EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.
UD2580/2009
MN2403/2009

WT1094/2009 EMPLOYEE ***-claimant***

against

EMPLOYER ***-respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)
Chairman: Mr D. Hayes BL
Members: Mr J. Goulding
Ms M. Maher

heard this claim at Dublin on 21st March 2011

Representation:
Claimant: Ms Fiona Pekaar BL instructed by Mr. Andrew Freeman Solicitor
Sean Costello & Company, Solicitors, Haliday House, 32 Arran Quay, Dublin 7

Respondent: Mr. Nevan Powell BL instructed by Ms Caroline Fitzgibbon Solicitor,
Fitzgibbon O'Riordan, Solicitors, 49 O'Connell Street, Limerick

Determination:
The respondent is the owner of a number of childcare centres. In the summer of 2009 it was experiencing some cash flow difficulties. This resulted in salaries being paid late in two consecutive months. In addition, a pay-cut of 6% was to be imposed. The combination of these factors caused a degree of disquiet amongst employees. As a result, a number of employees in the respondent's West Dublin branch, the claimant among them, joined a trade union.

In late September 2009, CM, the branch manager, sought assistance from head office to deal with the disquiet. On 29th September 2009, JM, an executive in charge of operations, came out to the branch. The intention was to allow employees air their grievances with head office. The idea was that employees would be taken in on an individual basis to meet both JM and CM. The first employee selected was the claimant's colleague in the baby room, SO. SO indicated that she had been advised by her trade union not to attend such a meeting alone. On being told this, CM telephoned head office and was told that the respondent did not recognise trades unions and that an employee was not entitled to bring someone along to a meeting that was nota disciplinary meeting. Having been so informed SO maintained her refusal. JM

thereupon informed her that a refusal would lead to disciplinary proceedings. The refusal was again maintained and SO was summarily dismissed. The exchanges between SO and CM and SO andJM took place in the presence of the claimant.

Subsequent to SO's dismissal, the managing director, RB, and the HR manager, NG, arrived at the branch. After lunch they sought to recommence the meetings and the claimant was requested to attend a meeting, now with four members of management. The claimant said that she wanted a witness to accompany her to the meeting and had been so advised by her trade union. She was told that the meeting was just an ordinary meeting with management and that she was not entitled to a witness. RB told the claimant that her refusal could have consequences and repeated his request and warning a further three times in the course of the following ten minutes. When the claimant still refused to attend without a witness, she was summarily dismissed. RB accepted that, in retrospect, things had become heated and were becoming "silly". As an aside, it was accepted by RB that a witness would have been allowed had the meeting been for either disciplinary or grievance purposes. It appears that the original purpose of the meeting was to allow employees air their grievances with a member of management from head office. It was RB's view, in retrospect, that they had acted in haste and that it might have been better to have suspended the claimant and tried to resolve the issue other than by dismissal.

The Tribunal is satisfied that the claimant was unfairly dismissed. It is, of course, the case that a refusal to follow a reasonable instruction in the course of employment is an act of insubordination such that it could lead to dismissal. However, any instruction must be reasonable in the circumstances. In this case a tense atmosphere was prevailing and a meeting was proposed with the intention of defusing the tension. The tense atmosphere was substantially heightened by the dismissal of SO. Instead of seeking to defuse the situation, the respondent appears to have stuck on a point of principle and inflamed it. The Tribunal is satisfied, in the circumstances of this case, that neither the instruction given nor the decision to dismiss summarily was reasonable. Further, not only were the procedures used not fair, there did not appear to any procedure leading to the dismissal. This was implicitly accepted by the respondent with the acknowledgement that it had acted in haste.

However, in order to succeed in a claim under the Unfair Dismissals Acts, 1977 to 2001, an employee is required to have at least one year's continuous service. The claimant was employed by the respondent on 18th January 2009 and was dismissed on 29th September 2009. She seeks to rely on s.6 of the Act and claims that her dismissal arose from her membership of atrade union. The onus of proving this claim rests with the claimant.

Whatever the initial intention of the proposed series of meetings, it is clear that their nature had transformed after the summary dismissal of SO. Having watched the dismissal of her colleague the claimant was now wary of accepting assurances that a meeting with her managing director, HR manager, operations executive and branch manager was nothing more than a run-of-the-mill event. It must have been clear to all involved that the interaction with the claimant had, after

the dismissal of SO, the potential to develop into a disciplinary process. Having seen her colleague dismissed the claimant was concerned to follow the advice of her trade union and request the presence of a witness.

The respondent insisted that the claimant was not dismissed for trade union membership and that, while they did not encourage it, they had no difficulty with it. However, against this assertion must be placed the directive issued to all staff on the evening of 29th September 2009 which made it clear that trades unions were not recognised by the respondent and that neither collective bargaining nor other trade union activities would be allowed. It seems at best to be remarkably coincidental.

By a majority, Mr Goulding dissenting, the Tribunal is satisfied that the claimant was dismissed after having sought to rely on advice given to her by her trade union. It does not appear to be the case that the claimant was dismissed merely as consequence of the fact of her membership. She was, however, dismissed as a consequence of having relied on that membership. It seems to the Tribunal that a necessary incident of membership of a trade union is the use of that membership for, amongst other things, advice as to how to deal with contentious employment situations. The majority is satisfied that the claimant was dismissed principally because she sought to rely on the advice of her trade union and that she was therefore dismissed as a result of her trade union membership. This is not to say that an employee can refuse to act on a reasonable instruction of an employer simply on the basis that he has received advice to the contrary from his trade union, particularly where the advice of the trade union might be unreasonable. This is a case, as is noted above, where the requirement of the employer was not reasonable.

Subsequent to her dismissal, the claimant secured alternative full-time employment, at a higher rate of pay, in September 2010. The Tribunal was given evidence of a number of job applications in June 2010 but not much other evidence in respect of attempts to secure alternative employment and thereby mitigate her loss.

The Tribunal is satisfied that the claimant was unfairly dismissed and that compensation is the appropriate remedy. Pursuant to her claim under the Unfair Dismissals Acts, 1977 to 2001 the claimant is awarded compensation of €7,500.00 as being just and equitable in the circumstances. The claims pursuant to the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and the Organisation of Working Time Act, 1997 were withdrawn.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)