

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1424/2005

against

MN1044/2005

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S.C.

Members: Mr. F. Cunneen
Ms. K. Garvey

heard this claim at Naas on 1 February, 2, 4 & 11 April
with oral submissions in Dublin on 25 April 2007

Representation:

Claimant:

Mr. Adrian Kane, Branch Secretary SIPTU,
George's Street, Newbridge, Co. Kildare
With Ms. Mary Fay B.L. instructed by
Ms. Aileen O'Carroll, Donal Taafe, Solicitors,
3 Burgh Quay, Dublin 2, on the last two days

Respondent:

Mr. Tom Mallon B.L. instructed by Mr. Séamus Given,
Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows: -

The respondent employed the claimant, as a packaging operative, from March 1999 and the employment was uneventful until an incident on 9 December 2004 as a result of which the claimant was dismissed on 24 March 2005.

On 9 December 2004 an employee from the engineering department (EE) reported to the

respondent that her purse had been taken from the ladies locker room in building 2 at around 12-45pm and that money had been taken from her bank account. It was subsequently established that attempts to withdraw money from the employee's account had been made at approximately 1-07pm and at 2-07pm at the ATM in building 2. The 2-07pm attempt was successful, the person responsible (PR) was identified following study of CCTV footage of the area where the ATM is located, admitted her involvement, whilst denying any involvement in the 1-07pm unsuccessful attempt, and never returned to the respondent.

The Security Manager (SM) along with the Packaging Operations Manager (POM) and the Human Resource Consultant (HRC) carried out an investigation into the incident. A colleague of EE, who was with EE in the locker room at 12-45pm, recalled having seen an employee wearing packaging uniform in the locker room at this time. She identified this employee to be the same person as was using the ATM at 1-07pm when shown the CCTV footage. Whilst she recognised this person as an employee she did not know her name until later. It was the claimant. As a result the claimant was interviewed by SM in the presence of POM on 10 December 2004 and denied having been in the locker room prior to going to the canteen. She could not recall if she had been to the ATM. The claimant was not shown CCTV footage at this stage. The Packaging Manager (PM) was of the opinion that the person bore a strong resemblance to the claimant. The person was wearing packaging uniform, including a mop cap, and she did not know of any other member of the packaging personnel who bore a close resemblance to the person.

The claimant was again interviewed on 17 December 2004, accompanied by a colleague, and could not remember if she had been in the locker room. She stated that she had lunch in the canteen with four colleagues, including the one who accompanied her to this meeting. The CCTV footage was shown to the claimant and her colleague at this meeting. Both said it was not the claimant, her colleague said it looked like someone they knew but did not name the person. Subsequently they both claimed that it was the same person in both the 1-07pm and 2-07pm footage, that is PR.

There was some difficulty in getting the CCTV footage transferred to a recording that could be made available for viewing by others including the claimant, this together with the respondent's two-week shut-down over the Christmas New Year period meant that there was a break in the process until 17 February 2005 when the claimant was required to attend a meeting with the investigating team on 21 February 2005 at which she was reminded of her right to representation. The claimant's shop steward attended this meeting with her. It was put to the claimant that she had been identified as the person at the ATM and that the investigating team felt that she had a case to answer. The claimant was suspended with pay pending the outcome of the investigation. The claimant indicated that on 9 December 2004 she had lunch with five colleagues, including the four she had mentioned on 17 December 2004. By this time the Gardai had also begun an investigation into the incidents of 9 December 2004. The Gardai had to be informed of the incidents as a condition of the respondent being provided with the information about the transactions on the ATM. At this meeting the claimant raised the issue of two parallel investigations. The Gardai had interviewed her prior to this meeting. The investigating team told her that the Gardai investigation was entirely separate from their investigation.

In the event the investigating team interviewed the five colleagues of the claimant mentioned on 21 February 2005. The colleague who accompanied the claimant on 17 December 2004 now stated that the person in the 1-07pm footage was the 2-07pm perpetrator. The consensus was that mop caps were not normally worn in the canteen area and that they all had lunch together. It is common case that the quality of the copies of CCTV footage available from February 2005 onwards is of a lower standard of clarity than that originally viewed in December 2004. The investigating team

produced a report which found that the claimant was the person who carried out the 1-07pm attempt and that her actions could constitute gross misconduct warranting serious disciplinary action up to and including dismissal. A copy of this report was sent to the claimant on 28 February 2005 and she was called to a disciplinary hearing with the Director of the OC Department (the Director).

At this meeting a series of points were raised by the claimant who was represented by both her shop steward and her branch secretary. The claimant was unrepresented at the meeting on 10 December 2004 and felt pressured at this meeting. The claimant's position was that she never wore a mop cap in the canteen area; the person in the 1-07pm footage was wearing a short uniform jacket whereas she always wore a long one and that PR was also the person in the 1-07pm footage. The Branch Secretary again raised the issue of parallel investigations and that the union were not in favour of the enquiry proceeding while there was an ongoing Garda investigation. This point was emphasised in a letter from the Branch Secretary to the Director on 2 March 2007. The Director responded to this letter on 7 March 2007 quoting precedents to justify the respondent's position in carrying on with the disciplinary process and affirming her intention to make a decision on 11 March 2007. On 10 March 2007 the Branch Secretary wrote to the respondent seeking a postponement of the decision. Whilst this was agreed to the decision to dismiss the claimant was communicated to the claimant in a letter of 24 March 2005. The claimant sought to exercise her right of appeal to the Group Human Resource Director (HRD), this commenced on 8 April 2005 when the Branch Secretary presented a series of arguments to the effect that the respondent had acted in undue haste which was contrary to natural justice and that as there was a criminal investigation ongoing the claimant had a right to silence and was therefore prevented from taking part in the appeal process. The appeal re-convened on 26 April 2005 and the conclusion was that as the claimant's position was that no appeal could be presented at that time then the Director's decision to dismiss the claimant stood.

The claimant was before the District Court in September 2006 as a result of the incidents of 9 December 2004. She was acquitted of the charges against her as it was found that she could not be identified beyond a reasonable doubt as the person involved in the 1-07pm attempt. There was considerable legal argument put to the Tribunal by the claimant's representative along the lines put to HRD on 8 April 2005. A further argument was put that as the claimant had been acquitted by the District Court the decision by respondent to dismiss her was subjecting her to double jeopardy.

Determination

Several issues were raised by the claimant including a legal argument that the respondent should have delayed the disciplinary process until the criminal proceedings had been concluded. After careful consideration the Tribunal is satisfied that it does not have to rule on the legal points involved in this argument. The core issue, however, is whether the claimant was the person who used the ATM at 1-07pm. The Tribunal heard a number of witnesses on this point and viewed the video footage several times. The quality of this footage had deteriorated and positive identification from the footage would be very difficult but in the Tribunal's view the person shown on the footage bore a resemblance to the claimant.

It was pointed out that the people who worked together wearing mop caps would recognise each other easily and the Tribunal attaches great weight to the evidence of PM who, from the outset of the investigation to the Tribunal gave her evidence in measured terms. She said that the person bore a strong resemblance to the claimant, the person was wearing packaging uniform, including a mop cap, and she did not know of any other member of the packaging personnel who bore a close resemblance to the person. *In her opinion it was the claimant.* The Tribunal was sceptical of the clear positive identification by EE's colleague who had seen the claimant in the locker room but may have convinced herself that the person on the footage was the same person.

The Tribunal was also sceptical of some of the evidence given by other witnesses, some of whom positively identified the person on the footage as being PR. Personnel records of PR, including a photograph, were seen by the Tribunal and these show that PR bears no resemblance to the claimant. The last witness, who had never seen the footage until the Tribunal hearing, also gave a very firm identification of PR as the 1-07pm person. The Tribunal rejects this evidence, which only undermined whatever credibility remained of the claimant's evidence.

The Tribunal has to make a finding of fact on this issue and, on the standard of proof required in civil cases, finds that the claimant was the person at the ATM at 1-07pm. Based on this finding of fact the Tribunal finds that the respondent has shown "substantial grounds justifying the dismissal" within the meaning of Section 6 of the Acts. The Tribunal therefore holds that the dismissal was not unfair and the claim under both the Unfair Dismissals Acts, 1977 to 2001 fails. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 also fails as the claimant was dismissed for misconduct.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)