

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD995/2011, RP1344/2011
MN1121/2011, WT402/2011

against

EMPLOYER

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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 G. Hanlon

Members: Mr P. Pierce
Mr F. Barry

heard this claim at Dublin on 9th October 2012

Representation:

Claimant : Frances E Barron & Co, Solicitors, Killeland House,
Ashbourne Court, Ashbourne, Co Meath

Respondent : Mr Tiernan Lowey B L instructed by
Vivienne Matthews O'Neill, DAS Group, Europa House, Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case

The respondent has been operating a crèche and Montessori school for over twenty years. It is a registered charity and is run by a board of directors. It has in excess of twenty staff and is subject to the Child Care Act. That Act together with other guidelines determines the working ratio between staff and children both during formal and extra curricula activities. Those activities include games on a pitch available to and adjacent to the school. The respondent employed the claimant as a childcare assistant in May 2004 and both parties signed a contract of employment the following month. Among the clauses and as part of that contract were items on breaks and a detailed disciplinary procedure. The respondent also had in place a document on general good practice and procedures. Contained within its six listed guidelines was that employees were not to leave their group/room unless necessary such as taking a designated break.

The disciplinary procedure which applied to all employees, including the claimant, contained the following: *The respondent reserves the right to depart from the precise requirements of the procedure outlined below where it is deemed reasonable to do so and where the resulting treatment is deemed to be fair.* Gross misconduct, which carried the likely sanction of summary dismissal, was referred as behaviour where it is alleged that an employee had deliberately broken service rules and regulations or standards of behaviour. The disciplinary procedure also gave employees certain rights at each stage of that process. These included the rights to representation at disciplinary meetings and to be informed and encouraged to use their right of appeal.

An assistant manager outlined an incident and its aftermath that took place in late November 2010. She told the acting manager of it but was not involved in the dismissal process.

Following a reported incident and complaint involving children while under the care of the crèche during a field activity on 23 November 2010 the respondent's acting manager and director invited three named employees including the claimant to a meeting at lunchtime two days later. This manager told the Tribunal that she did not inform those employees that this meeting was part of her investigation into this confirmed incident. No representation was offered to those employees nor were they informed that disciplinary action including dismissal was a factor in this case. However, the acting manager did tell that this was a very serious incident. Those three employees were on duty on the pitch where the incident occurred. According to the witness they carried collectively responsible for their individual and group behaviour while there. She opted to treat this scenario as a group issue as distinct from investigating their individual roles.

During the course of that meeting the claimant said she had no knowledge of it as she did not see the reported action against a particular child. The claimant added that she could have been on her break and that since she knew nothing of the incident she had nothing more to say about it. Following the conclusion of that meeting one of the three employees remained and then offered to resign as she felt responsible for the assault on the child. Following consultation with other directors that day the witness decided to accept that resignation. Those directors also decided to dismiss the other two employees unless they had something more to say about the incident.

A further meeting was convened later that afternoon and the witness again asked the two remaining employees whether they had nothing further to add to their earlier comments. That being the case the claimant along with other employee were informed they were now dismissed. The witness justified that decision on the grounds of gross misconduct. The acting manager was satisfied that she knew all the facts of this case and felt she had no choice but to impose that sanction. All those employees were of equal status and while the claimant was not answerable for the conduct of the others she was held jointly and equally responsible for it. Besides she was irresponsible in having nothing to say about this incident.

The witness accepted she did not follow the respondent's disciplinary procedure and cited the company's choice to depart from normal procedures. The claimant was not told she was facing those procedures and no right of appeal was offered to her.

Claimant's Case

This evidence consisted entirely of giving mitigation of loss.

Determination

Following the respondent's evidence the Tribunal concluded that it did not satisfy paragraph 6 (as amended) of the Unfair Dismissals Acts. The respondent as accepted did not follow its own procedures and its defence in not adhering to those procedures is not acceptable to the Tribunal. Indeed it is contrary to natural justice and its inclusion in a contract of employment is unreasonable if not illegal.

There was no direct evidence that the claimant contributed to her own dismissal. The sanction imposed on her was unnecessary putative and did not have regard to all the circumstances of this case. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the claimant is awarded €23,000.00 as compensation under those Acts.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is allowed and the appellant is awarded €1512.00 as compensation under those Acts that amount being the equivalent of four weeks' pay in lieu of notice.

The appeal under the Organisation of Working Time Act, 1997 was withdrawn during this hearing.

The appeal under the Redundancy Payments Acts, 1967 to 2007 must fall as the claimant has been unfairly dismissed. A dismissal by way of redundancy is a fair dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)