to come to a decision as to how to best cater for their mother's needs. Following advice from a consultant, who suggested to their mother that she be cared for in a nursing home, the family began to research a number of nursing homes. Eventually in May 2010 care for their mother commenced in a nursing home and the claimant's employment was terminated. It was also made clear to the claimant at that time that the monies owed for the national and mobile calls had not been paid. It was accepted by the respondent that the claimant had not been provided with written terms of employment.

Claimant's Case

The claimant gave evidence that she commenced working for the respondent in 2005. She worked 10 hours per day divided into morning and evening shifts each of 5 hours duration. She accepted that she had made the international telephone calls without permission and agreed to pay back the monies owed on a monthly basis. She denied that she made any national or mobile calls. She accepted that she had access to the respondent's mother's bank account and that (DMcC) took control of the bank account subsequent to December 2009. She stated that she understood that she was on holidays on 29th December 2009 but called to the respondent's mother's home that evening at 6pm following a call to do so from (DMcC). She gave evidence that their mother told her that she wanted to go to bed and told her (the claimant) to go home early. She accepted that she did not inform (DMcC) that she had gone home on the evening in question and admitted that she was at fault. She stated that she had forgotten to inform (DMcC). The claimant stated that she accepted that her employer's instructions were to stay until 10pm irrespective of what their mother said. She acknowledged that she was paid until 10pm each evening.

The claimant continued to care for the respondent's mother after that and there were no further

issues. She stated that her relationship with her employer was fine and she did not notice any change in the attitude of (DMcC) towards her. On 30th April 2010 she was given two weeks' notice of the termination of her employment. She gave evidence that (DMcC) informed her that their mother needed 24/7 care and was going to be cared for in a nursing home. She stated that she understood that this was the reason for her dismissal and sought a redundancy payment. She subsequently sought a redundancy payment on a number of occasions but never received any payment. She gave evidence that she had to wait 8 months before being provided with her P45.

Determination

The Tribunal gave careful consideration to all the evidence and submissions tendered in this case. The setting was a stressful family situation with the sibling members acting in the best interests of their aged mother, who having suffered a stroke was bedridden and cognitively impaired, but who explicitly did not wish to be cared for in a nursing home. The claimant was engaged to provide this in-home care on a daily basis and it appears that a bond developed between them. The claimant was in a position of trust and was given access to the woman's bank account and laser cards. The respondents gave uncontested evidence of the said bank account balance reducing consistently over a three year period with telephone charges inclusive of international calls, national calls and mobile phone calls made by the claimant without permission amounting to substantial sums. Evidence was given that the family members were emotionally conflicted and divided as to how to handle the situation being mindful of respecting their mother's wishes to remain in her own home and being cognisant of the fact that there was a bond between her and the claimant. The Tribunal noted the respondent's uncontested evidence that on the night of the 29th December 2010, the claimant abandoned her duties and left the woman alone.

During the course of her examination and cross-examination the claimant did not tender any reason for her behaviour, nor did she express any remorse for the dereliction of her duties and the breach of trust.

The Tribunal decided by majority decision, with Mr. Gill dissenting, that the claim for redundancy fails by reason of the claimant's misconduct pursuant to Section 14(1) of the Redundancy Payment's Act, 1967.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)