

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD1405/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. C. Egan B.L.

Members: Mr. D. Morrison
Mr. M. McGarry

heard this claim at Letterkenny on 17th November 2006 and 8th January 2007

Representation:

Claimant(s) : Ms Eiteain Cunningham, Sinead Bradley Solicitors, Unit 1,
Cedarwood House, Kilmacrennan Road, Letterkenny, Co. Donegal

Respondent(s) : Appeared in Person

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. She explained that the respondent had employed her for two years, originally on a part-time basis. The respondent had five stores in total. There were two full-time staff, including her, and a part-timer. She ran the store for the respondent. She explained the workings of the store, how the cash till was run and how the stores takings were handled. The respondent's lorry drivers occasionally covered lunch breaks. The staff hours were relayed to headquarters by telephone and their wages were paid from the till. No IOU was written up.

On May 26th 2005 she and the other full-time member of staff were called to the back of the shop by the first named co-owner of the business. His wife was also present. They were informed that money was missing from the till and asked where it was. They were also told that there was CCTV footage and the tapes would be viewed. The inclusion of the Gardaí in the matter was also mentioned. The claimant said that she was very angry and walked outside. After she left, her colleague admitted to taking some money, the co-owners wife later told her. The claimant said that she had never been accused of theft before and was upset and shocked. After May 26th 2005 she was told that only one person was to use the till. She explained that when a second person used the till, a reading was not carried out. She rang headquarters and asked why. Wages were still taken from the till but the staff now paid each other and a note was put in the till.

The following Monday she attended work. She contacted the first named co-owner and asked about the CCTV footage. She was informed that the matter was no longer in his hands and that it was up to Garda M. Later that day she received a telephone call from Garda M asking to meet her the following evening.

The claimant was very distressed and contacted her sister. The following day her sister and herself attended the Garda station. She was told it was up to her whether she wished to give a statement or not. When she was told there were only two suspects, she informed the Garda that there were also part-time staff working there.

Having spoken to the Gardaí, she contacted the first named co-owners wife and told her that she was not happy taking her wages from the till but was told she could not understand why. The following week her wages were delivered by the respondent's lorry driver. On the second week she did not receive any wages and was told she could do without. She had to take her wages from the till. She told the Tribunal that anytime she brought up the subject of the theft with the first named co-owner, she was told it was under Gardaí investigation. The claimant said that she "felt sick" going to work. She commenced a two-week holiday. During the second week she contacted the respondent's headquarters and requested a third week off. After the third day of her third week she contacted the second named co-owner and told him she had got another job. She commenced her new job in August 2005 in a supermarket working on the cash register but after her previous experience she felt she could not continue. The claimant told the Tribunal that she had not received a P45 or any payslips unless she requested one. She left her new job and was prescribed medication by her doctor, which she was still taking. She received disability benefit.

On cross-examination she said, when put to her that she would not have been asked to go to the Garda barracks if she had not been accused. She explained that customers were given receipts for their purchases and the respondent's copy was kept under the till when the till roll was full. When asked she explained what the safe looked like and stated that she was not aware where the lorry drivers went after they had picked up the stores takings.

On re-examination she stated that the days takings were counted and put in a bag for the drivers to pick up.

When asked by the Tribunal, she explained that she did not have to clock in to commence work. After March 2005 there were two full-time staff working as a third full-time staff member was absent on sick leave. If she had a day off a member of staff from another store would cover. She explained that she had not been previously warned on the meeting that was to take place on May 26th 2005 and was not offered any representative to be present. When asked if she was accused of theft that day she replied that the first named owner said that there was only two full-time staff. She did not hear her colleague admit to taking some of the money. She explained that after the incident the first named co-owner's wife treated her differently, previously they had been friends.

Respondent's Case:

The first named co-owner gave evidence. He stated that the T2 form lodged was the basis of his rebuttal to the claimant's claim of constructive dismissal. He explained that the claimant was a nervous person and not overly confident but was a very good employee. She was originally employed in the store in Stranolar.

In early January 2005 it came to his attention that money was going missing from the store in Stranolar. He explained that he did not do anything about it at first but "kept an eye on it". He felt that the person or persons involved might become over confident. In March 2005 the claimant's cousin commenced employment as a part-timer. In April 2005 two stores, including Stranolar, were amalgamated into one store in Ballybofey. After each evening the witness went to the store and printed out a reading of the days takings and he kept track of how much money was now going missing in the Ballybofey store. As time passed he began to rule out staff members involved due to their absence from work when money was taken.

On May 26th 2005 he and his wife met the claimant and her colleague in the store. He informed them of the missing money but did not give an amount. He told them that he had done research into the matter. The claimant was very agitated; she threw the store's keys on a pallet saying she "could not take anymore of this". He told her to calm down and no one was being accused. He informed them of the CCTV footage which would be viewed. They were told that if any one were to confess the Gardaí would not be involved and the person could pay the money back but there would no longer be a job for them. There was to be a preliminary report by the following Monday. After the claimant left, her colleague admitted to taking a small sum a week and he told her there was a lot more money missing. He asked for the keys to the store. His wife went outside to speak to the claimant and told her about her colleague taking some money but that there was still more money missing. The claimant and her colleague left together. The claimant returned and asked was her colleague fired and was told yes because she stole money. She also asked about the CCTV footage, she was very agitated and nervous. He told the claimant that if she was innocent she had nothing to worry about.

He received a call from the sacked staff member's father who could not believe what had occurred with his daughter. Having read an article in the local paper two days later he contacted the Gardaí about the missing money. The witness said that the claimant had never been accused but was a suspect. He had never told the Gardaí that she was accused of theft. The matter was still an open investigation.

The claimant continued to work for him for a further twelve weeks including three weeks leave. During this time he visited the store on one occasion. When asked about the claimant's wages, he said that she had never been told to go without her wages. He said that the incident had soured their relationship.

On cross-examination he stated that the claimant did not have a contract of employment. There was no grievance or disciplinary procedures in place. There was only one meeting with the claimant where the allegations were laid out and the claimant continued working for thirteen weeks after that. The claimant had telephoned him on several occasions to enquire what was happening and he referred her to the Garda Síochána. There was no manager on-site to sort out any grievances or report any incidents to. One employee admitted to theft but not theft of the entire amount missing. The witness did not outline to the claimant the process of elimination that led to her and another employee being the only employees under suspicion. He never accused the claimant of theft, as that was a matter for the Garda investigation. He denied that the atmosphere in the shop had changed after the meeting as the owners were rarely there during opening times.

The final witness was a member of An Garda Síochána. He told the Tribunal that he had been approached by the respondent in May 2005 regarding an allegation of theft of money by employee(s). The money had been stolen over a five-month period and the respondent had narrowed the potential thief down to two employees. Initially the respondent wanted advice and then he made a statement to the witness.

The respondent outlined to the witness the process of elimination but never offered him notes on the matter. The first three months, there was little or no information available but for April and May the respondent had identified who was working where and when. The employee that had admitted to the theft was a juvenile and the witness interviewed her in the presence of her parents. When the witness interviewed the claimant, she was very upset over the allegations. The witness had made it clear to the respondent from the beginning that the lack of security in the shop made it extremely difficult for the evidence to be present to pinpoint the two people accused. The witness contacted the crime prevention officer for the area to consult with the respondent regarding security procedures for the business.

The claimant contacted the witness a number of times and outlined a number of problems she was having in her employment. He told her that in his personal opinion, she should "stick it out" but it was not a matter for the Gardaí. She did express how difficult the environment was to work in and she objected to taking her wages out of the till.

Under cross-examination, the witness told the Tribunal that the respondent did have notes referring to the process of elimination but the witness outlined to him that there was insufficient evidence to procure a prosecution. He told the respondent that there was money missing over a five-month period and it was not correct to identify a small window of time and identify two people while ruling everyone else out. At no stage did any evidence appear against the claimant. The witness felt that the respondent had made allegations against two people and had nominated two suspects for the Gardaí to carry out an investigation. The witness advised the respondent to look up the dictionary to find out the meaning of the word “accuse”.

The witness was positive that he informed the respondent that the employee that had admitted partial theft had been charged but he may not have informed him that the case investigating the claimant was closed. The witness did explain that the claimant had told him of difficulties in the workplace including a change in atmosphere but he had informed her that this was not a Garda matter.

Determination:

The Tribunal in this case had to establish whether the circumstances of the claimant’s dismissal were so intolerable that she had no other choice but to resign her position.

Having heard all of the evidence adduced, the Tribunal determine that the respondent was remiss in not providing a contract of employment and grievance/disciplinary procedures for the claimant or any other employee. There was a very casual approach to security on the premises and there was no system of checking and/or balancing the tills at the end of each day for the employees’ accountability. The claimant was not provided with any payslips and the provision of information regarding her wages via telephone on a weekly basis was entirely unsatisfactory.

While it was reasonable for the respondent to investigate the theft of money from the shop, the allegations made against the claimant were unfounded and unsubstantiated and were dismissed by the Gardaí through lack of evidence.

However, the claimant continued to work for the respondent for thirteen weeks after the allegation was made against her. She applied for and received two weeks’ holiday and subsequently applied for an extra week over the phone, which was granted without objection. The Tribunal are of the opinion that this was not the action of an employee who was under severe pressure in their employment. The allegation of theft was handled badly by the respondent but the Tribunal determine that the claimant was not working under such intolerable circumstances that forced her to leave her employment, therefore the claim under the Unfair Dismissals Act 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN) Kate T. O’Mahony (MEMBER) D. Morrison (MEMBER) M.McGarry