

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1165/2011

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F Crawford BL

Members: Mr L Tobin
Mr F Keoghan

heard this claim at Dublin on 4th October 2012

Representation:

Claimant(s): Mr Eugene Hill BL, instructed by:
Ms Sabrina Comerford
Mercy Law Resource Centre, 25 Cork Street, Dublin 8

Respondent(s): Ms Donna Reilly BL, instructed by:
Ms Vivienne Matthews O'Neill, BL
Das Group, Europa House, Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Background:

The dismissal was not in dispute. The claimant was employed as a child care worker in a crèche. The claimant was dismissed for gross misconduct on 25 November 2010. The claimant was dismissed for not having observed an incident on 23 November 2010 when after school children were playing on the Astroturf pitch behind the crèche. The claimant and two other workers were monitoring a group of 7 to 9 year olds numbering approx 17 children. The next day the father of one of the children reported that his son had been held down by two older boys and had a sock pushed into his mouth. None of the childcare workers present witnessed the incident.

Respondent's Case:

The then Assistant Manager gave evidence that on the morning of 24 November 2010 the father of one of the after school children told her that his son had been bullied by two older boys the day before when they were playing on the pitch. He did not know the boys names. The witness asked the staff if anyone knew of the incident but no one did. The claimant was off that day. The witness asked the afternoon staff later and they knew the boys. She asked the boys if they done what was reported and they agreed that they had. The witness reported it to the directors and had no further involvement.

During cross-examination the witness stated that the incident would have occurred between 3.50pm and 4.30pm. Groups had 30-40 minute slots to play on the Astroturf pitch. The staff would have taken breaks during that time, but the claimant should not have been left to supervise alone. The crèche follows a ratio of 1:10 for 6-8 year olds and 1:12 for 8-13 year olds.

The Manager of the crèche gave evidence. She found out about the incident on 25 November 2010. She phoned the child's father. He was annoyed that such an incident could happen and he wanted an investigation. She told the three employees involved that there would be a meeting about it at 1.30pm that day.

She held the meeting with her two partners and the three staff members. The claimant said she might have been on a break at the time of the incident or else didn't see it happen. The claimant said that the child did not appear to be upset when she saw him later. He was being very boisterous and she had to ask him to calm down. Neither of the other two staff members witnessed the incident. One of the three asked to meet the Manager privately and she offered her resignation later that day. She offered to meet all of them privately over the day if they wished, but the claimant declined.

The Manager held a further meeting that day with the three staff members. One had offered her resignation. Neither the claimant nor the remaining staff member had anything to say. She told them that she and the other directors had decided that the incident had amounted to gross misconduct and that they were to be dismissed with immediate effect.

During cross-examination the Manager agreed that the boy's father was putting her under pressure. She accepted that the claimant was on a break for 15 of the 40 minutes that the children were playing outside. She considered that on the day of the incident crèche procedures had not been followed and that the child had been put at risk unnecessarily which she considered gross misconduct. The claimant should not have been outside alone with the group.

The Manager did not inform the claimant that the meeting was disciplinary in nature or that her job was at risk. She dismissed the claimant for bringing the crèche into disrepute. She did not inform the claimant that she could bring a representative with her. The claimant was not advised of her right of appeal. The handbook was issued to staff in mid-2010. She considered that a child's life had been in danger and that had over-ruled the company disciplinary policy.

Claimant's Case:

The claimant gave evidence that she worked for the respondent company for five years. She received a contract in June 2010. She worked in the playschool and after-school area. On the

day in question she took her break from 3.50pm to 4.05pm, at the start of the pitch time. Another colleague took a break after that and then preceded the claimant into the hall to prepare for the children. The other staff member took her break at 4.20pm. She was alone with the children for a few minutes. She saw the child in question when he came into the hall. He was running around and she asked him to stop as there was not the room to run around. He did not appear upset.

On Thursday morning she was asked if she had seen anything. She had not and was shocked to hear what had happened. She was informed that there would be a meeting later in the day. She was not aware that her job was at risk. At the meeting she told the manager about their break times and that she had been alone with the children at the end of the play period. The Manager said that they could come back to her if they had more to add. The claimant had nothing else to add. She did not realise her job was in jeopardy until she was dismissed. She gave evidence of her loss and mitigation. She was advised to change careers due to her dismissal. She had not worked since her dismissal.

During cross-examination she agreed that what had happened to the child had been unacceptable. She did not see the child upset. She found a sock on the pitch but couldn't remember what she said or did about it. She had walked up and down the pitch while she was supervising. One of the children felt sick and that was when she brought them in. The parents did not make any complaint on the evening when the child was collected.

Determination:

Having considered all the evidence the Tribunal finds that the dismissal was procedurally unfair and lacked proportionality. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and taking all matters into account the Tribunal awards the claimant €19,000 (nineteen thousand euro).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)