

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD444/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. C. Ormond
Ms M. Maher

heard this claim at Dublin on 12th September 2007
and 3rd December 2007

Representation:

Claimant(s): Mr Brian Forbes, Mandate, 9 Cavendish Row, Dublin 1
Ms. Mandy Kane, Mandate Union, 9 Cavendish Row, Dublin 1

Respondent(s): Ms. Aoife Salmon, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

The general manager of the Mary Street store told the Tribunal that he was employed in that capacity for over a year. The respondent employed three hundred and sixty staff in Mary Street. He relayed an incident when the security officer on duty asked him to go to the security office as a member of staff was observed acting suspiciously. He went to the office and he told the staff manager that he may have a problem. He could see that the claimant had a lipstick in her hand, the seal was not on the lipstick and she put the lipstick on her lips. She went around the shop and went to the stock room. He went to the stock room and he could not see the claimant. He saw the claimant in the upper stock room and she was getting stock for the department. He asked the claimant if she used the makeup earlier in the day and she told him that she had used it. The claimant opened her pocket and produced the make up. He told the claimant that they should report this to the staff manager. The claimant had the lipstick in a side pocket of her jacket. He went to the staff manager's office and both the shop steward and the staff manager were in the office and a meeting took place at 11.00a.m. He asked the staff manager and the shop steward could they

remain in the office. He told the claimant that they should discuss the situation. He again asked the claimant had she makeup and if she had anything in her pocket. The claimant went through her version and he then handed her over to the staff manager. The claimant was very nervous when she gave her version of events at the meeting. The claimant told him that she did not have anything else in her pocket. The staff manager gave a warning to the claimant and she read from the staff handbook and went through the process.

After the staff manager questioned the claimant they decided that they would ask the claimant to open her pocket. She had a number of sunglass covers in her pocket, which the respondent sold. He felt that this was a serious issue and HR dealt expeditiously with the disciplinary issue. The respondent had an 8½% stock loss in the health and beauty department and it had very high stock loss in makeup. The respondent was concerned about this matter. The store was quite at 10.30am and the security monitor was focused on the health and beauty department. The respondent sold its merchandise at a very keen price and the average item in the health and beauty department was priced under €5.

In cross-examination when asked if he was familiar with section C 4B of the disciplinary procedure he responded that he was aware of it. When asked why he did not give the claimant the opportunity to avail of representation at the meeting he responded that he would not recall what happened an investigative meeting. It was a version of what occurred before the meeting. He did not advise the claimant at the first meeting that she was under investigation. He came in half way through the incident and he spoke to the claimant in the stock room. He wanted to ensure that it was not her own make up and he did not see the incident occur. When he brought the claimant to the stock room it was a fact-finding mission and an investigative meeting took place after that. When asked how the claimant breached the security policy he responded that the claimant took makeup from a make up counter. She opened and sealed a lipstick and she concealed the item from her person. When asked if he gave her the opportunity to remove it, return it or pay for it he responded that the property was still in store. A sealed item had been used. When asked how he knew it was sealed he responded that he did not see the full view of CCTV footage and he saw her walking on the floor and opening the seal. The claimant told him that she had used the lipstick. When asked if she did not attempt to conceal the lipstick he responded that she did not deny using the lipstick.

When asked if it was normal procedure to inform staff of their rights before or during an investigation he responded it was normal to inform them of their rights during the investigation. The shop steward and the claimant were asked to attend a meeting. He asked the claimant to explain what happened and the claimant gave a version of what had occurred. Once the claimant admitted to using lipstick the shop steward informed the claimant of her rights. When asked if he was aware that staff could purchase goods in store during the lunch break he responded that he was not fully aware. He stated that staff could do what they wanted at lunchtime. He could not be sure that the rules and regulations were adhered to fully and generally goods were purchased outside of working hours. When asked if the claimant would not have the opportunity to purchase goods he responded that the store was open at 9a.m. The claimant was in work and she was not doing what she was supposed to do. The claimant had left the sales floor. There was a specific office in the stock room where items could be held. When asked if he was aware of every circumstance on the staff floor he responded that if he bought something in the shop he would have to get authorisation from the manager to buy it. In his thirty-one years with the company he had never saw it happen.

The claimant was nervous when he met her. The witness was summoned to look at CCTV footage. From the footage he could observe the claimant going to a mirror, she opened the seal and she applied make up and she went to the sales floor. He followed the claimant to the stock room after

the incident. There were very few customers in the store. The security officer told him that he saw the claimant-taking product from the beauty and health department and the claimant was beside a mirror.

When he brought the claimant to the stock room at 11.05a.m he had not seen the CCTV footage. The claimant broke the seal with her fingers. He had to ascertain if this was company product and he was 100% sure that it was. It took him a minute to get from the ground floor to the stock room. Part of the claimant's duty was to return items that had gathered the previous evening. The claimant would have ample time to do this.

The second witness for the respondent AMcN told the tribunal that he was employed by a security company and undertook work in the respondent for the past two years. As part of his duties he was told to observe the cosmetics department. He observed a staff member going to the make up area, she selected a lipstick and walked away with a basket in her hand. She tried to peel off the seal on the lipstick with her nail. He then got a VCR and recorded the claimant at a mirror and she tried on a lipstick. He saw her hand going to her pocket. The claimant went to the health and beauty department a second time and she got a second tube of lipstick. He changed the camera to try and get a frontal view and he observed that the second time the makeup was missing. The claimant left the underwear department and went to the stock room. All cameras were motion cameras and could zoom in and out. He told the general manager what had happened and he explained that the claimant took make up off the shelf and she used it. The general manager saw the end of the tape and he went to the stock room. He saw the claimant with the first selection of makeup and he saw her select the second item. He observed that she put the first item in her pocket and the second piece he lost.

CCTV footage was shown to the Tribunal, which showed the claimant going to the underwear department. She peeled the label off the lipstick and tried it on and she then walked away with the make up in her hand. She put a lipstick in her pocket, and then took an item off the shelf, she walked around the store and she put the items in and out of a basket. At 10.27a.m. the claimant peeled off the label and tried on the lipstick and at 10.31 she took a second lipstick. He could not see where the second item went but he was one hundred per cent sure of the first item.

In cross-examination AMcN stated that he saw the claimant with the first lipstick. He called the general manager and when the general manager arrived the claimant had the second lipstick. She had not applied the second lipstick. He saw her open the first lipstick and she had a second lipstick and he observed that the claimant tried on the second lipstick. When he tried to get a frontal view of the claimant she tried on the lipstick. She had the second lipstick in her hand and she then walked back down and he was unable to see the cosmetic department.

The HR manager told the Tribunal that she was on the shop floor with the general manager and received a call from security. Present at the meeting were the shop steward, the manager and the witness. The manager explained the alleged incident to the claimant and he asked the claimant to attend a meeting. It was an investigative meeting. She explained the process to the claimant and she asked the claimant to explain what happened. The claimant told her she was at the underwear department and she was returning stock. She applied lipstick and she intended to put it back, the claimant did not deny that she used the lipstick. She asked the claimant where she got the lipstick from and she told her it was half opened. The claimant had no colour on her lips; she said she intended to return the product. The claimant told her she did not have anything in her pocket. She told the claimant the respondent had the right to search and the claimant took out sunglasses covers out of her pocket and she told the HR manager that the sunglasses were her own. She picked up the

sunglass covers from the sales floor. She asked the claimant why she had the sunglass covers in her pocket. At a meeting on 6 February 2007 the claimant told her that she did not intend to take items. She admitted to opening a lipstick and she put the lipstick in her pocket and she intended to return it. She questioned the claimant about the sunglass case covers. The claimant had gone to bring down new lines of fashion and she had a knife in her hand. A letter dated 5th February was given to the claimant and she was advised of the meeting on 6 February.

After the investigation when the claimant was suspended the HR manager carried out the rest of the investigation. The claimant started work at 10.30 and the store opened at 9a.m. The claimant went to the health and beauty department and selected a lipstick. The claimant told the manager that she picked up items and returned to the shop floor. She went to a mirror and applied lipstick, she went to health and beauty department and selected another lipstick. She then went to another mirror and applied lipstick a second time, the claimant then went to the stock room. She spoke to Mr. E to establish what he had witnessed. The claimant told him that she had picked up lipstick before going to the underwear department. The HR manager put the facts to the claimant at the meeting. She did not change any of her stories after she viewed the CCTV footage; it was theft and gross misconduct.

In cross examination when asked if there was a certain degree of haste in arranging a meeting she stated that the general manager was contacted by security and the general manager observed the claimant using lipstick. He had no choice but to summon the claimant to a meeting. She felt it proper that the claimant be represented and KF the shop steward was in attendance at the time. The manager asked the claimant if there was anything she wanted to say. When asked if the claimant had the opportunity to speak to the shop steward she responded she was in attendance and she was not given the opportunity. When again asked that she offered the claimant the opportunity for representation she responded that she was trying to establish the facts. She gave the claimant every opportunity to explain what happened. The HR manager stated that she was the best person to consider all the facts. At the disciplinary meeting she offered the claimant the opportunity to look at CCTV footage. When asked that there was no reference to a basket at the disciplinary hearing she responded she did not raise the issue of a basket.

The group HR manager told the Tribunal that the claimant appealed her decision to dismiss to her. The first meeting took place on 22 March, and the claimant raised a number of points. The second meeting took place on 4 April to clarify points at the first appeal. On 22 March she asked the claimant to tell her what happened. The claimant told her she went to the health and beauty department, she saw a lipstick and tried it on. The claimant told her that she was going to return it to a bucket. She told her she had a basket with her. The union representative at the time stated that shopping on company time was a bigger issue, the claimant was clocked in and she should not have been shopping. The claimant told her she had two pairs of shoes in the basket. The claimant told her that she overheard the HR manager say that she should resign. When the group HR manager put this to the claimant she admitted no conversation took place. She was happy that the claimant's actions constituted gross misconduct.

In cross-examination she said that she was surprised why the issue of the basket was not raised at the disciplinary meeting.

Claimant's Case

KF on behalf of the claimant told the Tribunal she was a shop steward and had been employed for eighteen years with the respondent. Prior to 1996 staff paid for goods they purchased on Monday, Wednesday and Friday from 9.00am. to 9.30am. Post 1996 staff bought purchases and paid for them prior to going home at the cash point in menswear.

When asked if it was usual for someone to conceal something she responded that the claimant may have a basket in the storeroom. At the time the holding area was the stock room. If an employee wanted to purchase an item it was put in a bag and it was paid for whenever the purchaser wanted to buy it. If she wanted to purchase an item she would get a supervisor to leave it in the holding area.

The claimant told the Tribunal that she commenced employment with the respondent in April 2005. On 2nd February 2007 she spoke to her supervisor who asked her to do some recoveries. She went to various departments, she saw a lipstick in the health and beauty department and she opened it, she stated that it was half open. She tried on the lipstick and she put it on the second time. She went to the stock room with the lipstick and placed the lipstick in her pocket. She pulled a trolley around and she picked up sunglass covers and the general manager called her attention. She was about to put stock down and she had a knife and a lipstick in her hand. The sunglasses were lying in front of her and she placed them in her pocket with the lipstick.

The manager asked her if was she working in the health and beauty department and she told him she was doing recoveries. She told him she had make up and that she had used the lipstick. The manager asked her for an explanation. He did not tell her that she was under suspicion or investigation and she was not offered union representation. She was aware that there were CCTV cameras in store. She knew it was unhygienic to return lipstick and she went straight upstairs to put on the lipstick.

The policy in relation to staff purchases was that goods could be paid for during the break period, if she saw an item that she liked she could put it away and then pay for it. She recounted on one occasion she picked up a wallet, which was on the shop floor, and she returned the wallet to the manager. Another time she found €50 on the shop floor and she stated that she was not in a position to do anything that would harm the company. The lipstick was half open; the sellotape was half opened and at the end of the day she stated that she would buy the lipstick. She was dismissed in February and received her P45 in April. She endeavoured to obtain alternative employment. She undertook training as a care assistant in September after she was dismissed.

In cross-examination she stated that that she commenced work at 10.30a.m. and she went to the underwear department. She picked up the lipstick in the underwear department. She did not pick up the lipstick in the health and beauty department. The lipstick was in a basket that she had, she was delivering goods in a basket to the health and beauty department. She was surprised when her manager approached her. When asked if it was unusual for her manager to approach her she responded he could approach her. The manager went outside and came back and asked her if she had anything in her pocket, she was returning to the shop floor. When asked if it was normal practice to conceal anything she responded that you can buy anything and you can try it, she tried the lipstick, she liked it and she kept it within herself. When asked in relation to shopping in company time she did not have an issue at that stage. When asked if she had an issue shopping in company time and she concealed the lipstick in her own pocket jacket she responded if she saw anything she liked she would keep it to one side and then she would pay for it later.

She did not say at the meeting that she purchased the lipstick. The shopping basket was in her section, she had a basket that she kept in her department. At the meeting she informed HR that she had a shopping basket and that there was a basket, which she left at her section. She told the general manager everything and that the basket was in her department and if she were allowed to leave the stock room she would have put the lipstick in the basket. The general manager and CMC informed her that she had an intention to steal. At the first meeting she was asked why she had the lipstick in her pocket. At the appeal meeting she told those in attendance that she was trying to get stock from a shelf. She could not understand why she was asked all those questions. When asked in relation to applying for jobs she replied that she found it difficult to obtain alternative employment. Asked if she requested a reference from the respondent she replied that it was stated on her P45 when she worked for the respondent. She has been in receipt of a job seekers allowance.

In answer to questions from the Tribunal she stated that she put the lipstick in her pocket when she tried it on and she went straight to the stockroom. When asked why she did not put the lipstick in the basket along with the other items she responded that she had tried on the lipstick and she had decided that she would buy the lipstick. When asked why she tried on the lipstick again she responded the first time she was not satisfied and she tried it on a second time. When asked what basket did she find the lipstick in she responded the basket that she was using in the health and beauty department. She had a number of items in the basket to be returned to the health and beauty department.

Dissenting opinion of Ms. Mary Maher

Mary Maher dissenting that the dismissal in this case was unfair because the respondent failed in every respect to comply with the initial phase of their own procedures.

According to the company handbook, the first step in dealing with “an issue that is potentially one of gross misconduct” is usually suspension without pay. The handbook states: “Suspension does not presume that the individual is guilty of the offence. It merely provides management with the opportunity to fully investigate all of the facts.”

The second step in the process is a “thorough investigation by the store manager” by way of an interview with the employee in question: “This is an initial fact-finding interview and NOT a formal disciplinary hearing,” the handbook states. (Capitalisation as in handbook.)

A formal disciplinary hearing is the third step.

The company also has a search policy, agreed with the union, which allows regular searches of bags and personal possessions of the staff. The agreement states: “no accusation or suspicion of dishonesty is made or implied”.

In this case, the claimant was filmed on CCTV acting in a manner that aroused suspicion. Alerted to this by a security worker, the General Manager could have invoked the search policy and immediately established whether or not any item had been taken from the store’s stock.

Instead he signalled the Human Resources Manager that their might be a problem, and went to the storeroom to confront the claimant. No one else was present. He questioned her as to whether she had taken a tube of lipstick. The claimant said she had, and intended to pay for it.

In effect, the General Manager ignored the first step of the procedures – suspension without pay -- and proceeded to the second step of the process, the fact-finding investigation, without so informing the claimant or ensuring that a witness was present. The right to a witness is fundamental at every stage of an investigation of this kind.

He then brought the claimant to the Human Resource Manager's office to continue the investigation. He did not ask the claimant whether she wished to have a representative present, and if so, who that should be. As the shop steward was already in the office on other business, he decided the shop steward would be the witness.

The Human Resources Manager questioned the claimant in detail on the matter under question, and then held a private side meeting with the General Manager. This is an unorthodox and unacceptable step in a meeting of this kind, where high standards of openness and transparency should apply.

Asked at the hearing why the side meeting was held, the Human Resource Manager said it was “to decide what to do next”. This is further indication that neither manager was familiar with the disciplinary procedures, and that decisions were being made on an ad hoc basis as information was gained.

The decision taken at the private meeting was that the claimant should be asked to empty her pockets. This was apparently considered appropriate in view of the search policy. In fact, a search at this stage is highly inappropriate. Searches are an invasion of privacy. Under the agreement they are allowed in circumstances, which don't imply suspicion, meaning that there has been no questioning or suspicion voiced. The claimant had been questioned about her actions and her motives and was clearly under suspicion.

This investigation concerned only one item, a tube of lipstick, which the claimant had already said she had taken. A search could only confirm that fact and/or reveal other items, which were not subject to this investigation.

The Human Resource Manager then invoked what should have been the first step in the process, and suspended the claimant on full pay pending a formal disciplinary hearing.

This hearing took place three days later. The claimant was not informed of her rights until the meeting was underway.

The Human Resource Manager led the questioning, and this is the most serious breach of procedures. It is contrary to basic principles of natural justice that the person who conducts an initial investigation, and decides as a result of that investigation that the alleged culprit should be suspended, should subsequently preside at the formal hearing.

In this instance, the Human Resource Manager is further compromised by the fact that she held a private side meeting with the Store Manager at which it is possible preliminary judgments had been made.

Procedures are not technicalities to be waived under the weight of evidence, however compelling. Appropriate procedures are crucial protections for workers and are intended to assist both employees and employers. Employers should be held to due process in every case, but especially in cases where the consequences are as grave as dismissal.

Determination

By majority (Ms. Maher dissenting) the Tribunal find that the dismissal was not unfair. There were serious credibility issues with the claimant's evidence. It was inconsistent and contradictory and at times deliberately vague. On the second day of the hearing she attempted to suggest that we did not in fact see what we viewed on the CCTV footage on the previous occasion. In the main the respondent adhered to the correct procedures. However the claimant should simply have been asked to attend an initial investigation rather than an impromptu meeting in the storeroom. However on balance the procedures were substantially adhered to and given the seriousness of the incident and the weight of the evidence against the claimant we find that dismissal was appropriate. The claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

