

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE *-appellant*

CASE NO.
UD1422/2011
PW276/2011

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. A. O'Mara
Mr. F. Barry

heard this appeal at Dublin on 13th December 2012

Representation:

Appellant: Ms. Fiona McMorro B.L. instructed by Peter Connolly Solicitors,
6 Capel Street, (Opposite Nealons Pub), Dublin 1

Respondent: The Director of Nursing (Ms. H) and the Human Resources Manager (Ms. K)

This claim came before the Tribunal by way of an employee (the appellant) appealing against a Rights Commissioner's Recommendation (reference: r-099804-ud-10/JW)

Representation for the appellant informed the Tribunal that the appellant withdrew the claim under the Payment of Wages Act at the commencement of the Rights Commissioner hearing on 15th March 2011.

Background:

The respondent company is a group of six nursing homes. The appellant commenced employment as a part-time cleaner in the nursing home in 2008. From that time the appellant enjoyed an excellent working relationship with Ms. H's predecessor.

Summary of evidence:

The Director of Nursing (Ms. H) informed the Tribunal that in July 2009 the Health Information and Quality Authority (HIQA) published standards requiring all new and existing staff to undergo Garda vetting. As a result all nursing homes applied for Garda vetting for their staff in 2009. The appellant gave her consent to this process. The results were returned to the nursing home in May 2010. A number of the vetting results returned with issues. The Director of Nursing met with each employee regardless of whether or not there were any issues in the results. She asked each employee to verify that the facts listed were correct. The meetings were held on an individual and informal basis to discuss the contents of the vetting reports. Ms. H met with the appellant on 19th May 2010 and the appellant admitted freely to everything. The appellant was not represented at this meeting. The appellant was assured at the meeting that her position was not in jeopardy, given the length of her service and her exemplary record within the employment. However, it was the appellant's case that she was informed that she would be looked at first if anything went missing within the nursing home.

As part of concluding the files in relation to the vetting a formal meeting was held with the appellant, the Human Resources Manager and the Director of Nursing on 1st October 2010. It was the respondent's case that a similar meeting was held with the other employees in order to close the files on the matter.

It was the respondent's case that the appellant initially completely denied at this meeting that the vetting results related to her. The purpose of the meeting was to ensure that the Director of Nursing had the necessary paperwork in the event of a HIQA inspection. It was explained to the appellant that Ms. H and the Human Resources Manager were meeting with all of the staff in this regard. As the meeting progressed the appellant acknowledged that the vetting results did apply to her. A letter from the appellant's doctor was requested to ensure compliance with HIQA guidelines but this was not received from the appellant. The appellant was asked at this meeting if there was anything else the employer should be informed of. Ms. K stated that the respondent was satisfied to forget the appellant's past once they were satisfied by the medical evidence.

It was the appellant's case that she did not dispute the contents of the vetting report nor deny knowledge of the facts. The appellant stated that she had provided a doctor's letter regarding her health to the respondent but Ms K for the respondent refuted that this was ever submitted to the respondent. It was the appellant's case that she was asked to sign a waiver regarding the full disclosure of medical records and that she was informed that the matter would have to be considered further- a departure from the assurance given to her at the meeting in May.

Subsequently, an upset relative of a resident approached the Director of Nursing with a newspaper article dated 11th October 2010, concerning a court appearance by the appellant. The Director of Nursing immediately informed the Human Resources Manager and the Operations Manager.

A letter dated 12th October 2010 was delivered to the appellant's house informing her that due to the contents of the newspaper article she was suspended on full pay. A further letter dated 15th October 2010 requested the appellant to attend a meeting on 22nd October 2010 to discuss recent allegations that she had been charged with "...*forgery of prescriptions.*" The appellant was advised that she could be accompanied by a fellow employee or other representative. The appellant was accompanied by her sister at this meeting.

The appellant outlined at the meeting the events which had led to her appearing in court. She stated that it was an isolated incident due to pressure exerted on her by a person to whom she owed an outstanding debt. This person threatened the appellant and the appellant was in fear of him. A subsequent burglary at her house aggravated her fear and the appellant succumbed under duress to the wishes of the former acquaintance to carry out the criminal act in order to satisfy the debt. A fraudulent prescription was provided to the appellant and her role was to submit it to a chemist but she was arrested upon doing so. The appellant pleaded guilty and received a fine on foot of a court appearance.

A break was taken during the meeting and when it resumed the appellant was informed that her employment was being terminated. A letter of dismissal dated 22nd October 2010 subsequently issued to the appellant stating that following her recent conviction for fraud she was being dismissed. The letter further stated, *“as per your contract of employment, any dishonest or forgery are not acceptable to the Company and can result in dismissal.Unfortunately recent events call into question your suitability for this role, and have caused a fundamental breach of trust.”*

The Human Resources Manager for the respondent stated to the Tribunal that it was for the most recent conviction that the appellant was dismissed and not due to any issues that had arisen as a result of the vetting process. The appellant was not honest at the meeting on 1st October 2010 as she had not disclosed the prescription incident. As a result there was a breakdown of trust in the employment relationship. As a result of the appellant's conviction the respondent was forced to review its policy of prescription security and all stocks were checked. Ms. H stated that as the Director of Nursing she is accountable to HIQA and ultimately responsible for the 39 residents of the nursing home to whom she has a duty of care.

Representation for the appellant submitted that the terms “dishonesty” and “forgery” which were stated in the letter of dismissal did not properly apply in the context of the appellant's dismissal as the appellant was not convicted of forgery. The contract of employment was opened to the Tribunal in this context. In addition it was stated that Section 9 of the employee handbook refers to the right of appeal but the letter of dismissal did not outline this to the appellant and she had not read the handbook as there was only one copy of it on the premises.

The Human Resources Manager stated that the respondent had not appealed the Recommendation of the Rights Commissioner as it was accepted by the respondent that the Rights Commissioner found against the employer on a technical breach by virtue of the fact that the right of appeal was not specified to the appellant.

The appellant gave evidence of loss and attempts to mitigate that loss.

Determination:

Having considered all of the evidence, the Tribunal is of the view that the appellant was unfairly dismissed from her employment by virtue of the fact that the right of appeal was not outlined or offered to her.

The appellant was dismissed for not informing her employer about attempting to obtain drugs on a forged prescription. The employer had lost trust in her due to this. However, the employer

failed to give the right of appeal and bearing in mind the fact that the appellant contributed to her dismissal, consequently the Tribunal varies the decision of the Rights Commissioner reference: r-099804-ud-10/JW and awards the appellant €4,000 by way of compensation under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal find that it cannot hear an appeal under the Payment of Wages Act, 1991 in circumstances where the original claim was withdrawn before the Rights Commissioner (reference: r-099805-pw-10/JW).

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)