

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

MN1346/2008

Against

Employer

under

- *Claimant*

- *Respondent*

CASE NO.

UD1413/2008

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. G. Phelan  
Dr. A. Clune

heard this claim at Ennis on 3rd April 2009 and 8th June 2009 and 9th June 2009

#### **Representation:**

Claimant: Mr. Tony Kenny, Branch Organiser, SIPTU, O'Connell Street,  
Ennis, Co. Clare

Respondent: Ms. Ger Moriarty, Local Government Management Services Board, Olaf House,  
35-37 Ushers Quay, Dublin 8

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

##### Respondent's Case:

The Executive Engineer manages four recycling centres for the respondent. He is based in the headquarters in Ennis and visits the recycling centre that the claimant was employed in once a month. There is a Site Supervisor at the recycling centre that reports directly to the Executive Engineer. There are an average of 1,700 cars visiting the site a week, which increases to 2,000 around the Christmas period. The site is monitored by CCTV to ensure its safety and security.

The site has open top containers for wood and scrap metal. There is a compactor for cardboard with a hydraulic ramp to push the cardboard into the compactor. The compactor is very dangerous; a person was killed last year using one. There is a risk of someone climbing into one, as a result there is always an employee watching the machine. The compactor is operated by a key, which is removed when not in use in order to reduce any risk. The high volume of moving vehicles on the site is a risk as well as falling debris and broken glass. A risk assessment compiled by the Executive Engineer and the safety officer highlights these risks and also pays particular attention to the danger to children. Warning signs have been erected all over the site highlighting the dangers.

The respondent had a meeting with the Health and Safety Authority in October 2008 regarding the

risk assessment and preventative measures in place. Informal discussions had taken place with all staff during the risk assessment phase. The site has 4 full-time staff, 3 general operatives and 1 supervisor. All staff are aware of the safety statement, have had induction training on all equipment and have a safe pass.

On the 4<sup>th</sup> of January 2008 the Executive Engineer received an anonymous phone call from a member of the public who was concerned that on the 29<sup>th</sup> of December 2007 there had been an unsupervised child running around the site. The member of the public did not observe any staff members in sight. The Site Supervisor also reported the incident when he returned from holidays. The Site Supervisor was informed of the incident from other members of staff. The Executive Engineer received an incident report and asked for the CCTV footage for the 29<sup>th</sup> of December. The footage revealed a 7-10 year old child playing football on site and assisting members of the public with their recycling. The claimant was on sick leave when the investigation took place; he was informed on his return.

The acting supervisor on the day the incident took place, asked for the child to be removed from the site. He then left the site and on his return found the child to be still there. The child entered the site with the claimant. A report was compiled based on the CCTV footage. The Executive Engineer had no further involvement until he was interviewed as part of the official investigation.

There were other children on site that day but all were under supervision. There were no formal minutes taken of the staff interviews or the induction training. The claimant had not completed all the training identified for him.

The respondent HR Manager was notified by the Director of Services about the incident and was asked to instigate a formal investigation. An investigation team was then appointed by letter and given a copy of the grievance procedures. The investigation team do not make any recommendations. The claimant was given a copy of the Executive Engineers report, the grievance procedures and was shown the CCTV images. The formal investigation report was given to the HR department and the claimant. The claimant was informed that the report would be given to a nominated Director for consideration. The Director considered the report and met with the claimant to get his comments on the report. After considering the report dismissal was the recommended action. The County Manager is the only person with the authority to dismiss a member of staff. An appeal was made to the County Manager against the recommendation the nominated Director made. The focus of the appeal was that the incident did not merit dismissal, the HR manager was present at the appeal meetings.

There is no specific rule in the grievance procedures regarding bringing children onto the site or any written indication that this action could lead to dismissal. It is not normal procedure for staff to bring children into the workplace. The minutes of the first meeting held on the 6<sup>th</sup> of February 2008 identified the offence as being Gross Misconduct.

A Senior Executive Officer was part of the investigation team. The team met with the HR Department to clarify their role and the procedures involved in the investigation. She was given 2 DVD's, a summary of the CCTV footage and a record of the previous meetings. At the meeting with the investigator the claimant's representative did not give any written submissions or make any response. The transcript of the meeting was agreed with the claimant and his representative. The claimant does not dispute the incident, key witness interviews and the severity of the risks influenced the conclusions. The investigator's role was to decide if the incident constituted Gross Misconduct. The investigator issued her report on the 14<sup>th</sup> of March

2008.

The fourth witness gave evidence that he was supervisor on the respondent's recycling site on Saturday, 29<sup>th</sup> December 2007. The claimant contacted him the night before to say he would be late for work. When the claimant arrived for work his son was with him. The supervisor had no prior knowledge the claimant's child would be on site and he had never before seen a member of staff bring their child onto the site. The claimant told him that he did not have anyone to mind his son. The supervisor considered the site was too dangerous for a child due to the traffic on site. The supervisor told the claimant to remove his child from the site. The supervisor had duties to attend to elsewhere after this and it was his understanding that the claimant's son would soon be leaving the recycling site. It was normal for the supervisor to leave the site to attend to duties. The claimant would usually manage the site in the supervisor's absence.

When the supervisor returned to the site at approximately 12pm the claimant's son was still on site and this surprised the supervisor. The claimant told him that the site had gotten busy. The claimant remained on site for some time after the supervisor returned. The claimant's son was near the compactors at times.

At one point the claimant, his son and two colleagues were playing football and the supervisor asked them to stop, which they did. The supervisor again said to the claimant about his son being on site and the claimant replied that it was only for a while.

The claimant left the site for approximately 20 minutes but his son was left alone on site. When the supervisor saw the child playing near the compactors he told the child to go into the shed. The supervisor did not have a telephone number to contact the claimant. The claimant returned to the site and both he and his son left the site at approximately 1pm.

The supervisor concluded by saying that he is aware of health and safety procedures on site and the dangers associated with the compactors and traffic on site.

During cross-examination the witness accepted that in his statement he did not say that he had asked the claimant to remove the child from the site. The witness confirmed that the speed limit on site is 5mph. A key operates the compactors and only the respondent's employees have a key. If the door of the compactor is opened, as a safety mechanism the machinery will not work. When customers attend at the site with their children, the children must be supervised at all times by the parents.

The Health and Safety Officer at the time of the events gave evidence to the Tribunal. Her duties included upgrading risk assessments and performing site visits. The witness was familiar with the site where the claimant worked as she began to visit the site on a monthly basis. There were a number of issues with the site including traffic, vehicle interaction, operating functions of machinery and exposure to sharp items. The issues of exposure to compactors, traffic and sharp items pertained to children on site. There were a number of steps taken such as the placement of guardrails outside the compactor, ensuring children were supervised and imposing a 5mph speed limit on site. These control measures and the risks to children were communicated to all staff. The witness recalled speaking to the claimant as part of a group about the control measures for the compactors. The Health and Safety Authority (hereinafter HSA) performed random inspections approximately four times between June 2007 and January 2008. The main issue raised by the HSA was the operation of the compactors and that a member of the public would climb unseen onto the compactor. As a result the guardrails were introduced in July 2007.

In October 2007 the HSA raised the issue of items being thrown from the compactor. As a result of this concern the compactor operated only when the bin was fully closed. The respondent also had sensors installed on the bin of the compactor. The sensors cut off the power if the doors of the compactor are opened. A key lock system was also implemented.

However, during a further inspection on the 31<sup>st</sup> January 2008 an inspector from the HSA noticed that the top lid of the compactor was slightly open yet the compactor continued to operate. Improvements were made to the system and a second induction of staff was undertaken to inform staff how compacting operations should be carried out.

The witness stated that she was unaware of any other staff members bringing a child on site. The claimant had completed safe pass training as well as training in accident and emergency and safety procedures. There was no defined training course for recycling centres at the time of these events. The witness was satisfied that the safe pass training was adequate as the recycling site was akin to a construction site in relation to hazards.

In reply to questions from the Tribunal, the witness confirmed that between the time of the improvements to the compactors in October 2007 and the HSA's inspection in January 2008, the staff at the recycling site believed the issues with the sensors on the compactors was resolved.

The Director of Services at the time of the events gave evidence to the Tribunal. She became officially aware of the events of the 29<sup>th</sup> December 2007 during April 2008. Human Resources nominated her to receive the report of the investigation and to make a decision on the basis of facts established, as to whether the allegation of gross misconduct was established and to make a recommendation to the County Manager.

The witness met with the claimant and his union representative on the 15<sup>th</sup> April 2008. The witness outlined the structure and purpose of the meeting to the claimant and her role in the process. The claimant's representative informed her that he would formally request HR to allow him to cross-examine those individuals in the interview process.

The Director of Services put the allegations to the claimant and provided him with an opportunity to respond. The claimant did not deny or dispute the allegations or any of the findings of the investigation. The claimant raised two issues of mitigating circumstances. The first was that he was ill on the 29<sup>th</sup> December 2007 and the second was that he had a difficulty with childcare arrangements on that date. The meeting ended on the understanding that the witness would form a view on the matter and communicate it in due course to the claimant.

The Director of Services formed the preliminary view, based on the undisputed facts established by the investigation team, that the allegations of gross misconduct against the claimant were substantiated and it was her recommendation that the claimant be dismissed. In her view the claimant's mitigating circumstances did not alter the situation. Before she informed the County Manager of this recommendation she informed the claimant of her preliminary view and offered to meet with him again.

A further meeting was held on the 6<sup>th</sup> May 2008 to provide the claimant a further opportunity to state his case. However, no further information was put forward at this meeting and there was no dispute regarding the investigation's findings. The Director of Service wrote letter dated the 8<sup>th</sup> May 2008 to a Senior Executive Officer in the HR Department informing him that she upheld her

preliminary view that the allegations of gross misconduct against the claimant were substantiated and recommending the dismissal of the claimant. The Director of Services was satisfied that all procedures were complied with, ample opportunity afforded to the claimant and the complaints against him fully investigated.

During cross-examination it was put to the witness that the claimant was not afforded the opportunity to cross-examine those individuals interviewed by the respondent. The witness responded that the respondent had complied with its own procedures.

In reply to questions from the Tribunal, the witness stated that she considered the situation to be one of gross misconduct as stated within section 7.1 of the respondent's grievance and disciplinary procedure which states gross misconduct may include, "*serious negligence which causes or might cause unacceptable loss, damage or injury*" and "*serious infringement of health and safety rules.*"

The witness confirmed that members of the public are allowed to bring their children on site but the children must be supervised. She was unaware of any other staff members bringing their children on site. The witness confirmed that she made her recommendation based on the facts of the investigation. She did not view the claimant's personnel file as part of the process.

The County Manager from April 2002 to April 2009 gave evidence to the Tribunal. He became aware of the incident of the 29<sup>th</sup> December 2007 when he received correspondence from the HR department and the recommendation of the Director of Services. The claimant was informed of his right to appeal the recommendation to the County Manager.

The claimant subsequently lodged an appeal of the recommendation. The County Manager received all the documentation and informed himself of the relevant details. The appeal meeting was held on the 30<sup>th</sup> June 2008 at which his union representative accompanied the claimant. The facts of the case were well acknowledged but the basis for the claimant's appeal was that the sanction of dismissal was too harsh for what had occurred. The County Manager undertook to consider the matter further and he formed the preliminary view that the incident did constitute gross misconduct and he reached a preliminary decision to dismiss the claimant. This was outlined to the claimant by letter dated the 30<sup>th</sup> June 2008.

He afforded the claimant a further opportunity to respond at a second meeting. Following this meeting the County Manager upheld his preliminary decision to dismiss the claimant as the issue of health and safety is of paramount importance for the respondent. A failure to comply with the HSA could lead to criminal investigations. The County Manager stated that he did not believe the claimant to have deliberately set out to put his child at risk but how could the respondent explain what a child was doing unsupervised on site, if something had happened. In light of the foregoing the County Manager found the original view of the incident to be correct. The claimant was dismissed with effect from the 30<sup>th</sup> June 2008.

During cross-examination the County Manager confirmed that the decision to uphold his preliminary view was made on the 30<sup>th</sup> June 2008, the same day as the second meeting with the claimant.

In reply to questions from the Tribunal, the County Manager stated that he appreciated the length of the claimant's service with the respondent but health and safety obligations were very important and it was his view that the dismissal of the claimant was the appropriate sanction.

### Claimant's Case:

The claimant gave evidence that the respondent employed him for seventeen years. He spent three years of his employment working at the respondent's recycling centre. The claimant did not receive a copy of the respondent's safety statement. He confirmed that he had completed safe-pass training but this training was aimed at construction sites. The claimant received a few hours on-site training at the recycling centre. This training focused on how to operate the machinery on site.

The claimant was late to work on the 29<sup>th</sup> December 2007. On that date he had problems securing a childminder and he had no choice but to bring his child to work. He had never done this before. The claimant was not told that he could be dismissed on health and safety grounds for bringing his child to work. If he had been informed of this he would not have brought his child to the site. The supervisor did not ask the claimant to remove his child from the site. If the supervisor had given the claimant this instruction he would have removed his child from the site.

The 29<sup>th</sup> December 2007 was quieter for a Saturday. The claimant explained that access to the compactor is at a height of 1.5metres and the compactor works on a key basis. The claimant believed that the remedial work carried out on the compactor after the inspection in October 2007, was sufficient.

The claimant left the site for a period of time on the 29<sup>th</sup> December 2007. He asked the supervisor to take care of his child during this time and the supervisor agreed. The claimant left work early on the 29<sup>th</sup> December 2007, as he was unwell. The claimant was subsequently admitted to hospital where he remained until he was discharged one week later.

The claimant outlined his financial loss.

During cross-examination the claimant acknowledged that he could have absented himself on sick leave on the 29<sup>th</sup> December 2007. He attended for work despite being unwell as the site rules stated the minimum number of staff that must be present. During the time he was absent from site he was attempting to make alternative arrangements for the care of his child. The claimant did not consider his child was at risk by being at the site. The claimant was aware of the safety statement as it was in the office on site.

In reply to questions from the Tribunal, the claimant accepted the issue of his child on site was serious to the respondent but he added there were children on site all the time.

### **Determination:**

The Tribunal carefully considered the evidence adduced at the hearing. The facts of the case were not in dispute between the parties with the exception of the evidence given by the supervisor and the claimant concerning whether or not the claimant was instructed by the supervisor to remove his child from the recycling centre's site.

The Tribunal finds that the claimant made a serious error of judgement on the 29<sup>th</sup> December 2007 by bringing his child to the recycling centre's site. However, the Tribunal does not consider the claimant's error of judgement to constitute an action of gross misconduct. The claimant was unaware that by bringing his child to the site, it could lead to his dismissal. The Tribunal finds

that the claimant's error of judgment did not warrant the ultimate and irreversible sanction of dismissal. The claimant had long service with the respondent and he provided the respondent with mitigating circumstances as to why he had brought his child on site on the 29<sup>th</sup> December 2007. The claimant freely admitted to the allegations against him, however, the Tribunal is satisfied that on the occasion in question the claimant had made efforts to make alternative arrangements for the care of his child.

The Tribunal awards the claimant compensation in the sum of €15,000.00 under the Unfair Dismissals Acts, 1977 to 2007. In making this award the Tribunal noted the claimant's evidence regarding his loss and what efforts he had made to mitigate his loss.

The Tribunal awards the claimant the sum of €5,377.36 (being the equivalent of eight weeks' gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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