

	Complainant	Respondent
Parties	Aidan Fitzgibbon	Autism Initiatives
Representatives	Self-represented	Dominic Wilkinson, B.L., instructed by ARAG Legal Protection Limited

Complaint(s):

Act	Complaint/Dispute Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under Section 8 of the Unfair Dismissals Act, 1977	CA-00049639-001	12/04/2022

Date of Adjudication Hearing: 08/11/2022, 09/12/2022, 15/05/2023 & 09/08/2023

Workplace Relations Commission Adjudication Officer: Conor Stokes Procedure:

In accordance with Section 8 of the Unfair Dismissals Acts, 1977 - 2015, following the referral of the complaint to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint.

Background:

This matter was heard by way of remote hearing pursuant to the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 and S.I. No. 359/2020 which designates the WRC as a body empowered to hold remote hearings.

The complainant gave his evidence under affirmation while six witnesses for the respondent also gave their evidence under affirmation. Cross examination was facilitated for each of the witnesses.

Summary of Respondent's Case:

The respondent denied that the complainant was unfairly dismissed.

The respondent submitted that the complainant was employed as a Social Care Worker from 8 January 2007 until his dismissal on 31 January 2022. The respondent noted that it provides a range of supports to people with autism, and their families and carers. This can include supporting people with autism within their own homes.

The respondent submitted that the complainant was suspended from his employment on 27 November 2021. This occurred because it was alleged that on or about 5 November 2021 the complainant had said in response to a question about service users that "they are still autistic" and that allegedly he said "not my monkey, not my circus" in response to a question about an alarm. These matters were raised by a colleague on or about 24 November 2021.

The respondent submitted that shortly thereafter, they wrote to the complainant confirming, amongst a number of matters, that he had been suspended and that the Corrective Action Policy, which sets out the steps of the Disciplinary process/policy, was being invoked. The letter attached with it the details of two complaints. The complainant was invited to attend a disciplinary hearing scheduled for 14 January 2022 which was to be chaired by the Operations Director, who would be accompanied by a HR Consultant. The letter referred to the allegations and provided copies of same and of relevant policies and documentation gathered during the investigative process. It was submitted that the disciplinary hearing took place as scheduled and the complainant was afforded the opportunity to be accompanied at the meeting, but no person attended the meeting in this capacity.

A written record of the disciplinary hearing was taken and a copy of this was supplied to the complainant. On 31 January 2022 the Operations Director wrote to the complainant to confirm the outcome of the disciplinary hearing -

the allegations were upheld against the complainant, and he was considered to be in breach of the respondent's Code of Professional Conduct and their Equal Opportunities and Diversity policy. The letter advised the complainant that his employment was to be terminated as of the date of the letter. He was advised in the outcome letter that he could appeal the decision. It was submitted that amongst other considerations, part of the rationale for the decision was the nature of the environment within which the complainant worked and the services that are provided by the respondent.

The respondent submitted that the letter indicated that: "In relation to Complaint 1, you repeated twice that you have "no recollection" of making the statement but did not confirm you had not said this. You further stated it may have been misconstrued and "it would have been in jest if I did say it", both responses acknowledge the fact that it was possible you did say this but that you cannot recall.

The person to whom he was reported to have made this comment to, was interviewed and stated she: "did not hear that comment but could not remember." The only person who stated categorically whether or not the complainant made the comment "they're still autistic" was a work colleague who made the complainant upon which the disciplinary proceedings were based. The letter noted that the complainant could not recall the comment and if he did make a comment such as this, it was in jest, or it may have been misconstrued. It also noted that the complainant acknowledged that that if this was said, it was not appropriate language.

The respondent submitted that the letter noted *"This is a distinctive comment and I find the fact that (a colleague) reported having heard it as credible. In addition, during the disciplinary hearing interview, you stated that you were annoyed that the "two phrases were taken out of context". This implies that you did make the comment "they're still autistic". This can only be interpreted as being used in a derogatory and discriminatory context. Based on the findings of the disciplinary hearing I find you did make this comment. In relation to Complaint 2, you have admitted making this statement "not my monkey, not my circus" and I note you stated that in using this comment that you meant this about the alarm and not any service user, and it is a phrase you have used before. I find this language unprofessional, discriminatory, de-humanising, and flippant to use in a special service when an alarm had sounded. I do not find your explanation, that you were referring to the alarm, an inanimate object, as credible. Even if this was the case, I am of the view that your reference to a "circus" can only be reasonably interpreted as a reference to the service, which is a service for people with person-centred support needs. In addition, your actions after making the comments in leaving the service without checking what the alarm was, or if any help would be needed, was indicative of an attitude of disrespect towards the people we support. I find that this attitude increases the likelihood that you made the comments referred to in Complaints 1 and 2, and that the comments were made in bad faith, in a derogatory and discriminatory manner. Our's is a service that requires us to behave well and in consideration of the people we support. We must at all times ensure that we treat these individual's we support with respect and ensure their needs and welfare are looked after. I note that you did not apologise for the use of language in Complaint 2 but looked to excuse the behaviour by saying that it was language that you use. I find that this is unacceptable particularly given your length of time with the service..."*

The respondent noted that the complainant submitted his appeal in February 2022. The CEO who was accompanied by a HR Consultant, as a note taker convened an appeal hearing. The complainant was accompanied by his Union Representative. Meeting notes were taken and on 4 April 2022 the CEO wrote to the complainant to confirm the outcome of the appeal hearing which was to uphold the decision of 31 January 2022 and it affirmed that the complainant was dismissed from his role as a Social Care Worker. The complainant subsequently lodged a claim to

the WRC.

The respondent also submitted that a performance related discussion took place between the complainant and his Team Leader around July 2021, but a performance improvement plan was not pursued. It was also submitted that the complainant lodged a grievance about the matter in early November 2021 and that it was reviewed in January 2022 and was not progressed any further

The respondent submitted that on 15 August 2021 the complainant was involved in a car accident when in the company of a Service User. An investigation process was commenced, and the complainant was written to several times between August and December 2021. On or about 8 December 2021 a meeting was convened by the Operations Director to address an email sent by the complainant on 15 November 2021 and the proposed investigation into the accident.

The respondent submitted that the complainant raised an issue regarding a matter relating to medication. The complainant was interviewed in early December 2021 by an Area Manager with the HR Consultant acting as a note taker. On 11 January 2022, a report was published in relation to this matter.

The respondent referred to sections 6(4)(b), (6) and (7) of the Unfair Dismissals Act 1977 as amended:

“(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following: ... (b) the conduct of the employee...”

“(6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal.”

“(7) Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if [the adjudication officer or the Labour Court], as the case may be, considers it appropriate to do so— (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and (b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in section 14(1) of this Act or with the provisions of any code of practice referred to in paragraph (d) (inserted by the Unfair Dismissals (Amendment) Act 1993) of section 7(2) of this Act.”

The respondent submitted that the code of practice referred to in s6(7) is S.I. NO. 146/2000 Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (see Appendix 24) and the following paragraphs of the said Code read as follows:

“6. The procedures for dealing with such issues reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include: • That employee grievances are fairly examined and processed; • That details of any allegations or complaints are put to the employee concerned; • That the employee concerned is given the opportunity to respond fully to any such allegations or complaints; • That the employee concerned is given the opportunity to avail of the right to be represented during the procedure; • That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

7. These principles may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses.

...

11. Generally, the steps in the procedure will be progressive, for example, an oral warning, a written warning, a final written warning, and dismissal. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage. In such instances the procedures set out at paragraph 6 hereof should be complied with."

The respondent submitted that Kerr, A at page J-19 to J-20 of Termination of Employment Statutes (4th Edition., 2009) outlines the general approach to cases of dismissals for conduct as set out in *Hennessy v Read & Write Shop Ltd* UD 192/1978 (which it is noted is reproduced in Madden and Kerr, *Unfair Dismissal: Cases and Commentary* (2nd ed., 1996), p. 317)) as follows: "*In deciding whether or not the dismissal of the claimant was unfair we apply a test of reasonableness to 1. the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant, and 2. the conclusion arrived at by the respondent that, on the basis of the information resulting from such enquiry, the claimant should be dismissed.*"

It was further submitted that Kerr at page J-20 of Termination of Employment Statutes then sets out matters to be addressed to deal with the test of reasonableness as follows: "*This requires the Tribunal to consider whether the employee was made aware of all allegations and complaints that formed the basis of the proposed dismissal, whether the employee had adequate opportunity to deny the allegations or explain the circumstances before the decision to dismiss was taken, whether the employer believed that the employee had conducted himself or herself as alleged, whether the employer had reasonable grounds to sustain that belief and, if so, whether the penalty of dismissal was proportionate to the alleged misconduct.*"

The respondent submitted that in *The Governor and Company of The Bank Of Ireland v Reilly* [2015] IEHC 241, Noonan J addresses s6(4) and s6(7) of the said Act in the following terms:

"38. It is thus clear that the onus is on the employer to establish that there were substantial grounds justifying the dismissal and that it resulted wholly or mainly from one of the matters specified in s. 6(4), which includes the conduct of the employee or that there were other substantial grounds justifying the dismissal. Section 6(7) makes clear that the court may have regard to the reasonableness of the employer's conduct in relation to the dismissal. That is however not to say that the court or other relevant body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned – see *Royal Bank of Scotland v. Lindsay* UKEAT/0506/09/DM."

39. I respectfully agree with the views expressed by Judge Linnane in *Allied Irish Banks v. Purcell* [2012] 23 ELR 189, where she commented (at p. 4): "Reference is made to the decision of the Court of Appeal in *British Leyland UK Ltd v. Swift* [1981] IRLR 91 and the following statement of Lord Denning MR at page 93: 'The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view.' It is clear that it is not for the EAT or this court to ask whether it would dismiss in the circumstances or substitute its view for the employers view but to ask was it reasonably open to the respondent to make the decision it made rather than necessarily the one the EAT or the court would have taken."

The respondent submitted that based on the foregoing that the following matters need to be addressed: a. Was the

employee aware of all the allegations? b. What was the nature and extent of the enquiry into the allegation(s) by the respondent employer? c. Was the employee afforded an adequate opportunity to deny the allegations or explain the circumstances? d. Was the employee given the opportunity to avail of representation? e. Was the decision maker impartial? f. Based on the enquiry by the respondent employer what belief did they form as regards the allegations? g. Were there reasonable grounds for the respondent employer to sustain the belief they formed from the enquiry? h. Was it reasonably open to the respondent employer to make the decision to dismiss the employee? i. If the foregoing matters are satisfied was the penalty of dismissal proportionate/ a reasonable response to the alleged misconduct?

The respondent submitted that the complainant was aware of the allegations and that reference to the details of the allegations supplied to the complainant. As to the nature and extent of the enquiry, the respondent submitted that meetings in relation to the allegations took place with 3 employees between 30 November and 17 December 2021 and the complainant was provided with the documentation from those meetings when the disciplinary meeting invite was sent to him. During the disciplinary hearing, the allegations were put to him to obtain his response.

The respondent submitted that the complainant was afforded an opportunity to address the allegations and to explain the circumstances at the disciplinary hearing and was given the opportunity to avail of representation but chose not to at the initial meeting and was represented by this union at the appeal.

On the issue of whether the decision maker was impartial, the respondent noted that respondent engaged the Operations Director from its Northern Irish counterpart to conduct the investigation. He was not a party to the initial engagement with the complainant. The respondent also noted that the Appeal Officer was not a party to the disciplinary hearing held on or about 14 January 2022.

Based on the enquiry by the respondent, the employer found that the complainant had said “they are still autistic” and admitted making the statement “not my monkey, not my circus”.

The Disciplinary Decision Maker concluded that the complainant’s actions were in breach of the respondent’s Code of Professional Conduct policy and the Equal Opportunities and Diversity policy. He concluded that “... in keeping with. ... Corrective Action Policy the findings of this disciplinary are that the evidence is supportive of Gross Misconduct...”.

It was submitted that as the Corrective Action Policy provides that the disciplinary penalty for an act of gross misconduct is summary dismissal then it was open to the respondent to make the decision to dismiss the complainant and the following was set out at page 4 in the disciplinary outcome letter “...*Our’s is a service that requires us to behave well and in consideration of the people we support. We must at all times ensure that we treat these individual’s we support with respect and ensure their needs and welfare are looked after...*”

The respondent submitted the penalty of dismissal is proportionate due the contravention of its policies and taking into account that the two comments run contrary to the requirement to “behave well” and be considerate of the service users ensuring that they are treated with respect and ensuring their needs and welfare are looked after. It was found on the balance of the evidence that the complainant had in response to a question about service users said “they are still autistic” and had admitted making the statement “not my monkey, not my circus”, it was concluded that the findings of the disciplinary process were that there was evidence supportive of Gross Misconduct and that the complainant’s actions were in breach of the Code of Professional Conduct policy and the Equal Opportunities and Diversity policy.

To summarise, the respondent submitted that the dismissal of the complainant was due to his conduct (misconduct) and is fair as provided for by s6(4)(b) of the Unfair Dismissals Act 1977. The provisions of s6(7) which require reasonableness and following procedures have been complied with and more particularly the allegations were put to

the complainant, he was provided with the documentation gathered, disciplinary and appeal meetings were conducted by separate persons, the complainant was offered the opportunity to be accompanied by a representative but he only availed of this at the appeal hearing and the complainant was given the opportunity to respond to the allegations.

Witness evidence: Witness #1 – the Area Manager

The witness noted that the place of employment was a residential unit with three or four service users living in supported accommodation and supported services in the educational health and integration fields. Their primary users have autism but also had intellectual disabilities and were considered to be vulnerable adults. She noted that the complainant was employed as a social care worker and that this involved a certain amount of medical administration, cleaning, driving, and liaison, as needed. The job fundamentally means that service users are kept safe and well, engaged and provided with lifelong learning, for example reducing behaviours of concern on promoting ownership their own live, in as much as is possible.

The witness noted that the complainant was unhappy with the changes taking place in the workplace and could be considered a disgruntled employee. He raised concerns about his line manager but also concerns regarding the rota being used. He wanted it resolved informally but turned down facilitation because the facilitator was somebody being paid for by the respondent.

The witness noted that two complaints were made against the complainant, referring to derogatory comments he had made. The first complaint was when he was asked one evening how are the service users were, and he replied, “they still have autism”. The second complaint was when an alarm went off and he commented that this was “not my circus, not my monkeys” as he was leaving.

The witness stated that the complainant was suspended with pay while matters were investigated. It was noted that the complaint was raised by the senior social care worker. The witness noted that at the time there were separate concerns raised by the complainant regarding a personal improvement plan. The complainant had no issue with the plan itself but more with how it was being pursued. It was ultimately decided that they were not going to proceed with the improvement plan. The witness noted that there were still fundamental issues, and the complainant wanted to proceed with matters. She noted that performance improvement issues continued.

As for a protected disclosure being made, the witness noted that the appropriate language wasn't used which would lead it to be considered as a 'protected disclosure'. She stated that the complainant alleged that management was involved in covering up a medication error. She knows that the process that they use involves the use of a decision tree. The complaint went to investigation, but the investigation was deemed inconclusive and was not determined that medication was administered inadvertently to the service user.

Under cross examination the witness was asked who conducted the investigations, she noted that she did not personally interview the original complainant but noted that it was brought to her attention by another colleague. As regards the transcript of the meeting of November, she noted that it was written straight afterwards in Head Office - there may have been a 45-minute delay before it was finalised.

The witness was asked who deemed the remarks to be derogatory and who made the decision to suspend the complainant, the witness responded that that was the policy. The witness noted that after the complainant was suspended, three witnesses were interviewed, but that she was simply doing as she was directed to do. As to the decision to suspend the complainant, the witness noted that it depends on the severity of the allegation, in this case the allegations were considered to amount to gross misconduct. The witness was asked who decided that they

amounted to gross misconduct, but she stated repeatedly that the policy did.

The witness was asked what the normal process is for dealing with an error in medication. She said normally a Medicine Discrepancy Form was completed followed by medical accounting which is explored within the service first. She noted that there was a medication auditing tool also. She noted that timeframes can differ depending on the circumstances. It was put to her that the protocol dictated suspension where there was a medicines error, she replied that historically that was correct but that the practise had changed as it did not lend itself to best practise.

When asked about the issue of a protected disclosure, she responded that she was not aware that it was a protected disclosure but that it was simply an alleged safeguarding error. It was put to her that a cover up was implied. She was asked was a safeguarding concern raised, and she replied that the allegation was not founded. She confirmed that she never saw the original safeguarding concern and that the language of protected disclosures was never used with her.

As regards to a meeting with the union, the witness recalled a general meeting with the union members but cannot remember the manager going through a personal improvement plan "with a gleam in her eye'. The witness noted that the grievance was never processed through the appropriate channels with that she advised the complainant how to advance a complaint through the proper channels.

Under redirection the witness was asked was she aware that the complainant was representing the staff at that meeting? She replied that there was a union representative there as well but stated that she presumed both staff were there as members of the union.

The respondent's representative asked the witness whether there is a difference between safeguarding and a protected disclosure. She stated that there was safeguarding relates to if you said physical abuse, financial issues or overly restricted practises and that a protected disclosure was one that was reported to a member of management. In relation to the medication error, she noted that there were two errors in quick succession. She noted that the first may have been an error but that no medications were administered on the second occasion.

It was put to the witness that the Code of Conduct policy outlines what constitute serious acts of discrimination. It was put to the witness that the allegation was determined to be gross misconduct relating to disability.

The second witness for the respondent was also an Area Manager. She was involved with the fact-finding meeting and met with four staff. She completed the investigation report which was then sent on to human resources. In a summary of the findings of her investigation she noted that staff verified their accounts. Under cross examination she explained an initial delay and noted that it was normal for the investigation report to be sent to Human Resources section.

The third witness for the respondent is Chief Executive Officer of the organisation. He outlined his experience in the area and his career to date. He noted that there is a series of intervention policies and guidance to assist staff with their interactions with clients. He noted that he considered that this was working well and that there was a Code of Conduct in place which introduced the concept of personal responsibility which flows through that document. He noted that he would have expected the complainant to attend the required training.

He stated that he liaised with HR and the appeal set up for 22 February and that the complainant was accompanied by a union representative, also he noted that the complainant was invited to bring up any further issues. He spoke to an additional witness and as regarding his next steps he noted that he considered everything and wrote his report including a conclusion. His conclusion was that he did not believe that there was any further evidence or information such as to overturn the original decision. He noted that the respondent had a policy and followed it. There was no

apology on the part of the complainant and there was no remorse. He noted that the complainant was given every opportunity to make submissions and that he was represented. His decision was to uphold the disciplinary decision that was made at first stage. He noted that there were two comments made regarding the disciplinary process, the complainant went against the views of the organisation and was disrespectful of the client body and that when an alarm had gone off, he felt it was OK to leave. He felt that this showed a lack of teamwork on the part of the complainant in the first instance and in the second instance was disrespectful to the people the organisation supports.

Under cross examination, it was put to him that there was no investigation prior to the disciplinary hearing and that there was no record of the complainant being interviewed. The witness noted that the organisation uses a screening process on occasion, and he referred to them during the appeal. He noted that he considered all the documentation including that of the appeal letter. He noted that the notes from an interview with one of the complainants' colleagues were considered as part of the appeal.

It was put to the witness that the notes he looked at included a falsified account of a conversation, and that part of the appeal was that this was not a full account. It was put to the witness that this meeting note was not automatically sent to the complainant. The witness noted that anything brought up with him as part of the investigation was looked at, he noted that mitigation factors were not included in the appeal. The witness noted that he did go back to check on staffing levels and he reached a conclusion that he was comfortable with the process. It was put to him that it usually involves an investigation, and it was queried as to why was it different in this case.

Under redirection it was noted that two letters issued involving the outcome of the appeal, the first was a draft letter which was sent in error and then was followed up with a letter to clarify matters with a small change in the language regarding the conclusion.

The next witness for the respondent was the Operations Director. His job involved overseeing the day-to-day activities of the centre. He noted that he had 10 years' experience. He said they operated a zero-tolerance policy regarding abuse and that the complainant attended safeguarding training within the last two years. He noted that there was a national standard and national training to be undertaken by all staff. He noted that abuse related any suspected or actual abuse and that a period of suspension usually followed while the matter was looked at. He noted that respect, honesty and openness are the core values of the service. The witness stated he was aware of the allegations against the complainant as the decision was made by the Area Manager and to the Human Resources Manager. He noted the two comments made by the complainant. He was advised that the disciplinary process would be done independently and that if anyone was available in Northern Ireland, Scotland, England or Wales then they would be tasked with the appeals process. He noted that his responsibilities finished at the suspension piece. He also noted that the complainant was suspended from driving following an incident where he was carrying one of the service users. He also noted that he received no reply to the letter of 8 December seeking information on the incident from the complainant. He wrote to the complainant requesting that he re-engage with the process with regard to the car accident and safeguarding concerns.

Under cross examination the witness was asked would he have been aware of the issues that can be raised as a safeguarding issue, and whether you get a copy of the issue as it is being raised. It was put to him that there were two types of investigation regarding at a level of appropriate concern. He was asked who would be free to do the investigation and they looked for an external chair in accordance with the governance protocol.

The next witness for the respondent was the HR Business Partner. He noted that he was the note taker for the appeal

meeting. He stated that normally a draft version of a report was drawn up and then comments if any were added, the minutes were then finalised. He noted that two versions of the outcome of the appeal meeting were sent, the earlier version was sent in error.

Under cross examination he was asked why there was no screening process done in relation to the complaint made against the complainant. He was also asked would it be unusual for witnesses or the complainant not to be interviewed. He responded that normally witnesses were interviewed and if he was asked why they were not interviewed in this case. He was asked what the usual process regarding a complaint about staff is and noted that preliminary screening is normally undertaken with a response within a given time frame and then it is followed up with a grievance hearing. The witness noted that this was not conducted under the grievance policy, and it was put to him that it was never communicated to the complainant until after the appeal, which policy it was being heard under. He was asked who made the decision to deal with this as a Corrective Action Policy and he responded that he did not know. He noted that the complainant was suspended with full pay.

He was asked again who decided to go with the Corrective Action Policy rather than the grievance procedure but once again he responded that he did not know.

The next witness for the respondent was the Senior Social Care Manager who was the complainant's assistant (line) manager. She was cited as having made the original complaint. She stated that the working environment was the service user's home and that there were guides for interaction with the service users who are regarded as vulnerable adults. She noted that she did hear the complainant using the comment they are still autistic. She noted that the respondent was dealing with a negative inspection report at the time. She also noted that he was dealing with her own personal issues at the time.

Under cross examination she was asked to explain the delay in reporting matters. She noted that this was a stressful time for her and additionally she was on annual leave and found the complainant intimidating. She was questioned why she didn't report finding him intimidating but didn't respond. She stated that after the submission of the complaints she was not interviewed until a point during the appeal process.

It was put to the witness that it was inferred from her complaint form and from the on-call notes that he had breached the code of conduct. She suggested that she was relying on the team leader for support and that this accounted for the delay in making the complaint. Under cross examination it was put to the witness that the phrase 'not my monkey, not my circus' had been used previously by the complainant and it was queried as to why she did not report it previously.

The final witness for the respondent was the Operations Director for the Northern Irish counterpart organisation. He stated that the respondent's CEO asked if he would hear a disciplinary procedure and provided him with various relevant documents. It was never raised with him that the complainant did not have all the documents that had been provided to him. He came to the conclusion that there were breaches of the respondents policies, that in all probability the complainant did say what he was alleged to have said and based upon this, the witness said that he wrote up his report.

The witness stated that two allegations were put to the complainant in advance. He was asked what matters he took into account, and he responded that he took into account the issue of dehumanisation in the use of language, and that the complainant had not used appropriate language in terms of creating a continuity of care for the service users. He also noted that it created a poor learning environment for more junior staff. As to the second issue leaving without asking what the alarm related to, the witness concluded that this was indicative of a poor, uncaring and

unsafe attitude on the part of the complainant.

It was put to the witness that the complainant's behaviour on 27 November didn't form part of the allegations. In response the witness said that he didn't show any remorse or provide an apology in relation to the incidents and didn't seek an adjournment. Nor did he raise any point that indicated that he didn't understand the allegations that were being put to him.

Under cross examination the witness was asked if he interviewed anyone prior to the meeting that they had, and he replied "no". When asked what his remit was the witness responded that it was to review the evidence and come to a decision. The witness was asked whether he interviewed the complainant's line manager to validate the complaints, it was put to him that three statements constituted the investigation, and he was asked whether he received report on the handover of the suspension letter or was he aware that aspects of the note were challenged to which the witness responded "no".

The witness was asked whether the HR Business Partner had informed him that people should be removed from process, he was also asked whether he was informed that the complainant had a complaint against the Area Manager but he indicated that he was not aware of any such information.

It was put to the witness that there was no investigation into the original complaints and that as an Appeals Officer he did not look at any context. It was put to the witness that the policy states that *"if an employee is engaged of an act of gross misconduct, they may be suspended from work on full pay, while the organisation investigates the alleged offence."* It was put to the witness that he didn't meet with the original complainant. He said that he had not done so.

Under redirection it was put to the witness that he considered two written comments made by the complainant's line manager.

Summary of Complainant's Case:

The complainant submitted shortly before the first hearing that his dismissal was unfair for three reasons, procedural unfairness, having raised a Protected Disclosure, and for his Trade Union activities.

In relation to procedural unfairness, the complainant submitted that the respondent, on numerous occasions, failed to follow their own policies and there were numerous discrepancies and omissions throughout the process of his dismissal. The complainant had raised several concerns between June 2021 up to the date of his dismissal, which were subject to a very different process to the one which resulted in his dismissal.

In relation to the making of a Protected Disclosure, the complainant submitted that he raised several issues regarding the conduct of the direct line manager and Area manger to the Operations Manager and to the CEO. He submitted that he made a Protected Disclosure with regards to an issue regarding medication and the subsequent removal of paperwork and the organisations failure to follow proper procedure, this disclosure was also made to HIQA.

The complainant submitted that he was an active member of his Trade Union and was actively involved in recruiting new members. Prior to his dismissal, and with the support of the union, staff were in discussions with the respondent in relation to ongoing issues.

As regards the other matters that he raised in his initial complaint form, he noted that he was involved in a minor car accident resulting in cosmetic damage to the vehicle. As a result of this he was suspended from driving company vehicles pending an investigation into where it was alleged, he subjected a service user to psychological abuse. This complaint was escalated to both the HSE and HIQA.

An attempt to address this false allegation and the conduct of the individuals who made the allegations was not

addressed by the respondent. The complainant suggested that this allegation and the subsequent suspension was as a result of ongoing issues and an attempt to dismiss, to discredit and to remove him.

As regards the protected disclosure, the complainant submitted that on 22 September, he raised a potential medication error as per protocol. Subsequently, on 7 November he made a Protected Disclosure to a designated person regarding the potential safeguarding issues. This was also disclosed to HIQA. No feedback from the designated officer was ever provided.

As per the issue of grievances, the complainant submitted that numerous grievances were raised both by the complainant and his co-workers regarding the conduct of their direct line manager to the HR department Operational Manager and to the CEO.

The complainant submitted that he also raised a grievance regarding the line manager mis-recording information, using certain language, and conduct regarding the implementation of a Performance Improvement Plan.

The complainant submitted that the respondent's decision to dismiss him was fundamentally flawed as they did not afford him procedural fairness and that mitigating circumstances were not considered. It was submitted that the respondent failed to address numerous concerns raised by the complainant and that there was a concerted effort to discredit him and remove him from employment based on false allegations.

The complainant submitted that he was unfairly dismissed and sought to be reinstated to his position as Social Care Worker.

Complainant Evidence:

The complainant stated that within the process there was no investigation made. He noted that there was no breach of any particular policy found during the investigation. He stated that aspects of his personality were brought into question, but issues were never contextualised. The complainant said that there were mistakes on the part of the respondent in the appeals process. He noted that there were mistakes in the transcript of a conversation which he challenged but at this point was not raised with the decision maker. The complainant stated that human resources were fully aware of all the issues.

Under cross examination the complainant noted that as regards the appeal letter, he received two typed pages with no signature, no date and that it was not sent to an official e-mail.

He thought that his line manager and a colleague made it up because he had made a complaint about them. It was put to him that no complaint was made in accordance with various procedures. It was put to him that he was aware of the nature of the allegations being made against him. The complainant confirmed that he had received copies of statements but that they never articulated as to how he breached any particular policy.

He noted that the investigation was not unbiased because he had an ongoing complaint against one of his colleagues. The witness noted that the person conducting the disciplinary hearing used a note of a meeting that he had previously objected to as being incomplete. The complainant stated that he was not aware that he should have apologised or that an apology would have sufficed.

The complainant noted that there was an unexplained 19-day delay in making the initial allegations. He also noted that he was not invited to an investigation, only to a disciplinary hearing. The witness noted that he had taken complaints against both of the people who complained about him, and he noted that on the day that the alarm went off he was already finished work. He noted that there were five staff for four service users present, which he considered was sufficient to cover for the needs of the job.

He stated that the disciplinary hearing was the investigatory meeting. He noted that there was an erroneous

recording of that meeting which was factually untrue. He noted that his attitude on that date was recorded erroneously but that this fact was used against him in the decision. He knows he was not given the opportunity to address part of the investigatory process within the disciplinary process.

The complainant noted the procedural unfairness of the respondent's approach. He noted that they do investigate issues in other cases but did not do so in this case, for example, one of the complainants was not interviewed until the appeal process. He noted that other allegations were considered as part of this process and that they used an exaggerated account of the November meeting which would indicate that there was some sort of a witch hunt going on. He wondered who decided it amounted to gross misconduct.

The complainant noted that he can no longer go on with his profession which is down to the circumstances of his training and occupational background; and the current academic requirements laid down to CORU mean that his skills are not transferable to another employment in Social Care Work.

The complainant sought reinstatement. The complainant noted that he chose to stay at home until the end of August 2022 for a break. He noted that after this time, he applied to various positions with a number of companies, he even applied to be a train driver. He secured alternative employment in February 2023.

Findings and Conclusions:

The fact of dismissal is not at issue in this complaint. It is agreed by the parties that he was dismissed by way of a letter of 31 January 2022 from the person who conducted the Disciplinary Hearing. The issue before me is whether the dismissal amounts to an Unfair Dismissal.

The narrative contained in the original complaint submission was quite detailed, however, it made no reference to the reason for the dismissal being either as a result of penalisation arising from having made a Protected Disclosure nor to any Union involvement. Rather it confined itself to detailing a complaint regarding the issues of procedural fairness and the lack of consideration of any mitigating factors.

Section 6(1) and 6(2)(a) and (ba) deal with unfair dismissal and both union membership and making a protected disclosure. It states as follows:

6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.

(2) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following:

(a) the employee's membership, or proposal that he or another person become a member, of, or his engaging in activities on behalf of, a trade union or excepted body under the Trade Union Acts, 1941 and 1971, where the times at which he engages in such activities are outside his hours of work or are times during his hours of work in which he is permitted pursuant to the contract of employment between him and his employer so to engage,

(aa) without prejudice to paragraph (a), the employee—

(i) being a member of a trade union which made a request referred to in section 2(1) of the Industrial Relations (Amendment) Act 2001,

(ii) being in the employment of the employer concerned in the grade, group or category to which the trade dispute, referred to in that section, relates, and

(iii) having provided evidence or other information or assistance to any person, for the purposes of the examination

of that request by the Labour Court or in respect of an investigation made by it under that Act pursuant to that request,

(b) the religious or political opinions of the employee, (ba) the employee having made a protected disclosure,

The complainant gave evidence that he attended a meeting with management as a union member. One of the witnesses for the respondent noted that she presumed that all the attendees at that meeting were union members. Having regard to the evidence provided by both parties, I am not satisfied that the complainant has established that the fact of his dismissal resulted wholly or mainly from his union membership.

In relation to the protected disclosure element, the complainant made reference to having raised a grievance regarding a medicine error. The burden for establishing the linkage to the protected disclosure rests with the complainant. Having heard the evidence, I am not satisfied that the complainant has established that his dismissal resulted wholly or mainly from making a protected disclosure, but rather the rationale for dismissal appears to lie elsewhere.

Section 6(4), (6) & (7) of the Unfair Dismissals Act outline the circumstances where a dismissal is not considered an Unfair Dismissal, and state as follows:

(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

(a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) the conduct of the employee, (c) the redundancy of the employee, and

(d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute.

...

(6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal.

(7) Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the adjudication officer or the Labour Court, as the case may be, considers it appropriate to do so—

(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and

(b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in section 14 (1) of this Act or with the provisions of any code of practice referred to in paragraph (d) (inserted by the Unfair Dismissals (Amendment) Act, 1993) of section 7 (2) of this Act.

The respondent, as well as partially citing the foregoing legislation, also cited Section 6, 7 and 11 of the Code of Practice on Grievance and Disciplinary Procedures. Section 4 of the Code, concerned with the General Principles, is laid out below:

4. GENERAL PRINCIPLES

1. *The essential elements of any procedure for dealing with grievance and disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well*

defined and that an internal appeal mechanism is available.

- 2. Procedures should be reviewed and up-dated periodically so that they are consistent with changed circumstances in the workplace, developments in employment legislation and case law, and good practice generally.*
- 3. Good practice entails a number of stages in discipline and grievance handling. These include raising the issue with the immediate manager in the first instance. If not resolved, matters are then progressed through a number of steps involving more senior management, HR/IR staff, employee representation, as appropriate, and referral to a third party, either internal or external, in accordance with any locally agreed arrangements.*
- 4. For the purposes of this Code of Practice, 'employee representative' includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.*
- 5. The basis of the representation of employees in matters affecting their rights has been addressed in legislation, including the Protection of Employment Act 1977; the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980; Safety, Health and Welfare at Work Act 1989; Transnational Information and Consultation of Employees Act 1996; and the Organisation of Working Time Act 1997. Together with the case law derived from the legislation governing unfair dismissals and other aspects of employment protection, this corpus of law sets out the proper standards to be applied to the handling of grievances, discipline and matters detrimental to the rights of individual employees.*
- 6. The procedures for dealing with such issues reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include:*
 - That employee grievances are fairly examined and processed*
 - That details of any allegations or complaints are put to the employee concerned*
 - That the employee concerned is given the opportunity to respond fully to any such allegations or complaints*
 - That the employee concerned is given the opportunity to avail of the right to be represented during the procedure*
 - That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors, circumstances.*
- 1. These principles may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses.*
- 2. As a general rule, an attempt should be made to resolve grievance and disciplinary issues between the employee concerned and his or her immediate manager or supervisor. This could be done on an informal or private basis.*
- 3. The consequences of a departure from the rules and employment requirements of the enterprise/organisation should be clearly set out in procedures, particularly in respect of breaches of discipline which if proved would warrant suspension or dismissal.*
- 4. Disciplinary action may include:*
 - An oral warning*
 - A written warning*
 - A final written warning*
 - Suspension without pay*
 - Transfer to another task, or section of the enterprise*
 - Demotion*
 - Some other appropriate disciplinary action short of dismissal*

▪ *Dismissal.*

1. *Generally, the steps in the procedure will be progressive, for example, an oral warning, a written warning, a final written warning, and dismissal. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage. In such instances the procedures set out at paragraph 6 hereof should be complied with.*
2. *An employee may be suspended on full pay pending the outcome of an investigation into an alleged breach of discipline.*
3. *Procedures should set out clearly the different levels in the enterprise or organisation at which the various stages of the procedures will be applied.*
4. *Warnings should be removed from an employee's record after a specified period and the employee advised accordingly. The operation of a good grievance and disciplinary procedure requires the maintenance of adequate records. As already stated, it also requires that all members of management, including supervisory personnel and all employees and their representatives be familiar with and adhere to their terms.*

The respondent noted the following:

The respondent submitted that Kerr, A at page J-19 to J-20 of Termination of Employment Statutes (4th Edition., 2009) outlines the general approach to cases of dismissals for conduct as set out in Hennessy v Read & Write Shop Ltd UD 192/1978 (which it is noted is reproduced in Madden and Kerr, Unfair Dismissal: Cases and Commentary (2nd ed., 1996), p. 317)) as follows: "In deciding whether or not the dismissal of the claimant was unfair we apply a test of reasonableness to 1. the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant, and 2. the conclusion arrived at by the respondent that, on the basis of the information resulting from such enquiry, the claimant should be dismissed."

It was further submitted that Kerr at page J-20 of Termination of Employment Statutes then sets out matters to be addressed to deal with the test of reasonableness as follows: "This requires the Tribunal to consider whether the employee was made aware of all allegations and complaints that formed the basis of the proposed dismissal, whether the employee had adequate opportunity to deny the allegations or explain the circumstances before the decision to dismiss was taken, whether the employer believed that the employee had conducted himself or herself as alleged, whether the employer had reasonable grounds to sustain that belief and, if so, whether the penalty of dismissal was proportionate to the alleged misconduct."

Having heard the evidence of both parties, the complainant may be summarised as follows: the complainant made two comments which were held to amount to Gross Misconduct and was held to have acted in an unprofessional manner when he left the workplace while an alarm was going off. However, on consideration of the issues raised I have a number of concerns regarding the conduct of the investigation, disciplinary hearing and appeal that gave rise to the complainant's dismissal.

The initial concern that arises relates to the decision that the two comments made by the complainant amounted to Gross Misconduct. This decision resulted in the immediate suspension of the complainant as the comments, noted as amongst other things "flippant" in the course of the disciplinary hearing were deemed to amount to Gross Misconduct. Despite the cross examination of the witnesses, no one has taken ownership of the decision that these amounted to Gross Misconduct. The only answer given to the question 'who decided that the two comments amount to misconduct?' is that the "policy" did. The policy outlines instances of behaviours that may amount to Gross Misconduct and it doesn't include the phrase "they are still autistic" nor the comment "not my monkey, not my

circus". Someone must have made the decision, but no-one is taking responsibility for it. That decision gave rise to everything that followed but cannot be traced to a single person, just to a policy.

As regards the comments and behaviours amounting to Gross Misconduct, no analysis appears to have taken place. Instead, it appears that the decision maker on the disciplinary matter and on the appeal seem to have taken as given that the comments/behaviours amounted to Gross Misconduct.

Another concern that arises is that although the respondent outlined that in relation to most complaints raised, it operates a preliminary assessment procedure or screening process, no such procedure seems to have been followed in relation to the case against the complainant.

An additional concern regarding the process arises from the lack of fair procedures. The person who raised the complaint was not interviewed as part of any investigation process, nor was the complainant. Other staff members were interviewed but not the person who made the complaint. Issues were not put to complainant to consider and potentially explain or excuse as part of an investigation. Matters were only put to him at a disciplinary hearing when the investigation was already concluded. The person who raised the complaint was not spoken to as part of either the investigation or as part of the disciplinary hearing. Her complaints and any possible interview notes were not given to the complainant to consider and test in advance of the dismissal decision being made. This, in itself, is sufficient to derail the notion of fair procedures.

Furthermore, the colleague who was reported as having heard the remark may not have been an unbiased witness as the complainant had raised a grievance against her. This pertinent fact was not made known to the Disciplinary Decision Maker. The Disciplinary Decision Maker did not interview anyone, relying instead on the notes provided to him of interviews with selected staff. Notably the complainant and the person who made the original complaint were not amongst those selected staff. He also did not ascertain the reason for the 19-day delay in the making of the complaint. Accordingly I find that he did not consider the issue of possible witness bias, and whether possible conflicts of interest may have arisen in the investigation.

As regards the respondents concern that the complainant left his place of work when an alarm was sounding, he outlined how he was already finished his shift and had handed over to a full complement of staff who were on hands to deal with whatever alarms were going off. The disciplinary officer noted that the complainant had a bad or unprofessional attitude to work. He does not seem to have taken into account that the complainant was not working at the time that the alarm went off. However, he ultimately concluded that the evidence is supportive of "gross misconduct".

On the basis of the foregoing, I am satisfied that the dismissal procedure lacked procedural rigour resulting in procedural unfairness towards the complainant. Accordingly, I find that the complainant was unfairly dismissed. The complainant sought reinstatement, however given the depth of antagonism displayed by both parties towards one another at the hearing, I do not consider that reinstatement is an appropriate remedy in relation to this case. In relation to the mitigation of his loss, the complainant outlined that he did not seek alternative employment from the date of his dismissal until the end of August 2022. He stated that he then applied for a number of positions, including one as a train driver. He stated that he found alternative employment in February 2023. His gross salary amounted to €3500 per month, as he did not see alternative employment until August, his estimated loss up to that point is zero. Thereafter, he made certain efforts to mitigate his loss and gave evidence of trying to find alternative employment. His loss for that period up to February 2023 amounts to €17,500 however he only made certain efforts to seek employment and did not engage in full-time job seeking and therefore I award him €12,500 in lost earnings

which I consider just and equitable in all the circumstances.

Decision:

Section 8 of the Unfair Dismissals Acts, 1977 – 2015 requires that I make a decision in relation to the unfair dismissal claim consisting of a grant of redress in accordance with section 7 of the 1977 Act.

Having considered all the written and oral evidence presented in relation to this complaint, my decision is that the complainant was unfairly dismissed. I direct the respondent to pay him €12,500 in lost earnings which I consider just and equitable in all the circumstances.

Dated: 24-03-2025 **Workplace Relations Commission Adjudication Officer:** Conor Stokes **Key Words:**

Unfair Dismissal – procedural unfairness established – partial award of lost earnings