

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER

UD883/2011

against the recommendation of the Rights Commissioner in the case of:  
EMPLOYEE

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. P. Casey  
Mr. D. McEvoy

heard this appeal at Cork on 25th September 2012 and 27th November 2012

Representation:

Appellant:

Mr. Jim Healy, IBEC,  
Confederation House, Waterford Business Park, Cork Road, Waterford

Respondent:

Ms. Lorraine O'Brien, Mandate Trade Union,  
Southern Division, IBS House, 1-2 Emmet Place, Cork

**This case came before the Tribunal by way of an employer's appeal against the recommendation of a Rights Commissioner reference: r-097223-ud-10/pob.**

Hereafter the appellant is referred to as the employer and the respondent as the employee.

### Summary of Evidence

The employee commenced employment as a general assistant, in one of the employer's supermarket on 19 March 2007. The employee had a good record up to the events herein. On the evening of 15 June 2010 the employee was overseeing the self-scan checkouts. Only four of the eight self-scan checkouts were in operation that evening, the other four were cordoned off. The store manager (SM) received a report from another manager that a young boy (YB) claimed that he had been assaulted by the employee and that YB's father had been called in.

SM, accompanied by another manager, met with the employee that evening. The other manager took notes of the meeting. The employee told SM that YB had skipped the self-scan queue for a second time that evening, the employee had picked up the items and told YB to use the checkouts in operation and he demonstrated to SM how he had put his hand on YB's shoulder to pull him back. SM deemed the employee's behaviour to be serious misconduct and suspended the employee on pay. SM had not offered the employee the opportunity to have a representative or a witness with him at the investigation meeting; the events had been fast-moving that evening. The shop steward was not in the building and in any event SM thought it was irrelevant as the employee had admitted to having put a hand on a customer. There was a dispute as to whether the employee had said that he had lost his temper with YB.

The employer has security personnel to deal with trouble-makers in the store. Authority to physically restrain a customer rests with security personnel and they carry phones to facilitate contact. The employee should have contacted the security officer (SO) on duty by paging him or calling him on a nearby phone. SO moves around the store. SO took witness statements. He drafted YB's statement before his father arrived and YB signed it. SM had not given the employee the statements at the investigation meeting that evening because he had not known of their existence at the time. SM denied that he had told the employee that he would call the gardai. SM had no option but to suspend the employee. Laying a hand on a customer is considered to be misconduct. SM denied that the employee told him that he had put his hand on YB to calm the boy down.

The employee's position was that he had merely placed his hand on the boy's arm in a friendly manner, in order to direct him to a self-scan area; he had not assaulted the boy. The boy was abusive to him, called him a muppet and told him that he was going to get him fired. The notes adduced in evidence were not a correct account of what he said at that meeting on 15 June and in particular, he denied saying that he lost his temper with the boy. At the end of the meeting he was suspended on pay and escorted out of the building without being given an opportunity to collect his personal items.

SM then met the boy and his father. The boy's version of the incident was that the employee had put his hand on his shoulder and pulled him back and he showed SM a bruise in the form of three fingers on his arm. The encounter with YB's father was heated and no notes were made of that meeting.

The gardai had been called by YB's father and on their arrival about an hour later they viewed the CCTV footage of the incident. The footage of the incident had been lost in the severe flooding that hit the July 2010. SM's recollection was that it showed YB using the self scan, leaving, returning, skipping the queue and going to a self-scan checkout that was cordoned off. The employee approached him, words passed between the two of them, the employee picked up the goods and YB took them back and as he went to walk away the employee pulled him back. SM could not hear the words that passed between the employee and YB.

A disciplinary meeting was held on 22 June. SM and HRM (who took notes) were present and the employee was represented by his trade union official (TU). TU wanted to see the CCTV footage. She made the point that she could not see wrong behaviour on the footage. She had to ask SM to refrain from talking over the footage and giving his interpretation of the incident. SM's position was that he thought he was being helpful. Some of the interaction between the employee and YB had taken place behind the pillar and was not captured on the CCTV. SM accepted that he could not see that part of the incident that had occurred behind a pillar.

TU maintained that notes of the investigation meeting could not be verified because there had been no witness with the employee at the meeting. Neither SO nor SM recognised YB as someone who had previously been messing on the store. SM thought it would be highly coincidental if YB had sustained the bruise before he entered the store on 15 June. He believed the bruising was fresh.

SM concluded that dismissal was the appropriate sanction. The employee had put a hand on a customer resulting in a bruising and this warranted dismissal. SM had not considered relocating the employee to another store because of the gravity of what had happened. YB had a bad mark on his arm in the form of a bruise. SM could not refer the Tribunal to any document instructing staff not to put a hand on a customer. The employer's insurance company dealt with YB's father.

By letter dated 1 July 2010 SM informed the employee of his dismissal on grounds of serious misconduct, which comprised rudeness or ill-treatment of a customer at any time, which was a breach of customer care policy. He informed the employee of his right to appeal under the respondent's disciplinary policy. TU wrote three times to the designated person seeking an appeal hearing but was never given an appeal hearing.

**Determination:**

The employer failed to adhere to its own procedures in failing to grant the employee an appeal. The Tribunal has also some concern as to the statement made on the incident of 15 June. It notes that both TL and YB in their statements refer to the employee poking YB in the face while the evidence was that the employee had pointed at YB. Having considered the evidence the Tribunal finds that the employee was unfairly dismissed and the employer's appeal under the Unfair Dismissals Acts, 1977 to 2007, fails. The Tribunal decides that compensation is the appropriate redress in all the circumstances of the case. The Tribunal deems it just and equitable to award the employee the sum of €7,000.00 as compensation under the said Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)