

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Janet Burke -*Claimant*  
11 Woodfield, Dunmore East, Co Waterford

CASE NO.

UD362/2011

against

Brothers of Charity Services South East -*Respondent*  
Belmont Park, Belmont Road, Waterford

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Hennessy  
Mr T. Kelly

heard this claim at Waterford on 31st July 2012

#### **Representation:**

Claimant: Colm Walsh B.L. instructed by Ensor O'Connor, Solicitors,  
4 Court Square, Enniscorthy, Co Wexford

Respondent: Mr. Jim Healy, IBEC, Confederation House,  
Waterford Business Park, Cork Road, Waterford

#### **The determination of the Tribunal was as follows:**

The case before the Tribunal was one of constructive dismissal.

The claimant commenced her employment with the respondent as a locum care assistant in April 2004. She was employed under the ethos of the respondent to care for residents and advocate for them and she assisted the residents with a wide range of tasks. The claimant was mainly based in one house but she could be called into work in any house where cover was required. The claimant enjoyed her work immensely and the first six years of her employment were without incident.

The claimant attributed her contribution to a code of practice seminar in August 2009 to be the point from which management and permanent staff went against her. The claimant gave feedback at this seminar in relation to the treatment of relief staff by permanent staff. The first complaint made against her after that seminar was in January 2010. The complaint was made by a permanent member of staff and the services manager became aware of the issue.

The claimant outlined a number of accusations that were made against her. The most serious

accusations were made by one particular staff member who was a supervisor in one particular centre and the claimant became aware that she was talking about her. However, further complaints were constantly made against the claimant by permanent staff. The claimant outlined the substance of these complaints to the Tribunal. The claimant also recalled that in or around February 2010 she was stopped from administering diabetic injections despite the fact she had done this for years and other staff members continued to administer them. The claimant felt undermined by this.

The claimant stated that one particular staff member was the main problem but she acknowledged that there were many other things happening in the background. A number of permanent staff members ceased requesting the claimant's services and the claimant believed she was being perceived as a trouble-maker. As relief staff rely on a request for their services the level of work offered to the claimant reduced.

All of these events led the services manager to hold a meeting in May 2010 between the claimant and the other staff member with whom the claimant was experiencing difficulty. The outcome of the meeting was that the parties resolved to "move on." However, it was the claimant's evidence that within a fortnight the staff member had reported the claimant for two issues.

The claimant wrote a letter dated 14 July 2010 to the services manager stating that as he was aware she was under intense stress recently due to the constant harassment that she was being subjected to by other members of staff. The claimant stated that if she was forced to leave as a result of further inappropriate harassment she would have to consider her position but for the time being she would continue to work. The claimant requested a meeting to discuss her concerns in a formal manner to help resolve the on-going issues.

The meeting was held on 21 July 2010 and the minutes were opened to the Tribunal. The reason for the meeting was to discuss the allegations of "constant harassment" and systemic undermining" made by the claimant in the letter dated 14 July 2010. The claimant outlined her issues during the meeting. It was the manager's evidence that during the meeting they discussed possible reasons as why the other employee would lie or undermine the claimant. The minutes of the meeting reflect that during the meeting the claimant stated that the other employee was a neighbour of her brother's and "they did not get on." However, the claimant refuted this stating that she passed an off-the-cuff remark when she believed the meeting had concluded.

At the meeting the manager outlined to the claimant that staff members are entitled to achieve resolution by using the grievance procedures or dignity at work policy. The claimant stated that she did not wish to use formal policies and procedures to resolve her grievances.

Before concluding the meeting the manager informed the claimant that he would meet with the other employee, inform her of the claimant's allegations and issues and a joint meeting would then follow to try and resolve the difficulties between them.

In reply to questions from the Tribunal, the services manager confirmed that he was aware of the more serious allegations made against the claimant.

It was the claimant's evidence that on the of 28 July 2010 she received a telephone call from her brother who had been visited by the other employee and her mother at his place of business.

They had raised the issue that the claimant had told her manager that her brother had an issue with them. They told the claimant's brother that they were making a formal complaint about the claimant.

When the claimant's good name and integrity were undermined and her family became involved the claimant telephoned the services manager and informed him that she could not cope any longer. The claimant wanted it "all to stop" as there were complaints against her at every point. The claimant telephoned the services manager and told him he should not have told the other employee what she had said. The claimant also stated that she would not be returning to work and that she intended to resign. The services manager hoped he could arrange to meet the claimant again to discuss the matter further. He sent her a letter dated 3 August 2010 and attached a copy of the grievance procedures. The claimant accepted that she was provided with a full copy of the grievance procedure and dignity at work policy. The services manager contacted human resources for advice and in order for them to take the matter to a formal level. He had no further interaction with the claimant.

The claimant submitted medical certificates covering the period of 28 July 2010 to 8 August 2010. The claimant fully tendered her resignation by letter dated 10 August 2010 stating that since 16 March she had endured continuous bullying and harassment to the point where she found her position untenable. The claimant gave evidence pertaining to loss.

In reply to questions from the Tribunal the manager agreed that the claimant was a good worker but that she may have some difficulty working as part of a team. He accepted that allegations were put to the claimant by other members of staff. He had tried informally and somewhat formally to deal with claimant's difficulties with the other employee as he saw the difficulty that either or both of them were causing to the respondent's service.

A human resources employee gave evidence that she became aware of the letter of resignation from the claimant. She felt from the minutes of the meeting on 21 July 2010 that the claimant did not want to go through the dignity at work or grievance procedures. She wrote a letter to the claimant noting that the manager had advised her of all the relevant policies and procedures the claimant could avail of to address her complaints. *"In the absence of any further action on your part to put in writing specific instances of the offending behaviour and the context in which it occurred we have been unable to take any further action."*

During cross-examination she confirmed that she had not contacted the claimant to encourage her to utilise the grievance procedures as she felt there was no point asking again as the services manager had already dealt with the issue.

### **Determination:**

Having carefully considered the evidence adduced at the hearing, the Tribunal finds that there was a serious breakdown of personal relationships between the claimant and at least one other employee. The respondent offered the claimant the opportunity to have her complaints dealt with through the formal grievance procedure. The claimant at this time declined to use the grievance procedure and was willing to deal with the matter in an informal way and move on. The Tribunal finds that the claimant and respondent acted reasonably in so doing at that time.

However, it appears the difficulties continued and the actions by the services manager

caused members of the claimant's family to become embroiled in the difficulties. As a result of this the claimant immediately tendered her resignation considering herself constructively dismissed. The Tribunal does not believe the services manager acted with *mala fides* but believed he had clearance from the claimant for his action and did not anticipate it would cause difficulties for the claimant in circumstances where he should have so anticipated.

The claimant did not seek to utilise the grievance procedure and the respondent sought to rely on two previous decisions of the Tribunal (Case No. UD 720/2006 and Case No. UD 2096/2010) where failure to exhaust or utilise the grievance procedure was fatal to a claim of constructive unfair dismissal. The Tribunal notes that in those two decisions no reason was put forward as to the failure to use the grievance procedure. In the within hearing both the claimant and respondent agreed that the use of the grievance procedure at the time of resignation of the claimant would not have served any purpose. Nonetheless the Tribunal notes that in the absence of good cause it is desirable and preferable that the grievance procedure be utilised and exhausted.

The Tribunal finds that the claimant did not seek to mitigate her losses until in or about March 2012 but rather was involved in her own enterprise. The claimant's evidence on mitigation from March 2012 to date was vague.

In the circumstances, the Tribunal finds it was reasonable for the claimant to consider herself constructively dismissed and which dismissal is unfair. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and the Tribunal awards the claimant compensation in the sum of €6,000.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)