

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE - *claimant*

CASE NO.
MN1200/2011

UD1105/2011

against

Cope Limited, 2-5 Calbro House, Tuam Road, Galway - *respondent*

EMPLOYER

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 C. Egan B.L.

Members: Mr. W. O'Carroll
Mr T. Gill

heard this claim at Galway on 11th September 2012
and 14th January 2013

Representation:

Claimant(s) :

Respondent(s) :

Respondent's Case

The Assistant CEO of the respondent company gave evidence that the respondent provides board and shelter for homeless men. It operates a 26 bedroom hostel. A proportion of the service users have a history of street homelessness and have a deficit of independent living skills. The witness managed the hostel from 1997 to 2002 prior to becoming Assistant CEO. He now has responsibility for the oversight of the day to day operation of the hostel with Health & Safety being a key aspect of the operation. The service is part-funded by the HSE and a Trust in Care Policy document, produced by the HSE and operated by the respondent, was opened to the Tribunal. The respondent is obligated to adhere to these Trust in Care procedures. The claimant was employed as a residential hostel worker. He was recruited on a full-time basis in 2002. He was part of a team of 8 hostel workers who provided a 24 hour 7 day week service. Training was provided to all employees and a training certificate provided to the claimant in respect of his participation in a non-violent crisis intervention course dated 27 April 2010 was opened to the Tribunal.

The witness gave evidence that on 16 May 2010 a service user known as (L) reported to a hostel worker known as (SK) that he had been kicked three times by the claimant. (SK) reported the matter to (PC), team leader and the witness became aware of the incident on 18 May 2010. CCTV footage of the incident was shown to the Tribunal. The witness viewed the CCTV footage on the evening of 18 May 2010 and was obligated by the trust in care policy document to report the matter to the Gardai which he did on 26 May 2010. He was the authorized person to report the matter to the Gardai and this was an entirely different process from an investigation which was carried out by the respondent.

The respondent commenced an investigation which was carried out by the Human Resources Manager known as (VJ) and the claimant was suspended on full pay on 20 May 2010 pending the outcome of the investigation. A number of statements were taken from employees and service users as part of the investigation and these statements were opened to the Tribunal. The claimant attended an investigation meeting on 15 June 2010 accompanied by a trade union official. Following this investigation meeting the claimant's trade union representative requested that the respondent did not interfere with the claimant's planned holiday for a period of 8 weeks due to commence on 21 June 2010. The respondent acceded to this request and informed the claimant inter alia by way of letter dated 17 June 2010 that the matter "will be followed through at the first available opportunity on your return at the final stage of the disciplinary policy". Following the claimant's return from holiday the witness conducted a disciplinary meeting which the claimant attended with his trade union representative. The witness gave evidence that after careful consideration of all the circumstances he came to the conclusion that the claimant's actions in kicking the service user was violent behaviour and constituted serious misconduct. It was clear that the actions of the claimant were unprovoked and without justification as the service user was sleeping on an armchair in the dining room when the incident occurred. The witness gave evidence that the CCTV footage showed the claimant kicking the service user repeatedly. The respondent has a duty of care to the service users and if he had imposed a lesser sanction other than dismissal this would have been contrary to the duty of care that the respondent had. He stated that he could not stand over putting the claimant back into a work situation and he took the decision to dismiss the claimant with effect from 13 September 2010. This concluded his involvement in the matter and the claimant was given the opportunity to appeal the decision.

The witness confirmed to the Tribunal that the Gardai did not contact the respondent subsequent to his reporting of the matter. He also confirmed that he did not advise the claimant that he had reported the matter to the Gardai. He followed the procedures of the trust in care policy document and these procedures did not provide for him having to inform the claimant that he had reported the matter to the Gardai. He reported the matter as he believed that a criminal offence may have taken place and he stated that he was acutely conscious of following the company's procedures and abiding by the provisions of the trust in care policy document. He confirmed that the service user who had made the complaint had previously been barred from the hostel but was not barred at the time of the incident. There was no exclusion order from the hostel on the service user at the time that the incident occurred. The witness stated that there was no evidence from the investigation that the service user was in any way aggressive during the incident and the claimant's interaction with him was unprovoked and wholly unjustified.

The CEO of the respondent company gave evidence that she conducted the claimant's appeal hearing on 27 September 2010. The claimant's appeal was based on mitigating circumstances,

procedural deficiencies and the severity of the sanction imposed. The claimant was represented by his trade union at the appeal hearing. The witness concluded that the matter was given due consideration and all procedures were adhered to in order to ensure that fair and due process was applied. She stated that it is of paramount importance that all clients availing of the services must expect to be treated with dignity and respect in accordance with the respondent's professional duty of care. She gave evidence that there is no room for any unprofessional standards particularly when it is unprovoked. She viewed the CCTV footage and took the view that the actions of the claimant were unwarranted and she had no alternative but to uphold the decision to dismiss the claimant. She had no reservations that the decision to dismiss the claimant was the correct decision.

Claimant's Case

The claimant read into evidence a statement of the events of the day in question of 16 May 2010. He told the Tribunal that he called out to the service user, (L) on several occasions to try and get his attention but received no response. He then used his foot to lift (L's) foot of the radiator to rouse him and made contact with the back of his heel to wake him. He gave evidence that he used very little force, just enough to drop his leg off the radiator to wake him. He accepted with hindsight that he should not have done this, it was too much. He accepted that while the incident occurred and the CCTV footage looks rough the footage does not show a continuous flow. He stated that it is "stop/start footage".

The claimant gave further evidence that service users are on occasions allowed to sleep in the dining area between 12pm and 7am. However they are not allowed to sleep in this area after 7am. He believes that the sanction imposed on him after 10 years service with the respondent was too severe. He stated that his only intention was to waken the service user and there was no malice or aggression in his action. He said it was not a violent action and he did not kick the service user. He accepted that he over reacted by lifting (L's) foot off the radiator but at no time did he assault him.

The claimant gave evidence that (L) was a violent man and had been excluded from the hostel for four weeks previously for attempting to strangle a man. He was not afraid of (L) and gave evidence that he had received training from the respondent in Non-violent Crisis Intervention on 27 April 2010. He also attended other ongoing training courses during his time working for the respondent. He accepted that he had received a written warning in relation to clerical work and had also received a final written warning in 2007. The claimant provided further evidence to the Tribunal in relation to his efforts to mitigate his loss since his dismissal in September 2010.

Determination

Having carefully considered all the evidence, including CCTV footage, the Tribunal finds that the respondent has shown that it was justified in dismissing the claimant for gross misconduct. In this case, the claimant was a hostel worker employed by the respondent to provide care for homeless men. The claimant abused his position of trust by carrying out an unprovoked and violent assault, by kicking repeatedly an innocent, defenceless, homeless man who was sleeping in an armchair at the time of the incident. Evidence was given that the claimant was trained and participated in a Non-violent Crisis Intervention Course less than three weeks prior to the said incident. The respondent carried out a thorough investigation and at all times complied with fair procedures in applying the protocols contained in its Trust in Care Policy document. The

Tribunal, unanimously, finds that the decision to dismiss the claimant was fair and reasonable in all the circumstances. Accordingly, the claims under the Unfair Dismissals Acts 1977 to 2007 and the Minimum Notice and Terms of Employment Acts 1973 to 2005 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

