

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD2335/2011

- claimant

against
EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. T. O'Sullivan
Mr F. Barry

heard this claim at Dublin on 5th December 2012
and 16th April 2013

Representation:

Claimant(s) :

Respondent(s) :

The determination of the Tribunal was as follows:-

Background:

Evidence was adduced by a member of the Gardai, the Human Resources Director and the Assistant Living Co-Ordinator on behalf of the respondent's side. The claimant and a spouse of a former client gave evidence on behalf of the claimant's side.

Determination:

The Claimant was employed as a Relief Personal Assistant with the Respondent commencing employment on the 2nd July 2004. The claimant was continuously engaged on a series of short term contracts until he was dismissed from his employment on the 11th May 2011.

Because of the nature of the work carried out by each Personal Assistant, in assisting dependent persons, each one is required to obtain Garda clearance upon the commencement of employment with the Respondent, and every two years subsequently.

Garda clearance forms were completed, signed and dated by the claimant on the 15th July 2004, the 21st February 2005 and the 24th January 2011. The Garda Central Vetting Unit did not show up any matters of interest or anything untoward in relation to the claimant

However the Garda Vetting dated the 24th January 2011 disclosed a possible match with the

claimant with the same date of birth but at an address not listed in the vetting application form. This disclosed a conviction on the 20th September 2002 for handling stolen property for which, as it transpired, the claimant was sentenced to three months imprisonment suspended for three years.

The claimant was invited to explain why he failed to disclose his previous conviction and his explanation that he misunderstood the court proceedings and the implications of the penalty - that he was to be good for two years and that everything would be wiped clean. This explanation was not acceptable to the Respondent and by letter dated the 11th May 2011 the claimant was dismissed because "the level of trust and confidence has been irreparably breached".

It is clear that the claimant's continued employment with the respondent was subject to receiving satisfactory Garda clearance on a continuous basis. This is clear from the various contracts which contained the proviso that:

"Continued employment within the IWA is subject to a satisfactory Garda Clearance"

Where an employer discovers that an employee has provided false or misleading information, they must conduct a fair investigation and the sanction must be proportionate to the seriousness and the relevance of the inaccuracy. By not applying fair procedures, employers leave themselves open to a finding of unfair dismissal, notwithstanding the dishonesty of the employee.

It is not enough for the employer to show that an employee has not been truthful, they must also demonstrate that the deception is material to the particular employment and/or any terms of the contract. In the case before the Tribunal the deception was material to the employment and in breach of a fundamental term of the contract.

The Tribunal considered whether the fact that the claimant had worked for nine years with a blemish free record should attract a lesser penalty than dismissal. The Tribunal takes the view however that the fact that the claimant had escaped detection did not mean that the Respondent had waived the necessity to obtain satisfactory Garda clearance.

The Tribunal note in particular the word "continued" in the context of the claimant's continued employment being subject to satisfactory Garda clearance. This is essential where the claimant is assisting vulnerable persons.

The Tribunal considers that the claimant's efforts to explain away the inconsistencies in relation to his conviction as not credible. His recollection of the District Court proceedings were unbelievably hazy in a way that cannot be explained away by the fact that English is not his first language.

The Tribunal notes that at the hearing on the 16th April 2013 the claimant had sufficient recall of the District Court proceedings to advise the Tribunal that of the four persons charged in the District court only the claimant and one other accused were convicted while the other two accused were acquitted. This recall is surprising considering the previous lack of understanding in relation to the matter.

The Tribunal carefully considered the evidence adduced at the hearing. The respondent has a fundamental duty of care to its dependent service users. After the completion of a full, fair and

thorough investigation the claimant was dismissed. The Tribunal is absolutely satisfied that the dismissal was fair and reasonable having regard to all the circumstances.

Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)