

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD341/10

- claimant

Against

EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan BL

Members: Mr C. McHugh
Mr A. Butler

heard this claim at Wicklow on 21st April 2011, 30th August 2011 and 31st August 2011.

Representation:

Claimant: Ms Mary Paula Guinness BL, instructed by Haughton McCarroll, Solicitors, 2 Church Street, Wicklow, Co Wicklow

Respondent: Ms Catherine Day, Peninsula Business Services (Ireland) Limited, Unit 3 Ground Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is engaged in childcare. The company runs a crèche and has ten employees and forty children. Cameras are in place for real time viewing. No recording occurs. The claimant was employed as a child care assistant with an unblemished record.

The owner (AB) became aware of an allegation against the claimant on 30th July 2009. It was alleged by the parents (C and D) of (E), their 2½ year old child, that the claimant had become cross with him, had hit him on the back and pulled his soother from his mouth. The incident in question is alleged to have occurred on 30th March 2009.

AB subsequently met the claimant and put the allegation to her. The claimant denied the allegation.

On 4th August 2009 the claimant was suspended on full pay pending an investigation. AB carried out that investigation and took statements from several members of staff. No staff member had witnessed the incident on 30th March 2009. No entries were made in any of the diaries kept in the respondent's premises. However, further issues of concern came to light. None of these issues were recorded in the daily dairies. The claimant was invited to and attended a reconvened investigative meeting on 14th August 2009.

The claimant wrote to AB with her grievances. AB received that letter and acknowledged it on 18th August 2009 explaining that because of their duty of care to all concerned it entailed the respondent investigating the matters fully and completely.

Following that meeting the claimant was invited to attend a disciplinary meeting on 24th August 2009 and was furnished with written statements in advance of that meeting. G took notes of the meeting and AB chaired that meeting. H accompanied the claimant. Other allegations were put to the claimant. At that meeting the claimant denied the allegations put to her and offered her explanations. AB did not go back and interview witnesses who had raised issues. The claimant questioned those who had given statements, I, J and K. The claimant again denied all the allegations put to her. The meeting adjourned and the claimant was told she would be informed of the outcome of hearing.

By letter dated 26th August 2009 AB received a letter from a concerned parent. It had been brought to that parent's attention that an accusation had been made against one of the respondent's staff. The parent said that should the staff member return to the crèche she felt that she would have to find alternative care for her child.

The claimant was provided with copies of further information in advance of a reconvened disciplinary hearing scheduled for 7th September 2009. AB wanted clarification of the incident involving child L and also wished to discuss the letter received from a concerned parent. H accompanied the claimant. Witness I attended at that meeting. Witness I said that toddler L had been crying while holding the claimant's hand. None of these incidents had been reported or recorded in the daily diaries. AB was doing her best to get to the bottom of the incidents in question. She believed the concerns raised by the parents.

AB contended that she had tried her best and believed she had done a good job.

Witness I who worked with the claimant told the Tribunal that she had seen child E quite upset having returned to his room. While she had concerns she did not raise them with AB. She did not want to cause an issue.

Witness J remembered seeing child E quite upset when he saw the claimant in the garden. She did not think to raise the issue with AB.

The mother of child E who was 2 ½ at the time the incident occurred noticed that E was quite upset when she picked him up that day. At the time E could not verbalise but some months later E told her that he did not like the claimant as she had pulled out his soother. She spoke to AB and gave her a statement. This mother believed her child, as did the child's father.

The mother of child N told the Tribunal that the claimant had squeezed her child's hand. N repeated this on several occasions to her mother. She believed her daughter was telling the truth. By letter dated 17th September 2009 the claimant was summarily dismissed on the grounds of gross

misconduct.

The claimant appealed the decision to dismiss her. Prior to the appeal hearing AB went through the claimant's grounds of appeal. The appeal hearing took place on 1st October 2009. AB carried out the appeal. AB upheld the decision to dismiss the claimant. By letter dated 30th October 2009 the claimant was formally notified of this decision.

Claimant's Case:

The claimant worked in childcare for seven years and had attended various courses during her tenure.

She denied all the allegations.

When she was dismissed from her employment she was shocked and upset to such a degree that she suffered severe mental disorder as a result. She did not receive a reference from the respondent and has been unsuccessful in obtaining alternative employment in Ireland. She subsequently moved to England and secured part time work on 6 November 2010. She works 20 hours per week in retail.

Determination:

On an application by the claimant that the respondent had not discharged its onus of proof that the dismissal of the claimant was fair the Tribunal held with the claimant. The reasons for so holding are as follows:

The Tribunal finds that on the standard of the investigation carried out by the respondent and on the evidence before the Tribunal it was not reasonable for the respondent to reach the conclusion that there was a reason which entitled the respondent to fairly dismiss the claimant. The Tribunal finds that the procedures used by the respondent were otherwise than in accordance with fair procedures due in the main to the fact that the same parties carried out the investigation stage, the disciplinary stage and in particular the appellate stage and thus breached the principle of *nemo judex in causa sua* (no man may be a judge in his own cause).

The Tribunal thus finds that the dismissal of the claimant in the circumstances was unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal awards the claimant an amount of €46,800.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)