

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:

CASE NO.

EMPLOYEE

- **claimant**

MN526/2009

UD509/2009

against

EMPLOYER

- **respondent**

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Mr J. Hennessy  
Mr F. Dorgan

heard this claim at Waterford on 23rd February 2010

Representation:

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Claimant :

Ms Aoife Budd B.L., instructed by Ms Mary T Ronayne, Solicitor,  
The Brewery, Shandon, Dungarvan, Co Waterford

Respondent :

Mr Patrick O'Riordan, Healy Crowley & Co., Solicitors,  
9 O'Rahilly Row, Fermoy, Co. Cork

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

**Claimant's case:**

The claimant in her evidence told the Tribunal that she is a Montessori teacher and has a Diploma in Special Needs. Her experience in Montessori was outlined to the Tribunal and she commenced working with the respondent in November 2006 as Crèche Supervisor. The children ranged in age from five months to three years. There were three others working with her in addition to the

manager. The claimant was responsible for the day-to-day running of the crèche and this included rosters in addition to being hands on in looking after the children. The crèche was open from 8am to 6pm but there was a shift in operation and the staff took turns to open in the mornings.

There was an incident in October 2007 with a child, K, where the parent stated that the claimant mishandled the child when she took him to the sink to wash paint off his hands. It would not be unusual to pick up a child quickly and bring to the sink. The claimant was issued with a verbal warning which was to remain on her file for three months. The Manager and the members of the committee decided the outcome. The claimant explained to the Manager what had happened and she rang the mother of the child. At the time of the incident there were a group of mothers doing a course and one of those mothers made the complaint. Another mother GO'C claimed that the claimant shouted at her child in July 2008. When the mother came in to collect her child E, who was 18 months old at the time, the claimant was changing her nappy and was saying to the child to calm down. GO'C made a complaint a week later. The claimant was suspended with pay for a week. Counsel for the claimant stated that confirmation was given by letter dated 9<sup>th</sup> July 2008 and a written warning would remain on her file for 12 months. The claimant had no recollection of having seen this letter. When the claimant returned to work she was asked to meet with the Manager and members of the committee. The respondent told the claimant they had investigated the matter and the claimant told them what had happened.

On 3<sup>rd</sup> September 2008 the claimant was 20/25 minutes late getting in to work. One of her colleagues, M asked her if she was wrecked, the claimant was in the kitchen that day. The next day, Thursday, 4<sup>th</sup> September, the Manager called the claimant to the office and she was told that the three girls complained about her the previous day. The claimant was not shown or told what the complaints were. The claimant said she would need to hear the complaints. As far as the claimant was concerned she was getting on ok. That day when the crèche closed at 6pm the claimant met with the Manager and the three girls. M commented about the play dough and that the claimant made her feel she could not do her job right. As far as the claimant was concerned, she was trying to help her. M said she felt the claimant looked down on her and E said the children were afraid of the claimant. The claimant was not told what the complaints were in advance of the meeting. The claimant asked could she be given a couple of weeks to resolve matters. The Manager would not show her the complaints. The three girls left the meeting before the claimant and she was in total shock. The Manager said she was calling an emergency board meeting and that it was not looking good. On Friday 5<sup>th</sup> September 2008 the claimant went in to work and she told the girls she possibly would not be in on Monday. The claimant gave the keys of the crèche to the Manager. After the meeting the Manager rang the claimant and told her it was not good news but was giving her the opportunity to resign rather than be dismissed as it would be easier for her to get another job. The claimant wrote the letter of resignation as requested and left it in the letterbox at the crèche.

On Monday the following week the claimant asked the Manager for a reference. She also collected all her books at the crèche and she again asked the Manager if she could see the complaints. On the Thursday of that week the Manager rang her and said that one of the girls had mentioned that the claimant had taken books belonging to the crèche. A week later the claimant's mother suggested that she should withdraw her resignation as she was forced into it. As far as the claimant was aware she told the Manager she was withdrawing her resignation and she confirmed her withdrawal by letter dated 15<sup>th</sup> September 2008. The respondent would not allow the claimant to withdraw her resignation and this was confirmed by letter dated 2<sup>nd</sup> October 2008. Further correspondence was opened to the Tribunal including letter dated 19<sup>th</sup> November 2008 wherein the claimant requested again written details of the complaints. The claimant said she was in a state

of shock and felt underpressure to resign. She could not go back and work for the respondent. The claimant then outlined her efforts to obtain alternative employment.

In cross-examination the claimant accepted she was late getting to work the odd Monday but was not constantly late. She also accepted she was hung over but was not drunk going in to work. She agreed that she picked up the child and brought him to the sink but she denied she picked him up with one hand. She denied that she was rude on the phone to a parent and was not bossy.

In answer to questions from Tribunal members witness stated she was not offered a witness at the meeting of 4<sup>th</sup> September 2008. On Wednesday, 3<sup>rd</sup> September nobody told the claimant she was hung-over and to go home.

### **Respondent's case:**

The first witness to give evidence on behalf of the respondent was M who was a child-care assistant and was working in the crèche on 3<sup>rd</sup> September 2008. The claimant was her supervisor. She was in the toddlers' room and was looking after seven/eight children on her own. She worked an eight hour day and the claimant did the rosters. They all did different shifts which were either 9am to 6pm or 8.30am to 5.30pm. MMcG, her colleague was also there that day. The claimant was twenty minutes late coming in to work that morning. At 11.40am they have dinner in the crèche and whoever is in the kitchen would make the dinner. On the Monday the shopping is done for the week. The claimant's eyes were red but she did not say anything to the claimant as she felt intimidated by her. There was also an incident with play dough and the claimant was involved. The claimant was very unpleasant in appearance and would force-feed the children the dinners. Witness spoke to MMcG and she said she felt intimidated. On the Wednesday she and her colleagues went to the Manager, and told her how they felt in relation to the claimant. This was the first time they had made these complaints. They had all kept quiet not knowing that the others felt the same. They told the Manager about the claimant coming in late with red eyes and looking tired. On Thursday the claimant was also late coming in to work and the claimant heard that witness and her colleagues had made complaints and wondered why she had not been told. The claimant said she wanted a meeting with witness and her colleagues and they told her of the complaints.

In cross-examination witness stated that after the meeting with the manager she asked them to write out the complaints. It was hard to work with the claimant. Witness was late getting to work on one occasion. She has never been disciplined or had complaints made against her.

In answer to questions from Tribunal members witness stated that on the Wednesday she and her colleagues decided to make the complaints together. In relation to complaints from parents she did not meet the parents in question.

The Tribunal also heard evidence from MMcG. She worked as a childcare assistant and the claimant was her supervisor. The manager of the crèche was her mother. She opened the crèche at 7.45am. On 3<sup>rd</sup> September 2008 the claimant was not with it and did not want to help. Her eyes were red and she was all over the place. Witness felt intimidated by the claimant and it was hard going in to work. When witness started working in the crèche if she was doing the cooking she got the feeling that she was annoying the claimant. In the beginning she felt that the claimant did not like her and she picked on witness. She kept everything to herself until 3<sup>rd</sup> September when her colleagues said they felt intimidated by the claimant. She had not spoken to her mother about the claimant before this. The claimant was rude to parents, some she liked and she treated some

children differently. The odd time, once or twice per month the claimant would be late on a Monday morning and she would send a text message to witness on a Sunday night asking would she open up the crèche for her. She found it hard to work with the claimant. On the Thursday it was very tense as the claimant did not know that witness and her colleagues had made the complaints. The claimant wanted to know what the complaints were about and witness stated that she made her feel down and intimidated. Witness felt it easier making the complaints with her colleagues as she felt the claimant would make things worse for her if she lodged the complaints on her own. At the meeting each person was given an opportunity to speak including the claimant. She felt the claimant had sufficient opportunity to defend herself and she attempted to deny the complaints

In cross-examination witness stated that the claimant came in to work on 3<sup>rd</sup> September 2008 with a smell of drink from her breath. It was not put to the claimant at the meeting that there was an allegation of being drunk or being under the influence of an illegal substance. The claimant helped her a few nights after work.

In answer to questions from Tribunal members witness stated that she did not complain prior to this as it would be said that she only did so because her mother was the manager.

The next witness to give evidence was E who is also a child care assistant and the claimant was her supervisor. On 3<sup>rd</sup> September 2008 witness was in the baby room. She said the claimant's eyes appeared red and glassy. At 11.45am she went to the shop and the dinners were meant to be ready at that time. The claimant came in to her once that day and witness had to look after five babies on her own and got no help. The claimant was eating a lot that day, cooking chocolate and rice krispies and she stayed in the kitchen for most of the day. In her statement she said that the claimant looked awful and was on something more than drink. She also mixed up the names of two children. She spoke to her two colleagues and they decided they would meet with the Manager and tell her everything that had been happening. They wrote out statements and when the claimant found out they had complained her the atmosphere was very tense. They told the Manager how they felt about the claimant and witness verified what the previous witnesses had stated. She wrote her statement at lunchtime, on her own. They were told to write the statements individually. She worked with the claimant for eighteen months. She hated coming in to work, had a sick feeling each morning and wanted to leave. Neither she nor her colleagues said anything to the claimant prior to this. Parents did not like the claimant's manner and the children were afraid of her. The claimant did not interact with the children.

The Tribunal then heard evidence from the Manager of the childcare facility which opened in 2006. She hired the claimant as a childcare supervisor. Witness is also a committee member. There are three full time and two part time members. She mentioned an incident where a parent brought her child to be minded and the claimant gave her a hostile reception. The claimant also pulled the child when she would not put on the bib. Witness however did not see this incident. Witness received the complaint regarding the claimant and when she spoke with her the claimant agreed it was not the correct thing to do. The claimant received a verbal warning and said she was sorry. In July 2008 the claimant was suspended with pay for a week to allow the Board to investigate an incident where it had been alleged by a mother of one of the children at the crèche that she overheard the claimant shouting at her daughter in a loud voice. The claimant was told that a written warning would remain on her file for twelve months.

On the weekend prior to Wednesday 3<sup>rd</sup> September 2008 the claimant had been at the Electric Picnic concert. She was twenty-five minutes late for work on the 3<sup>rd</sup> September and there was a

smell of drink. This behaviour was not good enough and she was not in a condition to drive home. Witness told the claimant she looked terrible and her response was that she was fine, that she had overslept. She should not be at work and it was irresponsible. This was very serious and would have to go before the board. The claimant finished work at 4.30pm and witness was finishing at 6pm. Three of the girls came to her and made complaints about the claimant and she asked them to put the complaints in writing. The next day, Thursday, she told two members of the board. The claimant was late for work again that day. Witness met the claimant and said to her she was late but the claimant just shrugged her shoulders. She told the claimant her behaviour was out of hand and she also told her that the girls had filed complaints the previous night. She suggested that the claimant should do a business course with W.I.T. as he did not think she was suited to childcare work. When she told her what the girls had said she was shocked. She told the claimant the girls were frightened coming to work and that the children would take up the vibes. Witness felt that if the claimant was still working with the respondent the business would not be open today. A meeting was held that evening with the claimant and the girls. The girls left the meeting and the claimant stayed on to talk with witness. The claimant was shocked when she heard the complaints and she asked would she be given a second chance. The claimant admitted it was totally irresponsible. On Friday 5<sup>th</sup> September witness met with the claimant and that night the board of directors including witness had a meeting. The board of directors decided she could resign as they did not want to dismiss her. The claimant was told the board had given her the opportunity to resign and she tendered her resignation by letter dated 6<sup>th</sup> September 2008. The following week the claimant sought to withdraw her resignation by telephone call on Friday 12<sup>th</sup> September 2008. This was followed by a letter from the claimant dated 15<sup>th</sup> September 2008, withdrawing her resignation. Witness discussed with the board the claimant's request to withdraw her resignation and they decided this was not acceptable. By letter dated 2<sup>nd</sup> October 2008 it was confirmed to the claimant that she could not withdraw her resignation.

In cross-examination witness stated that the claimant was not offered a representative in relation to the incident in July 2008 where an investigation took place and the claimant was suspended for seven days. At the meeting on Thursday 4<sup>th</sup> September 2008 the claimant was not offered to have a representative present as she did not ask to have one.

Evidence was also given to the Tribunal by a mother whose daughter was the subject of an incident in July 2008. When she went to collect her daughter from the crèche she could hear that a child was very upset and heard shouting. It transpired that the claimant was shouting at her daughter. Witness wanted to get her child out of the crèche as soon as possible but was also concerned for the other children. She spoke with the Manager and told her she was taking her child out of the crèche. The Manager told her that the claimant was suspended with pay pending investigation. Witness brought her child back to the crèche in September 2009 and she has been getting on very well there since then.

The last witness was the company secretary and director. He is not paid and the only people who are paid are the manager, the childcare staff and the caretaker. There is no other childcare facility in the town. The manager has no decision in the hiring and firing of staff. This is the responsibility of the board of directors. Witness and the chairman had previous knowledge from the Manager in relation to Wednesday 3<sup>rd</sup> September 2008. The manager told him there was an incident with the supervisor where she came in late and there was a smell of drink from her. The soonest the board could meet was on the Friday night. The manager read the written complaints to the board and they viewed it as being extremely serious and it would be difficult for the claimant to continue working in the crèche. It was decided she should submit her resignation and if she had not done so there would be a meeting on the Monday and it was clear what course of action would then follow. In

the area of childcare the crèche has to operate to the highest standard possible. The board took a serious view and this would be considered to be gross misconduct. The claimant was given the opportunity to resign so that firing would not appear on her CV.

In cross-examination witness was asked in the interest of fair procedures if an employee should be told of the allegation and given the opportunity to respond, his response was that it depended on the seriousness and if it was requested.

In answer to questions from Tribunal members witness confirmed that the written complaints were given to the board.

**Determination:**

Having considered the evidence very carefully the Tribunal accepts the evidence as to the behaviour of the claimant. The Tribunal finds however that the situation was not dealt with in a fully appropriate manner. The Tribunal also finds that the claimant contributed very substantially to the situation. The Tribunal accordingly awards the claimant the sum of €2,500 under the Unfair Dismissals Acts, 1977 to 2007. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

