EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE (*claimant)* UD312/2011
MN304/2011

Against

EMPLOYER *(respondent*)

under

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: Ms J. McGovern B.L.

Members: Mr D. Peakin
Mr. P. Woods

heard this claim at Dublin on 12th June 2012

Representation:

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Claimant(s) : Siptu, Liberty Hall, Dublin 1

Respondent(s) : Mr. Tim O'Connell, Ibec, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case

The respondent operates a security company mainly in the Dublin area providing security to approximately 600/700 sites. The claimant was employed as a Security Officer and commenced his employment in September 2002. He received a dismissal notice on the 29th November 2010 following an incident in The Square Shopping Centre, Tallaght on the 25th November 2010.

The Customer Services Manager (CSM) gave evidence on behalf of the respondent and stated that on the evening of 25th November 2010 he received a call from the Operations Manager in The Square, Tallaght requesting his attendance at this site. When he arrived he was informed that at approximately 7.30pm the claimant had been chasing a number of young teenagers out of the centre when he spotted a child hiding, thought he was one of the teenagers and grabbed him by the elbow. The child's family arrived and were aggressive towards the claimant. When the child's father arrived the CSM told the claimant to stay in the office. The CSM then apologised to the parents for the mistake on the part of the security guard.

In cross-examination, the CSM stated he did not witness the incident. He only briefly spoke to the claimant about the incident before he met the family but the claimant was asked to give a written statement with his version of the incident which he did the following day, the 26th November 2010. On the evening of the 25th November the CSM had come to the conclusion that the claimant had used 'excessive force' contrary to Section 8.3 of the training manual. The witness confirmed that the manual did not state "no force" to be used.

In reply to the Tribunal the CSM said he spoke to the claimant in the security room. The claimant said that he had grabbed the child because he panicked. The CSM apologised to the parents on behalf of the respondent. The CSM emailed a narrative of events to his superior that evening and a letter issued on 25th November 2010 inviting the claimant to a meeting on the 26 th November 2010 to discuss the incident.

The Assistant HR Manager, EF gave evidence. She stated that she attended what she termed 'an investigation meeting' at 11.30am on 26th November, 2010 chaired by PB (who was on annual leave on the day of hearing). The claimant attended and was accompanied by a union representative at his request. EF indicated that the documents available at this meeting included the aforementioned email from the CSM with his version of events, a written statement from the claimant and a third statement that was not put in evidence. She further indicated that she attended this meeting as a note taker only and PB was the decision maker. The notes of this meeting were opened to the Tribunal.

It seems that there was CCTV footage available of the incident but the only person to view same was PB. The claimant was not afforded an opportunity to view the footage however it was not used in the 'decision' as the claimant admitted taking the child by the elbow.

The conclusion of the investigation meeting was that the claimants actions on the evening of the 25th November 2010 were inappropriate both because he used 'excessive force' with the child and because his subsequent response to the child's family was not adequate in that he did notgive his name when asked and he did not apologise. This decision was communicated to theclaimant verbally and there is no written decision in this regard save for the notes of the meeting.

Some 15-20 minutes after the conclusion of the 'investigation meeting' EF then proceeded tohold a 'disciplinary meeting' on the 26th November 2010 wherein she was the decision maker.EF stated that she asked the claimant questions in relation to the incident and stated the arrestprocedures were not followed. The witness felt that the claimant should have exercised ahigher standard of professionalism as he had attended 3-4 retail training courses with arresttraining during the course of his employment. While EF referred to various training courses thatthe claimant had attended there were no details of these courses or their substantive contentbefore the Tribunal.

The witness indicated that at the disciplinary meeting the claimant said he took the child by the elbow and that he had panicked. He declined to give the child's grandmother his name at the time of the incident. EF decided that the claimant's actions amounted to gross misconduct and decided to dismiss the claimant as he could have taken a different course of action and wastrained to do so. EF was aware of the incident by 8am on the morning of the 26th November2010. The incident was at 7pm the night before and there had been no objection to the meetingbeing called for the 26th November. She was satisfied that a full investigation had

been carriedout and denied that the claimant did not have time to answer the charges. According to EF thelevel of force used was inappropriate. The claimant did not engage with the child or ask him toleave. When asked if she had spoken to any of the child's family she replied that she had notbut felt there was no need as the claimant had admitted to grabbing the child. In her opinion theonly course of action was to terminate his employment. No alternative sanction was considered.

It must be noted that the letter that issued to the claimant on the 25th November 2010 invited him to a meeting to discuss the incident in question. When asked by the Tribunal if the claimant was warned that the outcome of the 'investigation meeting' or the 'disciplinary meeting' could amount to a decision of gross misconduct and subsequent dismissal the witness stated she was not the author of the letter in question.

In reply to the Tribunal, EF confirmed that there was a lapse of 15-20 minutes between the 'investigation meeting' and the 'disciplinary meeting' and she was present at both. The witness was the note taker at the investigation meeting and she chaired the disciplinary meeting. At the time, senior management were not involved in the decision as they carried out appeals. The witness could not remember if she used the wording "gross misconduct" at the investigation meeting.

Giving evidence, B O'M stated he is the HR Director with the respondent company. He indicated that he conducted an appeal of the decision to dismiss on the 16th December 2010attended by the claimant and his union representative. The documentation available to himincluded the investigation notes from the 25th November 2010, the claimant's statement, the statement of the CSM and a statement of a third person who did not give evidence at the withinhearing. He did not do any preparation work for the appeal meeting as he prefers to come to anappeal with no previous knowledge of the case. At the appeal hearing the claimant admitted theincident and said "I put my hands up". The claimant apologised for not apologising to the child's family after the incident. He indicated that at the time he wanted the heat to go out of thesituation before apologising. The claimant also referred to his previous eight year unblemishedrecord and felt this should be taken into consideration.

B O'M on the other hand felt that the incident should not have occurred as it did. The claimant was very well trained and worked the majority of his time in retail security. The claimant should have avoided the use of force at all times. The 10 year old child who was hiding was not a threat to the claimant. The claimant did not say he asked the child to leave. In B O'M's opinion the repercussions of the incident also had to be taken into consideration including the damage to the respondent's reputation, the possibility of the loss of the security contract and any possible litigation that may occur. BOM confirmed to the Tribunal that the respondent retained the contract in question.

On cross examination B O' M gave evidence that a lesser sanction was considered but the respondent expected a much better response from the claimant given the situation so he felt that an alternative sanction was not appropriate. There was no need to go into other surrounding circumstances as there was no dispute that the child was grabbed. He did not view the CCTV footage as there was no dispute about the incident occurring. Grabbing a 10 year old child was excessive in itself. B O'M felt that given the claimants service and training the incident should have elicited a better response from him.

When questioned about the respondents procedures applied on the 25th November 2010 the HR

Director stated that he was not happy with how the investigation meeting was held but at the time resources were scarce. He considered the process was flawed but not fatal. He looked at the case overall and after considering the evidence came to the conclusion that there was no other option but to dismiss the claimant. The respondent now holds separate meetings as regards investigation and disciplinary procedures.

Claimant's case

No witnesses were put forward in relation to the claimant's case. The claimant's representative stated that re-instatement was not an option for the claimant.

Determination

The Tribunal carefully considered all of the evidence. From the outset basic fair procedures were not adhered to following the incident and it was accepted by B O'M in evidence that the investigation and disciplinary procedures were flawed. The respondent's actions in this case are completely disproportionate to the incident at hand. What is also very unusual is that the whole of the 'disciplinary process' was conducted by and under the heading of the HR department and there seems to have been no input whatsoever by the directors or any other senior management within the respondent company.

The incident happened at 7.30pm on the evening of Thursday 25th November 2010. That same evening a letter inviting the claimant to a meeting issued. That letter indicates "that the purpose of the meeting is to discuss an incident on site". The following day at 11.30am an investigation meeting was conducted by PB who did not give evidence in this case. EF attended as a notetaker and those notes were opened to the Tribunal. The claimant and a representative also attended. At no stage is it detailed in those notes that any possible sanction could arise. EF confirmed in evidence that she does not recall whether a possible sanction was mentioned to theclaimant in either meeting. Following the investigation meeting, EF gave evidence that there was an approx 15-20 minutes break before the disciplinary meeting took place. That disciplinary/dismissal meeting was in fact conducted by EF with PB as a witness (who conducted the investigation). The Tribunal also noted that at the end of the notes of the investigation meeting that the word "terminate" was written. EF stated that this was the decision of the disciplinary meeting, rather than a decision of the investigation meeting.

On Monday 29th November 2010, EF wrote to the claimant to notify him of her decision to dismiss him.

The basis for the dismissal seemed to be the use of force in this situation. EF, as assistant HR Manager indicated that the claimant could appeal to B O'M, the HR Director. The claimant subsequently appealed and the appeal was upheld by the HR Director. In evidence, the HR Director confirmed that the procedures were flawed and that despite this he upheld the decisionto dismiss. It seems from the evidence that alternative sanctions were not adequately consideredby either EF or BOM. The mitigating factors proffered by the claimant, including anunblemished record, do not seem to have been considered either. Furthermore, it seems to theTribunal that at no stage did the respondent communicate to the claimant that he may bedisciplined in relation to the incident.

In all of the circumstances, the Tribunal considers the dismissal unfair and awards the claimant

€48,000 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal also awards the claimant his statutory entitlement of €1,900, being the sum due for four weeks' notice, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)