EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1658/2011,
MN1716/2011
WT658/2011

against

EMPLOYER

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

Members: Mr G. Andrews
Mr D. McEvoy

heard this claim at Tralee on 18th February and 13th May 2013

Representation:

Claimant : Ms Elizabeth Murphy B L instructed by
Terence F Casey & Co, Solicitors, 99 College Street, Killarney, Co Kerry

Respondent : Mr Brian O'Sullivan, IR/HR Executive, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Summary of Evidence

The respondent manages sportsand leisure centres for a number of town councils throughout the country including a large centrelocated in the southwest. The local town council invested heavily in this centre and a board ofmanagement was formed to oversee the leisure project from the building to the running of thecentre. At least one member of the town council was on the Board of Management. Themanagement of the centre was contracted out to the respondent. The contract with the previousmanagement company had been prematurely terminated due to its alleged poor performance in thatrole. The claimant became an employee of the respondent, carrying over his existing terms andcondition of employment, by reason of the transfer of the management contract to the respondent.The respondent did not have a presence on the board of management but had close contact with itthrough a member of the town council (PC). The claimant became an employee of the respondent.There were around 30 employees in the centre, as well as 3 duty

managers and the claimant asgeneral manager.

Prior to taking up the position of general manager with respondent in February 2010 the claimant had been working in the centre under the previous management company of the centre from September 2008. He felt he was successful in promoting that facility. Prior to his commencement in the centre in autumn 2008 he had acquired extensive overseas and domestic experience in the hotel and leisure industry in particular in the sales and marketing areas.. While there was no formal change to his conditions of employment when the respondent took over the centre the claimant was asked by the company to fill in a questionnaire on management skills, traits, personality and abilities. Following this exercise the respondent told him that he did not have the management skills that they would have looked for in a general manager. As a result, the claimant considered himself to be "on the back foot" in his relationship with his new employer from the beginning.

The respondent's then manager, who later became area manager (TM) visited the premises on a weekly basis initially and later on a fortnightly and then monthly basis. He visits all centres on a regular basis to standardise procedures and policies in all the centres and manages the managers on six KPIs. It was TM's position that it soon became apparent that there were problems with the claimant in the performance of his managerial function in the management of the centre, in particular that he had problems in the areas of public relations (PR) and HR. It was the respondent's position that these problems were informally highlighted to the claimant but no improvement was made.

An investigatory meeting was held on 20 October 2010 at which the claimant's performance problems were discussed. TM's letter of 13 October 2010, inviting the claimant to the meeting,outlined that HR issues and his relationship with the Board would be discussed at it. It was the respondent's position that the claimant acknowledged these problems and undertook to makeimprovements. Following the meeting TM issued the claimant with a verbal warning (not appealed)and the claimant was placed on a performance improvement plan (PIP). The PIP focused on the claimant's lack of communication with the staff and required him to hold regular meetings with theemployees at various intervals depending on the status of the employee and urged the holding ofpep talks with as many employees as possible at the start of their daily shifts.

The claimant's position was that contrary to his experience with the previous management company he was not present at the BOM meetings and consequently had no relationship with the Board. PM called up a few times each week and had suggested that the claimant should attend the Board meetings but it never happened. His contact with BOM was solely and exclusively through AM. The meeting of 20 October was a shock to him because he had a great team. Prior to this problems had not been highlighted to him, informally or otherwise. He was not informed which members of staff had difficulty with him. The respondent wanted him to work more weekends and evenings. The respondent had terminated the contract with the security company and while his hours were 9.00 to 5.00 he frequently worked longer than this, in particular when security issues arose. The claimant was not told which members of staff were making the complaints.

It was the respondent's position that the claimant's performance showed no sign of improvement subsequent to the October meeting, resulting in a further investigatory meeting being held on 16 December 2010. The aspects of his performance which were highlighted as being problematic in the letter inviting him to the meeting were his performance in HR and his failure to respond adequately to PIP. Following the meeting the claimant was issued with a written warning by letter dated 16 December 2010. The claimant was disappointed because 2010 had been a good year for the centre. He resolved to enjoy Christmas and hit the ground running in January 2011. The

claimant's evidence to the Tribunal was that he had not sent PIP reports to management because he had not been given guidelines on how to report and furthermore he had a large workload because when staff left and were not replaced he took on some of their duties.

The respondent requested all managers to implement pay cuts across all centres. While the claimant was willing to do this he felt head office in Dublin should be involved in this. The respondent commented that he was highest paid in the group and told him he should take a 30% pay cut. He took a 10% pay cut and imposed a 5% cut on the staff. (It is not clear to the Tribunal at what time the pay cut was implemented.)

A job description for the role of duty managers was circulated for the first time in March 2011.It required the duty manager *inter alia* to supervise and organise pool staff, gym staff, front of house and leisure attendants efficiently; that a duty manager must not leave the building unless another duty manager is present and that they undertake any other duties reasonably requested by the club manager.

It was TM's position that the staff continued to have problems with the claimant, in particular with his continuing poor communication and not knowing where he was. The claimant was invited to a further "investigatory" meeting on 15 April 2011 to discuss his performance and for the first time 13 specific complaints were outlined in the letter inviting him to the meeting. Some of these centred on the claimant's alleged failure to communicate with staff: not giving adequate notice of changes in or cancellation of classes, failure to internally advertise a particular vacancy (duty manager), emailing staff rather than speaking to them, using wholly inappropriate language to staff and issues around the ordering of stock. The claimant provided explanations to the allegations. The main issues of concern for the respondent were the claimant's alleged failure to ensure a duty managerwas in charge of the centre when he was absenting himself from the centre and leaving the swimming pool unattended. A written policy on swimming pool safety was not in place at the time.In October 2010, following the drowning of a child in Navan, the respondent emailed the managersof the various centres instructing that there must be a lifeguard on duty at all times and if they needa break they must be relieved from the pool deck by another trained lifeguard. In the email it wasindicated that relevant materials, including Swimming Pool Safety Guidelines, received at aconference, were to become company policy. The meeting was conducted by a director (thedirector) of the respondent company. In her evidence to the Tribunal the director could not say howlong the lifeguard was absent from pool on 7 March.

The claimant was surprised to be called to the investigatory meeting in Dublin on 15 April because the centre had done very well and exceeded expectations in the months January to March (inclusive) and he had reduced the payroll and costs. He provided explanations for the 12 of the 13 issues outlined by the respondent. He denied absenting himself from the centre without leaving a duty manager in charge. His explanation in relation to the pool having been unsupervised on 7 March was that in the morning in question the hall was not set up for a class and, believing that TY was on pool duty, he radioed AX to help him set up the hall. Once he learned that AX had been on pool duty he immediately sent him back to the pool. His position was that the pool was empty at the time and other staff members in the centre would have heard him call AX over the radio system and could have alerted him that AX was on pool duty. AX was aware that he should not have left the pool unattended. He informed the respondent that the pool was empty at the time a lifeguard was not present. The claimant felt that his explanations were falling on deaf ears. He knew that the respondent wanted him out. A recess lasting about an hour was taken. On resuming the meeting the claimant was presented with a letter of dismissal for his continuing unsatisfactory performance. The director had taken the decision to dismiss the claimant.

The director justified the sanction of dismissal on the grounds that leaving the pool unattended and the centre without a duty manager was a serious breach of trust. During the course of the meeting the claimant admitted to certain wrongdoings. Those admissions in conjunction with earlier warnings were the factors in her decision. She invited the claimant to appeal her decision.

The claimant appealed his dismissal. In his letter of appeal he raised issue *inter alia* with the fact that the identity of those making complainants had not been disclosed to him, thus leaving him at a disadvantage in defending the charges against him.

The claimant's position was that under his stewardship the centre was doing well financially and won a number of awards: the White Flag Award in 2010 (an independently awarded quality mark) for its standard of excellence, the Silver Disability award and the LAMA award. As manager of the centre he expected support from the respondent but it was not forthcoming. The respondent had its office in Dublin and he was in the southwest of the country.

Determination

The respondent's conclusion, at the outset of the employment relationship, that the claimant did not have the management skills that it would have looked for in a general manager, coloured the respondent's mind in its dealings with the claimant throughout the period of his employment with the respondent.

It was fatal to the requirement of fair procedures not to identify the complainants to the claimant. It left him at a disadvantage in his attempts to answer the charges against him. From early on complaints seem to have poured in and the Tribunal feels that the veil of secrecy afforded to the complainants may have contributed to this. It is not entirely helpful to an employee to label an upcoming disciplinary meeting an investigatory meeting or to fail to warn him of the possible sanction of dismissal prior to the day of the meeting.

The Tribunal recognises that it is open to an employer to set out the parameters of any appeal it may provide for in its disciplinary policy. However, to be a meaningful, an appeal should examine the procedures applied at the earlier stages of the investigatory and disciplinary stages. The procedural issues raised by the claimant in his appeal were not addressed by the appeal manager, who in any event was not present to give evidence to the Tribunal.

The Tribunal now turns to the substantive issues. While the respondent had a large number of issues with the claimant its two main areas of concern were leaving the pool unattended and the centre without a duty manager. The evidence on the latter incident was contested and the claimant was not given the name of the employee to whom TM spoke on the phone on 11 March 2010. The Tribunal accepts that health and safety are matters of primary importance to the respondent. In accepting the claimant's uncontested evidence on the events of 7 March, which led to theswimming pool having been left unattended for a short period, a reasonable employer would havetaken the particular circumstances into account rather that apply a blanket response of dismissal onall occasions where no lifeguard was on duty. In the circumstances appertaining on 7 March areasonable employer would not have dismissed the claimant. While the director claimed that thepool was left unattended on a number of occasions, no evidence was adduced to substantiate thatallegation.
For the above reasons the Tribunal finds that the dismissal was both substantively and procedurally unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the

claimant is awarded €65,000.00 as compensation under those Acts.

The appeals under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the organisation of Working Time Act, 1997 were withdrawn at the outset of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)