EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE *-Appellant*
UD2470/2009

against
EMPLOYER *-Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. O. Madden B.L.

Members: Mr. C. Lucey
Mr. C. Ryan

heard this claim at Dublin on 23rd February 2011 and 5th July 2011 and 6th July 2011

Representation:

Claimant: Ms. Cathy Maguire B.L. instructed by Ms. Clare Feddis,
P J Walsh & Company, Solicitors, 12 Upper Fitzwilliam Street, Dublin 2

Respondent: Mr. Michael McNamee B.L. instructed by Das Group, Solicitors,
12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

Background:

The respondent operates a crèche and Montessori school. The claimant was employed by the respondent on a temporary basis in 2007. In time a full-time position became available, the claimant applied for this position and was successful. The claimant gave evidence that she qualified as a Montessori teacher in 2006 but has over 24 years experience working in childcare in various different capacities. She has always had a very good relationship with parents and children alike and she never had a complaint made against her prior to the 28th August 2009, on which date a number of her colleagues made an allegation against her.

Respondent's Case:

Employee G gave evidence that she was the person to report the incident to the supervisor. Employee G stated that she was looking out the door of the toddler room into the garden when she saw one of the children lying on the ground and crying. She observed the claimant walk over towhere the child was and pull him by the arm over to the slide. The claimant shook the child by

thearms and asked why he was crying in what Employee G considered to be an aggressive tone. Employee G went out to the garden and told the claimant there was no need to be so rough with thechild. The claimant looked shocked when she saw Employee G. Employee G told her she was shocked by what she had seen. The claimant said she did not know what Employee G meant. Employee G's written statement was opened to the Tribunal. Employee G confirmed that she waspresent at the disciplinary meeting for the claimant to put questions to her.

During cross-examination Employee G said she had lost trust in the claimant after what she had witnessed and would be unable to work with her again.

Employee M gave evidence that she was the toddler room assistant at the time of 28th August 2009. Employee M's written statement was opened to the Tribunal. She heard a child crying in the garden, looked out the window and observed the child lying on the ground. She subsequently sawthe claimant sitting at the bottom of the slide, holding the child by the arms and shaking him. Employee M confirmed that she was present at the disciplinary meeting for the claimant to put questions to her.

During cross-examination Employee M confirmed that she had a good working relationship with the claimant, however, she did not think that she would be able to work with the claimant again.

Employee K gave evidence that she saw the child lying on the ground and crying. She saw the claimant pull the child by the arm and drag him to the slide. She observed the claimant squeezingthe child's arms and shaking him back and forward. Employee K confirmed that she was present atthe disciplinary meeting for the claimant to put questions to her.

Employee L gave evidence that she is employed as a childcare worker in the after school room. On 28th August 2009 at approximately 3.10pm the claimant came into the room and said to Employee L that she felt awful, as she had just lost her temper outside with a child. The claimant denied saying this at the disciplinary meeting.

During cross-examination it was put to Employee L that what the claimant had in fact said was that she had been reported for being rough and that someone might have it in for her. Employee L confirmed that the claimant had also said that. She added that she had a good working relationship with the claimant and had no need to fabricate lies about what the claimant had said to her.

The respondent gave evidence that she has been the owner and manager of the crèche and Montessori since the time of September 2004. The respondent was not present at the crèche at the time of the alleged incident. However, when she returned at 4pm the supervisor advised her that an incident had been reported. The respondent asked the employees for a written statement of what they had observed and asked them not to converse with each other in relation to the incident.

She spoke with the claimant and informed her that an alleged incident had been reported which was that the claimant had dealt with a child in a rough manner, which was a serious allegation. The claimant asked if she should leave and look for another job and the respondent told her that procedures had to be followed. The claimant returned to the classroom for the remainder of the day and the respondent considered matters.

Sometime later the respondent informed the claimant that she was suspended with pay pending an investigation. The claimant started to collect her personal belongings from the classroom. When the respondent observed this she asked the claimant why she was doing this and the claimant

became upset and said she knew what was going to happen. The respondent assured the claimant she would have an opportunity to state her case.

The respondent had received all of the witness statements by Monday, 31st August 2009. She consulted with a Ms. C who is a tutor of an owner management course and has a background in human resources. The respondent also informed the Health Service Executive, as was correct procedure in line with the preschool regulations and guidelines issued by the relevant Department. An Environmental Health Officer and a Pre-School Officer from the HSE attended the crèche on Tuesday, 1st September 2009 and the respondent outlined the events to them. The officers conducted an inspection of the premises.

The respondent also contacted the child's mother and informed her that an alleged incident had taken place involving her child and a member of staff and that there was an allegation that her son had been handled in a rough fashion. The child's mother understood there was a process to be undergone and asked to be kept informed of developments. The respondent's note of this conversation was opened to the Tribunal.

The respondent wrote letter dated 3rd September 2009 inviting the claimant to attend an investigation meeting relating to the alleged incident. At this meeting on 4th September 2009 the claimant submitted a written statement to the respondent. The claimant's statement and notes of this meeting were opened to the Tribunal.

The respondent stated that the claimant had confirmed the incident had taken place by virtue of her statement. The respondent was satisfied what had happened from the witness reports. During the meeting she asked the claimant if she had shaken the child. The claimant replied that she could not remember, " but if three staff say yes, then I must have. Maybe I did shake him, not aware of doing it but I could have done it." The respondent concluded the meeting by outlining the procedure to the claimant if it was found that her behaviour constituted gross or lesser misconduct, she would be required to attend a disciplinary hearing.

The respondent concluded from the investigation meeting that the matter should progress to the disciplinary process and she wrote letter dated 9th September 2009 to inform the claimant that this meeting would be held on 16th September 2009. The respondent enclosed copies of witness statements from the staff members who had witnessed the alleged incident. The respondent also confirmed the witnesses would be in attendance. A note taker was also present (Ms. C).

The notes of the disciplinary hearing were opened to the Tribunal. The respondent stated that the claimant was provided with a copy of the notes of the investigation meeting. A friend of the claimant's accompanied her to this meeting. The claimant submitted a new statement at this meeting in which she stated that she realised she may have incriminated herself somewhat at the meeting of the 4th September 2009 when she said that if the witnesses had seen her do it then she must have done it. The claimant said that was not the case and that she had never done anything to hurt a child. After the statement was read the claimant put a number of questions to the witnesses.

The respondent said to the claimant that three separate witness statements indicated that there had been inappropriate interaction. She informed the claimant that the child's mother had mentioned a previous incident in the crèche but she assured the claimant that incident was not a consideration in this case. The respondent concluded the meeting by stating that all of the facts would be considered and the result of the disciplinary hearing would be conveyed on 21st September 2009.

Letter dated 21st September 2009 informed the claimant that the respondent had reached a decision to dismiss her on the grounds of gross misconduct. The respondent had made the decision on the balance of probabilities to uphold the allegation against the claimant. The claimant was informed of her right to appeal.

During the course of her evidence to the Tribunal the respondent stated that she felt that the claimant added nothing new at the meetings. The respondent found it difficult for discussions to develop when there was a complete denial from the claimant. The respondent was concerned to do right by the child, her staff and the claimant. The claimant had to be accountable for what had happened but she did not hold her hand up and apologise. There was no opportunity to consider options other than the dismissal of the claimant, as she never took responsibility for her actions. There was one denial against three witness statements. In reaching her decision to dismiss the claimant she did take into account the claimant's employment history. The claimant did not raise any mitigating factors at any stage of the process.

The claimant lodged an appeal of the decision to dismiss her. The respondent engaged external individuals to handle the appeal and she did not have any dialogue or input regarding the decision reached by the appeal officer. A solicitor advised the respondent that as an appeal was an internal process it was not appropriate for the claimant's solicitor to attend. For this reason the claimant's solicitor was not allowed to attend the appeal hearing.

During cross-examination the respondent confirmed that the claimant continued to care for children for some 40 minutes until the end of the class.

It did not occur to the respondent to tell the claimant that the matter had been reported to the HSE. She did not give the claimant an account of the conversation that she had with the child's mother but the claimant could have requested this if she had wanted it.

The respondent confirmed that she asked the claimant to meet for an "off the record" meeting on 7th September 2009, as she wanted to ensure that the claimant realised how serious the situation was. At the meeting the claimant said to her, "they can't prove it." It was put to the respondent that the claimant would deny saying that.

At the meeting they spoke about the claimant's resignation. The respondent honestly believed that the claimant thought she could just deny everything and continue in her role. The respondent stated that if the claimant had admitted to the incident then they could have explored options but regardless of that there had been a total breakdown in trust and she could not have someone work for her who emphatically denied the incident.

MB gave evidence that she has qualifications in the area of human resources. Ms. C and MB have managed a business together for the last ten years.

MB received the documentation from the respondent including notes of the investigation meeting, notes of the disciplinary meeting and witness statements. MB passed all of the documentation to AB, who was charged with hearing the appeal. MB stated that she did not confer with AB regarding her decision but MB was present as a note-taker at the appeal hearing.

The appeal was heard on 30th September 2009 and the claimant arrived accompanied by a solicitor. MB telephoned the respondent in relation to this matter only and was informed that the respondent

had received legal advice that as the appeal was an internal process the claimant's solicitor should not be in attendance. MB informed the claimant and her solicitor of this fact and offered to adjourn the meeting to allow the claimant time to find alternative representation for the meeting. However, the claimant's solicitor said that the claimant did not have anyone else to represent her and would proceed with the meeting on her own. MB accepted that she had not recorded in her notes that an adjournment of the meeting was offered.

During cross-examination it was put to MB that the claimant was given the witness statements but that she had not been provided with a copy of the notes from the investigation and disciplinary meetings. It was put to MB that the claimant's solicitor would deny that an offer of an adjournment was made at the appeal meeting.

Giving evidence AB outlined her background and experience to the Tribunal. MB contacted her to conduct the appeal process. AB considered the documentation and subsequently conducted the appeal hearing on 30th September 2009. AB concurred with MB's recollection that an adjournment of the meeting was offered.

As it was the claimant's appeal it was an opportunity for her to present new information. Notes of the appeal hearing were opened to the Tribunal. AB told the claimant that she had reviewed the documentation. She informed the claimant that it was her opportunity to speak to an independent person and outline any new information she felt was relevant. AB waited for the claimant to advance on some of the comments she had previously made such as stating that she thought that someone might "have it in" for her but the claimant did not put any such information forward at the appeal nor did she outline any mitigating circumstances.

AB was very aware of the consequences of either decision she might make. She was conscious of the impact on the claimant but AB was also conscious that the claimant had not said in what way the decision to dismiss her was incorrect or why she should not have been dismissed. AB read all four of the claimant's responses and could see that the claimant's denial had hardened until she outright denied the incident. As there had been no new information presented to cause the matter to be re-investigated and given the huge impact of the witness statements, AB upheld the decision to dismiss the claimant.

During cross-examination it was put to AB that the claimant was not provided with a copy of the notes from the investigation and disciplinary meetings. This surprised AB, as she thought the claimant had been given a copy of the documentation prior to the appeal.

AB confirmed that she accepted the witness statements at face value. She read each witness statement to the claimant at the appeal and the claimant did not raise any issues about the statements. AB had read the statements to the claimant to try and draw out from the claimant what her defence was.

Claimant's Case:

OD gave evidence that she is a Montessori teacher and has managed her own Montessori school for the past 34 years. She has also held the position of a voluntary child protection officer for some time. OD stated that if the event in question had happened within her Montessori school she would have approached it differently. OD stated that she would have discussed the matter at length with the accused person and would not just accept the witness statements at face value. If matters were not resolved at that stage, then she would progress matters. OD stated that she did not think she

would have "gone so far so quickly" and she felt that there had been a huge overreaction. OD thought that the respondent could have approached matters in a calmer manner. OD said that if she were dealing with a situation such as this and the person in question changed their story, she would find it very unsettling and disconcerting.

During cross-examination OD confirmed that she did not have any experience of dealing with an incident such as what was alleged against the claimant. OD has not had cause to conduct a disciplinary process in her own business, and has not had cause to dismiss an employee. However, she tutors and mentors individuals in how to manage staffing issues. OD stated that if she sees a situation arising she tends to deal with it sooner rather than later and she has an open relationship with the teachers, parents and children.

If she were conducting a process and a person changed their statement, OD stated that the process would then have to be changed. She did not agree that the claimant's comments amounted to partial admissions.

Giving evidence the claimant stated that on the afternoon of 28th August 2009 she had brought the children out to the garden as normal. The claimant observed one of the children crying and went over to him. She did not know what had happened to him and she crouched down to try and find out what was wrong. She began to lose her balance so she walked over to sit at the end of the slide. The child was upset and the claimant put her hands on both sides of his shoulders and under his chin to get him to look at her as she was trying to get him to make eye contact. The claimant asked the child what had happened and why was he crying. Employee G came over and told the claimant to stop shaking the child. The claimant was shocked by what Employee G had said but she was still trying to find out what had happened the child. The child then told her that he had bumped into another child. Only later did the claimant see that there was a bump on his cheek and she applied ice to it at that time. When she had walked to the slide she had held the child by the hand but she did not pull or drag him and she did not shake or squeeze his arms. She did not tell Employee L that she had lost her temper with a child when she went inside to the classroom.

The claimant agreed that the notes of the meeting with the respondent were broadly accurate. She was not "thinking straight" at the time due to the serious allegation made against her. The claimant had said to the respondent that maybe she should look for another job, as she was shocked by the allegation made against her and she was assuming if the allegation was made that she would be asked to leave her job. She had started to pack her personal belongings for the same reasons.

The claimant did not have a representative at the investigation meeting as she only received the letter about the meeting the day before. She did not know why she had not availed of a postponement of the meeting but said that she was stressed by the allegation made against her.

The respondent contacted her by telephone on 7th September 2009 to have an "off the record" meeting. When they met the respondent told the claimant that the allegation against her was very serious and she asked the claimant if she wanted to resign or continue in the disciplinary process. They spoke about the fact that three staff members had made witness statements to the effect that they had seen the claimant shake the child. The respondent told the claimant that if she decided to resign she would be paid a month's salary. The claimant did not say to the respondent "they can't prove it." The claimant asked to see the witness statements but the respondent told her that she could not see these statements unless she proceeded to the disciplinary stage of the process.

On the 9th September 2009 the claimant confirmed to the respondent that she wished to progress to

the disciplinary stage of the process. The claimant confirmed that a friend accompanied her to the disciplinary meeting and subsequently she received the letter of dismissal from the respondent.

At the investigation meeting the claimant had said that she could not remember shaking the child " but if three staff say yes, then I must have. Maybe I did shake him, not aware of doing it but I could have done it." The claimant referred to the notes of the disciplinary meeting when she stated, " I realise also that I may have incriminated myself somewhat at the meeting on Friday 4 th September 2009 when I said that if the witnesses saw me do it then I must have done it. This is not the case." In relation to this comment the claimant said that in her 24 years experience of working in childcare there had never before been an allegation made against her. She was stressed by theallegation and it affected her terribly. The claimant was conscious that there was a possibility shecould lose her job. There were three witnesses who said she had shaken the child but the claimantknew that she had not done it.

The claimant did not recall an adjournment of the appeal hearing being offered. The claimant gave evidence of loss.

During cross-examination it was put her that she had a different approach to the situation in each of the exchanges with the respondent. The claimant did not agree.

It was put to the claimant that she had said at one of meetings that if she was honest with herself it had been a "real learning experience". The claimant said what she meant was that three of her colleagues had made statements against her and the learning experience she referred to was that having her hands on a child's shoulders could be misconstrued as shaking the child but she had not shaken him.

It was put to the claimant that she had stated that she "apologised profusely for her alleged actions". The claimant said what she meant by this was that she was sorry for people thinking the worst of what she had allegedly done but she had not done anything. It was put to the claimant that for her to make such statements and then change to denial had caused difficulty for the respondent. The claimant accepted this.

The claimant confirmed that she had been asked to read and sign the notes of the investigation meeting and therefore she was aware of what was contained in the notes but she did not recall being provided with a copy of these notes at the outset of the disciplinary meeting.

At the off the record meeting the claimant assumed that the respondent had already made up her mind and was hoping that the claimant would resign.

At the appeal hearing the claimant raised the issue that although she had not been rough with the child she believed that the punishment was too severe for an alleged one-time action.

In reply to questions from the Tribunal, the claimant confirmed that she had a good working relationship with her colleagues who had made witness statements and she believed they might easily have misinterpreted the situation, which was that the child was shaking, and the claimant had placed her hand under his chin.

The claimant's solicitor gave evidence that the claimant contacted her prior to the appeal meeting. The solicitor's notes of arriving at the appeal meeting and being precluded from the appeal were

opened to the Tribunal. She refuted that an adjournment of the meeting was offered.

Subsequently, the solicitor requested copies of notes of the investigation and disciplinary meetings, as the claimant had not received them.

The solicitor required a child minder for three days per week for a period of seven months. She employed the claimant in this role from the time of January 2010.

During cross-examination it was put to the witness that it had not been raised at the appeal that the claimant had not received copies of the notes of the investigation and disciplinary meetings. The witness stated that it was up to the appeals officer to ensure this had been done.

Determination:

The Tribunal finds, by majority with Mr Lucey dissenting, that the dismissal was unfair.

Mr Lucey in his dissenting opinion found that, as the incident involved gross misconduct, as the investigation and appeals procedure as set out in the "policies and procedures" manual were implemented, and as the employee did not offer any explanation or put forward any mitigating circumstances, the employer was left with no choice but to dismiss the employee. While a dismissal undoubtedly could have serious consequences for the employee, this must be balanced against the potential implications of a lesser sanction for the employer's business and the jobs of the other employees in this highly regulated sector. Mr. Lucey's view is that the dismissal was not unfair.

On the balance of probability and given the impact of the outcome of one incident on the career of the employee, by majority the Tribunal is of the view that the dismissal was unfair.

Following detailed examination of all factors the Tribunal by majority award the claimant the sum of €3,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)