

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD265/2006

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. M. Flood
Ms. K. Warnock

heard this claim at Dundalk on 18th July 2007
and 19th July 2007

Representation:

Claimant(s) : Mr. Aaron Shearer BL instructed by:
Mr. Fergus Mullen, Woods Ahern Mullen, Solicitors, 18 Francis Street, Dundalk,
Co. Louth

Respondent(s) : Mr. Peter Ward BL instructed by:
Ms. Karen Killalea, A & L Goodbody, Solicitors, I.F.S.C., North Wall Quay
Dublin 1

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. She explained that she had commenced employment with the respondent as a Sales Assistant in September 1995. In September 1998 she was promoted to trainee store Manager in a 'B' rated store. In July 2002 she was promoted to an 'A' rated Manager and moved to a larger store which now sold computer games and consumer electronics. She explained that there were different grades for staff according to the size of the store they worked in.

She reported to the District Manager (hereafter known as FM). Sales targets were set and weekly calls were made to HQ to log the stores' sales transactions. When asked, she said that sometimes FM would not visit the store for months and then it could be twice a month.

Audits were carried out in the store once or twice a year, depending on the size of the store. During the period of November 2001 and April 2003 five audits took place in her store. She told the Tribunal that she was given no feedback from these audits, except April 2003 when she was informed that it was a "good audit". During this time, the claimant had a good working relationship with FM.

In May 2004 she was again upgraded to the post of 'A+' Manager, as the store she worked in had been

re-graded. She was not put on a probationary period and there was no formal performance appraisal. She only received a branch report and limited training. On June 23rd 2004, FM visited the store. Both he and the claimant toured the store. It came to light that sales could be improved. The claimant told the Tribunal that not all branch visits were documented.

On July 2004 she received a letter of congratulations from the Retail Director (hereafter known as KM). There was no indication from this letter that the respondent had a problem with her performance. The claimant became pregnant in July 2004 and because of difficulties she had to absent herself on sick leave. The following month two staff were dismissed but this not brought to the claimant's attention.

By September 2004, despite an increase in the stores functions, there had been a reduction in staff levels. A lot of the experienced staff had left or were sacked and the Manager of the consumer electronics section of the store was made redundant. She told the Tribunal that she requested more staff and more resources for the busy store.

A branch visit took place on October 6th 2004 resulting in a poor branch report stating a large number of units were missing. She explained to the Tribunal that FM had previously asked her to box up a number of units to be transported to another branch. No targets were given to the claimant after the report of October 6th 2004.

On October 12th 2004 the claimant suffered a threatened miscarriage. On this same day FM was in the store on a branch visit. She informed him of her threatened miscarriage. She commenced sick leave and returned on November 17th 2004. Her doctor advised on her return she should request to work shorter weeks. This was agreed. She again requested more experienced staff. Staff did come from other stores to help clean up the store. The atmosphere in the store was terrible.

In December 2004 she was asked to attend a meeting in a local hotel. As other staff were also attending meetings with management that day she stayed in-store, as it had to be staffed. One by one staff members left to attend the meetings but did not return. She rang FM as she was now on her own. Two staff returned but she was told that her meeting was postponed. At the earlier meetings two staff members had been suspended.

On December 16th 2004 she was informed that there was to be a meeting but not told what it was about. The claimant, the internal Auditor (hereafter known as PB) and the HR Manager were present. The claimant was not offered a representative. PB rang the interview, but the claimant said it was more like an interrogation and she felt intimidated. She was asked questions over and over again and the meeting went on for hours. At the end of the meeting, she was told that she was suspended with pay pending further enquiries and to hand over the keys of the store. She was not to attend the store. It was explained to her that she had not been carrying out her job as a member of management correctly, had not informed HQ of any problems in-store and that some stock was not accounted for. She received a letter confirming her suspension from HR. This letter also notified her of a disciplinary hearing to be held in January 2005.

The disciplinary meeting took place on January 11th 2005. The claimant, her representative, FM and the respondent's Director of HR (hereafter known as MB) attended. PB came in at one point to show a piece of video footage from the store. She was accused of overseeing an incident with one of the staff giving unauthorised discount. The claimant said that if she had seen it she would have stopped it.

On January 21st 2005 she received a letter informing her that she was to be demoted two grades, receive a reduction in salary and advised it was a final written warning. She was very unhappy and appealed the decision. An appeal hearing was held on February 28th 2005 but she did not attend, as she was heavily pregnant. She received a letter dated March 10th 2005 informing her that she was to be regarded to Manager but the letter again insinuated, she felt, that she was not trustworthy.

She commenced maternity leave and during this time decided what she would do. The claimant told the Tribunal that she could not return to work, it would never be the same again and she felt she was not trusted. On September 9th 2005 she submitted a letter of resignation. The claimant gave evidence of loss.

On cross-examination she agreed that there had been a breakdown in the running of the store in July 2004 but said that she was absent for various periods during July and December 2004. Stock was moving in and out of the store and not recorded on the system. The value of loss to the respondent was priced at over €6,000 but the claimant said that PB had not stated that amount to her. There was an inadequate number of staff and those present needed more training. She was working part-time and had no cover when she was absent. She then stated that maybe she should have shouted louder for more staff. She was the only Manager in the store at the time.

When put to her, she said that the results of the seven audits between August and November 2004 had not been communicated to her. She agreed that there had been huge losses and a number of irregular transactions during this time. When put to her she said that she had declined looking at the audit reports at the disciplinary meeting as she found it a very distressing meeting. When asked, she said that she did not dispute the minutes of the meeting of December 17th 2004.

When put to her, she said that if she wanted to recruit more staff she would have to discuss it with FM. When put to her she agreed that her brother had come to the store to get a DVD on her staff account, but stated that he was just picking it up for her own personal use. When put to her she said that she had been standing beside a member of staff during a transaction where he allegedly gave staff discount but had not observed him do it.

When put to her she said that the respondent was entitled to investigate any irregularities in the store but was unhappy about how the investigation was carried out.

The letter dated January 21st 2005 from FM was put to the claimant in detail there were eleven issues stated. She accepted most of the issues raised, however she did not accept point three, stating she was not given proper feedback relating to the audits. In relation to point five, she explained that the three hundred covers in the vault and not on the shelves were the units she had been told to send to the Drogheda branch by FM.

When put to her, she said that her union representative had attended the appeal hearing in February 2005 on her behalf. When asked, she said that she declined to view the audit reports at the disciplinary meeting because to understand them properly you would have to be physically in the store. She was unaware if she could have taken the reports back to the store with her. When asked, she explained that the store was opened seven days a week for ten to twelve hours a day.

Respondent's Case:

The Senior Internal Auditor (PB) for Northern Ireland and the district covered by FM gave evidence. He explained that the respondent employed him for the past sixteen years, twelve of these in internal audit. His job was to visit the stores in his remit ad hoc and carry out audits to assess if the stores were operating correctly. Stores were normally visited twice a year for either a spot check or a full audit. At the time the respondent had seventy-five stores around the country.

He visited the Dundalk store seven times between July 21st and September 20th 2004. The witness explained a chart identifying items missing or not accounted for in the Dundalk store, between the periods of his seven audits. The witness told the Tribunal that he had given the claimant feedback on five of the seven audits, as she had been present while they were carried out.

The witness stated that he had attended a meeting in August 2004 where two staff members were dismissed as they had been distributing free units or were giving discounts to friends/family. After September 2004 CCTV footage was viewed and the information was compared to the chart of the seven audits. A loss of over €6,300 was recorded. The witness said that this was a substantial loss and could not compare to any other store in the group.

He attended separate interviews with the claimant and three other staff members in December 2004; the HR Manager also attended these meetings. Two employees were dismissed. He had no role in the dismissal of the claimant.

On cross-examination he explained that a full written audit had been carried out in November 2001, May 2002, November 2002 and April 2003. There was no record of a spot check in December 2003. When put to him, he said he was not sure how many stores were re-graded to 'A+'. When put to him, he said that he commenced spot checks in the store after one of the respondent's trainers flagged that issues were arising in-store. He agreed that there did not seem to be any problems with the store in July 2004 and agreed that the claimant had received a letter of congratulations in July 2004 and was given a promotion with no probation period. He was also aware that the claimant had been absent on sick leave during 2004 and had commenced part-time work in November 2004.

When asked why the claimant had not been asked to a disciplinary meeting before December 2004, he explained that they were trying to identify the problem in the store and ascertain who was causing the problems. The claimant had been given regular feedback and shown some printouts. He agreed she had not been given the final printout giving the total loss in the Dundalk Store.

On the **second** day of the hearing the District Manager (FM) gave evidence. He explained that, at the time, he was overseeing fifteen stores for the respondent company. The claimant was the branch Manager of the Dundalk store and she reported directly to him. There were three other 'A+' rated stores in his district.

He told the Tribunal that the store seemed to be running fine until May 2004 then it began to deteriorate. There were problems with the turnover; the balance collection, the TPT and the cover checks were not being carried out. The witness said that he had discussed the issues with the claimant but had no written record of them. He also explained that when he visited the store he did not always write a report on it.

In July 2004 the witness was overseeing the opening of a new store in Boyle. He then commenced annual leave and returned on August 3rd 2004. He told the Tribunal that he visited the Dundalk store on August 4th, August 13th and August 31st 2004 and spoke to the claimant on these occasions. He informed her of two staff members being dismissed because of irregular transactions in store. He also visited the store on September 9th and September 23rd 2004, but these visits were not documented. Between August and October 2004 he had regular conversations with the claimant, two or three times a week.

On October 6th 2004 he carried out an extensive check of the Dundalk store. Standards were poor. Less than a week later the claimant suffered a threatened miscarriage and commenced sick leave until November 2004. He was still conversing with the claimant about the management of the store during this time.

On December 17th 2004 the claimant was called to a disciplinary meeting in a local hotel in Dundalk. The witness told the Tribunal that his copy of the minutes submitted at the hearing were an accurate reflection. On January 21st 2005 the witness wrote to her regarding the disciplinary meeting. The witness told the Tribunal that he had decided on the sanction against the claimant to demote her two grades. He was not involved with the claimant's appeal of his decision.

On cross-examination and asked why there was no report of his visit in July 2004 he said that there was no necessity to fill out a branch report every time he visited the store, only if he needed to leave a list of instructions. However, he did agree that there should have been a report. He told the Tribunal that he spoke to PB On July 21st 2004 and informed him of his concerns about the Dundalk store.

He again told the Tribunal that he had on-going conversations with the claimant during the investigation. He agreed that staff levels had fluctuated during 2004 but stated that one member of staff was taken on in September and three more in October 2004. When put to him he said that in August 2004 he had a perception that the claimant was not performing in an acceptable manner. He had no problem with the claimant's attitude but felt she was failing to comply with company procedures. He could not recall a note on the claimant's file to that effect. When put to him, he said that PB had informed him that 300 units were misplaced in August 2004 and the issue had been raised with the claimant.

When put to him he said that he wanted cover checks preformed twice daily in-store but could not recall if he had given the claimant a time scale to work from. He explained that during the claimant's period of sick leave Managers from other stores covered the store. When asked, the witness said that he was called to a disciplinary hearing in late 2004/early 2005 concerning the issues of the Dundalk store. He received a written warning, which affected his annual review in 2005. His salary was not reduced. When put to him, he said that the claimant had not been used as a scapegoat.

He agreed that there had been a shortfall of staff numbers in October 2004 but staff from other stores had helped out. When put to him he stated that he had trusted the claimant but there had been a lot of other issues involved.

Determination:

The claimant failed to discharge the onus of proof required to establish that she was constructively dismissed by the respondent. The claimant in the internal appeal had requested that a lesser sanction be imposed on her than the double demotion and this was acceded to by the respondent. The respondent is entitled to conduct an investigation into the serious situation that existed in the branch which could not be allowed to continue and existed because of the state of the management skills exercised by the claimant at that time. There was no question of the claimant being involved in defrauding the respondent. Having requested the reduced sanction against her in the appeal she could not say that this was unfair. As the claimant has failed to prove a dismissal took place, her claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)