

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employer

UD861/2006

against the recommendation of the Rights Commissioner **R-040389-UD-06/JT**
In the case of:

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mahon B.L.

Members: Mr. B. Kealy
Ms. K. Garvey

heard this appeal at Dublin on 8 March
and 20 & 21 November 2007

Representation:

Appellant:

Mr. Marcus Dowling B.L., instructed by Ms. Maryrose Dillon,
William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2

Respondent:

Mr Shay Fleming B.L., instructed by R.T. Ringrose & Co., Solicitors,
3 Chancery Place, Dublin 7

This case came before the Tribunal as a result of an appeal by the employer (the appellant) against a recommendation of the Rights Commissioner Ref: **R-040389-UD-06/JT**, in the case of the employee, XXXX (the respondent).

The determination of the Tribunal was as follows: -

The employer operates a large distribution operation including a warehouse on behalf of a leading retail organisation. The employee, a warehouse operative, was part of a team involved in the loading of goods onto trucks for distribution to the retail organisation's stores. The employee, who had previously been a contract security guard at the site, had been employed since 21 July 2003 and the employment was uneventful until an incident, which occurred during the night shift, which commenced at 6-00pm on the evening of 27 November 2005. The employer has an agreed right of search policy that allows for both personal and locker searches. The employee was a shop steward and signatory to the policy at the time it was agreed in June 2005. The events of this case are concerned only with personal searches. The relevant parts of this policy are as set out as follows: -

When:

- All KD employees could be requested to comply with a search, as per policy, on leaving through the turnstile. This process will be facilitated by the use of a random button system. Every person leaving site will need to press the buzzer before going through the turnstile. There will be a light system which will flash green or red once the buzzer has been pressed. If the light is green, the person will swipe through the turnstile, or be let through by security. Should the light flash red, the person will be asked into the security office to be searched.
- An employee could also be requested to undergo a search - should strong evidence be presented to management – at any time during the course of the employees time on site.

Searching a Person

- A suitable private area should be selected where an empty table or surface is available.
- The KD search log book must be available and written records maintained. Any searchee has the right to read and view their search detail as recorded.
- Before commencing the person conducting the search must obtain consent from the individual.
- The search should comprise of:
 - Bags – ask the person to remove the contents of their bag(s) ensuring all compartments are included. On no account should the person conducting the search put their hands into the searchee’s pockets or bags.
 - Coats – Coats, jackets or overalls may be removed providing appropriate and adequate clothing is worn underneath. This must be established before any request is made. Request that the person remove their coat or jacket and lay it flat on the table. The person conducting the search will then “pat” down the coat or jacket. Should the person conducting the search feel anything in the coat or jacket, they will request the person to remove the item and place it on the table.

Under no circumstances should the person conducting the search put their hands inside the garment including inside the pockets even if the searchee consents or requests them to do so. If items are detected the person to whom the garment belongs to should be asked to remove the items.

Refusal

- Although employee searches form part of the company search policy, consent must be obtained on every occasion.
- If a person refuses a search they must be informed of the following:
 - Their manager will be informed of the refusal.
 - That they are in breach of the company search policy.
 - Such breaches may lead to disciplinary action.
 - A decision may be taken to call the Gardai
- If the person still refuses, the following should be recorded in the employee search log:
 - The date and time.
 - The persons name and department.
 - The reason for the refusal.

Where

- All searches will be actioned in a private area/location. A private room will be available and the search will be conducted away from any public areas and other staff members.

Who

All searches **must** be conducted by two people. One to perform the search and the second to act as a witness.

Only the following people are authorised to conduct searches for KD:

- The loss prevention manager or officers.
- All members of the Distribution Centre Leadership Team.
- Members of management from Team Manager upwards.

The following people may act as a witness:

- Agency security personnel
- Another person of responsibility within the Distribution Centre e.g. Support Functions
 - **Under no circumstances should any person identified as a witness, instigate or perform searches, or act in any capacity other than to observe proceedings.**
 - **No one person is authorised to conduct a search alone.**
 - **Any person who performs a search must be fully trained in this policy and the procedure.**
 - **During a search the witness must be present at all times.**

At around 01-30am on the morning of 28 November 2005 the employee entered the security area to pass through the turnstile as he wished to go to his car in the adjacent car park. On pressing the buzzer the employee received a red light, which meant that the employee was to be requested to undergo a personal search to which the employee agreed. The employee removed his coat and placed it on the table. The security guard (SG), who was acting alone, then carried out the search. The Tribunal saw CCTV footage of this search. Initially SG was satisfied with this search and allowed the employee to proceed through the turnstile. Whilst the employee was leaving the security area SG became concerned about a bulge that he perceived in the employee's clothing. SG requested the employee to submit to a further search. The employee declined this request but chose to remove his coat, which had been removed for the initial search, and the hoodie, which had not been removed for the initial search, and place them on the ground just outside the security area. The employee then proceeded to his car which was parked some thirty to forty metres away. The employee was seen to be handling a bag in the vicinity of his car. On his return to the security area the employee was asked to remain there. A search of the area around the employee's car revealed a bag containing MP3 players, DVD and cabling that was found under a car parked adjacent to the employee's car.

The employee's position is that he needed to go out to his car, as he needed to check on a bag of pieces of lace material, the property of his wife, which was being returned to her via a work colleague of the employee. The employee had problems with the locking mechanism of the car, which was on loan to him following the recent write-off of his previous car, and, because he had lost the key to his work locker, he had been forced to leave the bag of lace, given to him at the start of his shift, under his car. The employer's position is that the employee was responsible for the bag being found under the car parked adjacent to his and that it was this bag that was seen by another security guard (AG) in the vehicle gatehouse which is some twenty metres from the turnstile area when AG saw the employee in the car park.

The shift manager (SM) quickly became involved in the matter and the employee volunteered to be searched again. SM requested statements from the employee, SG and AG. The employee was accompanied by his union representative. The Gardai were called but took no further action in the matter. The employee was suspended with pay until further notice by letter dated 28 November

2005 from the human resource manager (HR) this letter requested the employee to attend an investigative meeting the following day. The letter stated that there was an allegation of suspected theft against the employee and that disciplinary action up to and including dismissal might result from it. There was an investigative meeting conducted by the operations manager (OM) at 11-00am on 29 November 2005 and attended by a human resource officer (RO), the employee and his union representative. This investigative meeting was reconvened at 2-45pm on 2 December 2005 and once again at 4-55pm on 7 December 2005. Following consideration of the matter the employee was informed by telephone on 8 December 2005, confirmed in a letter the next day of his dismissal for gross misconduct. The employee exercised his right of appeal against the dismissal and the appeal was heard on 6 January 2006. The appeal was heard by another operations manager and was the employee was notified of the failure of his appeal by letter of 13 January 2006.

Determination:

It is clear to the Tribunal that, whilst the red light indicated that the employee was to be requested to undergo a personal search on the morning of 28 November 2005, in line with the agreed right of search policy, the actioning of that search was not in accordance with that policy. Specifically SG who conducted the search is only authorised to be a witness to a search. The only people authorised to conduct searches for the employer are the loss prevention manager or officers, all members of the Distribution Centre Leadership Team or members of management from Team Manager upwards. The following people may act as a witness: agency security personnel. It must follow that a search that was not conducted in accordance with the relevant policy cannot be relied upon in a disciplinary situation. However this illegitimate search revealed nothing untoward and the employee was cleared to proceed through the turnstile. It was at this point that SG, without the benefit of having seen CCTV footage, became concerned at what he observed. The right of search policy also states “an employee could also be requested to undergo a search - should strong evidence be presented to management – at any time during the course of the employees time on site”. At the time the employee refused the second search no such evidence had been presented to management so whilst there are sanctions indicated in the policy for such refusal this was not a refusal of a search properly requested in accordance with the policy. Having regard to all the circumstances the Tribunal finds that the dismissal was unfair. However had the employee submitted to the request for a second search, and had his position been vindicated, the events, which subsequently unfolded, could not have led to the position in which he found himself. Having considered the significant contribution of the claimant the Tribunal awards €1,000-00 under the Unfair Dismissals Acts, 1977 to 2001

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)