

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee - **claimant**

UD1102/2008

MN1013/2008

WT457/2008

against

Employer -**respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr W. Power
Mr A. Butler

heard this claim at Naas on 7 April
and 5 June 2009

Representation:

Claimant:

In person

Respondent:

Managing Director of the respondent

The determination of the Tribunal was as follows:

The claimant was employed as a social care worker from 1 July 2007 for the respondent, which provides services for people (service users) with Aspergers Syndrome, mild intellectual disabilities, mental health issues and challenging behaviour in community residential homes and day centres. The respondent has around 70 employees and 7 facilities spread over two counties. After an induction period the claimant began to work night shift for which he received a sleepover allowance. The employment was uneventful until February 2008 when the claimant approached the managing director, in the absence on leave of his regional manager (RM), for a cheque for a

holiday for one of the service users despite the holiday not being approved at that time. This raised a disciplinary issue whereby the Claimant was acting on his own accord, without recourse to his supervisors, on a matter which he should have had recourse. Subsequently, MD and RM met the claimant informally and the disciplinary matter was discussed and all the parties agreed to move on without further action.

In April 2008 the claimant was given one month's notice of being moved to a new facility being opened to deal with challenging clients. The nature of the work of necessity involves dealing with moderate levels of challenging behaviour. This means the work can be very physical and can involve being assaulted; this is considered the norm and a necessary part of the job.

Several new facilities were opened during the time of the claimant's employment and staff were allocated to these facilities following clinical assessment of the service users and all attempts were made to put the most suitable staff members in the facilities to which it was felt that their skills could best be utilised. The respondent's position was that the claimant was moved because he was good, particularly with challenging clients, and not as a punishment.

This involved the claimant moving on to twelve-hour day shifts compared to his previous 24 or 48-hour night shifts. The claimant was unhappy at the prospect of losing his sleepover allowance but nonetheless complied with this change to his working arrangements as provided in his contract of employment. As a result of this change to his working arrangements, which took effect in May 2008, the claimant sought out the clinical director, who had hired him, as he felt he was being treated unfairly. As a result the claimant was asked to give it two months in the new facility. The respondent's position is further that RM issued the claimant with a verbal warning for poor timekeeping during this period. No written confirmation of this verbal warning was opened to the Tribunal.

The claimant was moved from this new facility to a different facility some time in July 2008 but was still working dayshift. When the claimant could not be accommodated at short notice in August 2008 for a week's holiday he took two sick days, on 21 and 26 August 2008, for which medical certificates were provided.

From the beginning of September 2008 the claimant reverted to night shifts. There were two service users under the supervision of the claimant and his team leader on a one to one basis. On 7 September 2008 the first service user (SU1) assaulted the claimant by bending his thumb back. This took place after his arrival at the unit and when SU1 had not yet taken his medication. Some time after this incident the claimant refused to be left alone with SU1 when TL was supposed to go to assist with the second service user (SU2) who was in a hospital and was due a scheduled visit. By the time this refusal by the claimant took place SU1 had taken his medication and, having apologised to the claimant, in TL's opinion was safe to leave with the claimant. However the Claimant refused to be left alone and further, refused to remain with SU1 if a female colleague, whose assistance was offered, was provided to work with him. He threatened to walk off site if TL did not remain with him. The upshot was that TL was unable to provide support at the hospital for SU2. TL reported the matter to RM by telephone.

On 8 September 2008 MD was contacted by RM to be informed of the incident and it was agreed that there would be an investigation and "if the facts stood up" there would be a written warning for professional misconduct. A meeting between the claimant, RM and TL took place, in the facility, at around 9-00am on that day as a result of which the claimant was told that he was to be issued with a written warning. The written warning, dated 8 September 2009, and signed by RM, was sent to the

claimant some days later. It was in relation to unprofessional conduct on 7 September 2008 relating to failing to carry out instructions of TL resulting in: -

- Negligence of care to a service user in hospital
- Breach of your duty of care towards service users
- Threatening to leave (service user) unsupervised if left alone with them
- Refusal to transport service user

The claimant was told at the meeting, prior to receiving the letter that as he now had a verbal and a written warning he was being warned that a subsequent second written warning would result in immediate dismissal. He was advised that he had fourteen days to lodge an appeal with MD.

Whilst it is not clear what level of detail the claimant was given when being told of the verbal warning at the time, after he was told of the warning, the claimant was asked to take SU1 back to hospital.

The claimant refused this request. As a result, after less than an hour after being told of the written warning the claimant was dismissed. MD, whilst accepting that he made the decision to dismiss, could not tell the Tribunal if he was contacted about the content of the next two letters issued both dated 8 September 2008 but both were sent some days later and both signed by RM.

It is accepted that the dismissal occurred prior to the Claimant receiving any letters.

The first of these two letters contained the second written warning. It was in relation to gross misconduct on 8 September 2008 relating to failing to carry out instructions of RM and TL and was described as follows: -

The nature of the unsatisfactory conduct is gross misconduct by

- Failure to carry out the instructions of RM and TL
- Negligence of care to a service user in hospital due for discharge
- Breach of your duty of care towards service users
- Refusal to transport service user as requested

The claimant was told he now had a verbal and a two written warnings and informed that he was to receive notification of dismissal. He was advised that he had fourteen days to lodge an appeal with MD.

The dismissal letter stated, “ In consultation with MD it was decided that your conduct was unsatisfactory and that you be dismissed

The reasons for your dismissal are:

- Failure to carry out the instructions of RM and TL
- Negligence of care to a service user in hospital due for discharge
- Breach of your duty of care towards service users
- Refusal to transport service user as requested
- Threatening to leave (service user) unsupervised if left alone with them”

The letter confirmed 8 September 2008 as the date of dismissal and again advised that the claimant

had fourteen days to lodge an appeal with MD.

The respondent's position is that SU1 was much happier in his institutional setting with which he was more familiar rather than the residential setting for which he was being gradually prepared for by visits to the respondent's facility. The claimant's position, denied by the respondent, was that, following earlier discussions between him and RM, it had been agreed that he would not be assigned to look after SU1 as he was not happy looking after SU1. He had concerns that RM was "out to get him".

Determination:

The Tribunal is not satisfied that the respondent was not aware that the claimant had concerns about looking after SU1 in the months before the dismissal.

The respondent's grievance procedures were not followed and fair procedures were not followed. The claimant was given no right of representation, there was no proper enquiry, and the claimant was summarily dismissed within an hour of the meeting about the first incident commencing. The second written warning was contained in the same letter as the letter of dismissal. It was open to the respondent to suspend the claimant pending an enquiry into the events of 7 September 2008 instead he was instructed to accompany SU1 on his journey back to hospital. The Tribunal is in no doubt that at this point RM was fully aware that the claimant had a problem with SU1. At no time did the respondent attempt to investigate the claimant's difficulties over dealing with SU1. If an employee raises a grievance, there is an obligation on an employer to deal with that grievance and not in a summary manner. Their concern for the service users clearly overrode their concern for the claimant, a member of their staff who clearly had a grievance about being expected to look after SU1. The Tribunal does not accept that the claimant's conduct on 8 September 2008, after being told of the first written warning, amounted to gross misconduct. For this reason, and the fact that the procedures followed were unfair, the Tribunal finds that the claimant was unfairly dismissed and in all the circumstances measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €8,500-00. The Tribunal further awards €580-00, being one week's pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. No evidence having been adduced in this regard, the claim under the Organisation of Working Time Act, 1997 fails

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)