

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

Employee

**CASE NO.**

UD811/07

**Against**

2 Employers

**under****UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. S. Ó Riordain B.L.

Members: Mr. C. Ormond  
Mr. P. Woods

heard this claim at Dublin on 4th January 2008 and 12th March 2008.

**Representation:**

Claimant : Mr. Tom Mannion, Mannion Solicitors, Oranmore House, Taney Road, Dundrum,  
Dublin 14

Respondent : Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower Baggot Street,  
Dublin 2

The determination of the Tribunal was as follows:-

Dismissal as a fact was not in dispute.

**Respondent's Case:**

The Regional Security Manager responsible for carrying out investigations in stores in Ireland was asked to conduct an investigatory meeting with the claimant, when he was made aware by the Store Manager that the claimant had a jacket in her possession and there was no record of payment for this jacket. He conducted the investigation on 29<sup>th</sup> May 2007. A company witness also attended this meeting. The claimant chose not to have a representative present.

Procedures in place in the store afforded employees a 75% discount off the value of a uniform and 25% discount on other purchases. Each employee had a uniform allowance of €800.00. Employees had a staff discount card which was used against purchases of items. The claimant was aware of the discount rules attaching to the discount card. The Regional Security Manager asked the claimant several questions about a yellow jacket she was seen wearing on Tuesday, 8<sup>th</sup> May 2007 in the

store. She had chosen the jacket the day before, Monday, 7<sup>th</sup> May 2007 and asked that the jacket be put on hold and looked for a different size the following morning. She wore the jacket at work that morning and she said that she had intended paying for the jacket down the line. The claimant did not ask permission to wear the jacket that day. She went on holidays to South Africa on 11<sup>th</sup> May 2007 and returned on 28<sup>th</sup> May 2007. She said that she had intended paying for it on the day she returned but had not got around to it, as the Store Manager was too busy.

The claimant had been a trusted employee of the company. The Regional Security Manager gave the claimant about five minutes notice prior to being asked to attend a meeting and the claimant was not aware of what was to be discussed at the meeting.

Under cross-examination the Regional Security Manager explained that an employee can place an item on hold and this item can be kept until payment is made. He accepted that the point of purchase usually was the time of the transaction at the till. While it was not stated in the employee's contract of employment that she could not wear an item before purchase, the Company's Staff Handbook specifically says "that items of uniform must not be removed from the store or worn for work before payment has been made under any circumstances". The extended date of purchase can be up to two days. He couldn't confirm if the claimant actually wore the item on 8<sup>th</sup> May 2007. He was not present when the claimant spoke to the Store Manager the previous day.

The Regional Security Manager confirmed that, in the eight years the claimant had worked with the company and regularly purchased items, this was the only item not paid for. Other items selected by the claimant prior to going on holidays had been paid for. He said that he had not formed an opinion on the claimant's intention to pay: payment had not been made and he had no reason to believe that payment would be made. He suspended the claimant.

A Senior Store Manager from another branch of the respondent company gave evidence. He worked for the respondent for 20 years and knew the claimant. He had been asked by the company to conduct a disciplinary meeting with the claimant. This meeting took place on 1<sup>st</sup> June 2007. The claimant was accompanied by a colleague as her representative. He asked the claimant to explain her understanding of why the meeting was taking place. He also asked the claimant to confirm that she had read the notes of the investigatory meeting. The claimant explained again that the reason she had not paid for the jacket was because it had slipped her mind. She had mentioned that she intended paying for the jacket to two members of staff. She was aware of the severity and said she would take the punishment. He reminded her that three weeks had elapsed and that she had ample opportunity to pay for the jacket.

The Senior Store Manager adjourned the meeting on three separate occasions and spoke to the HR Department. On reflection there was a clear breach of company procedures and the claimant was fully aware of this. The claimant had de-tagged an item of stock and failed to make payment. She had not informed her Manager that she had taken an item from the store. Therefore, the Senior Store Manager's conclusion was that he had no choice but to dismiss the claimant for breach of company policies, which he believed to be gross misconduct. He informed the claimant that she had seven days to appeal the decision.

Under cross-examination, the Senior Store Manager said that he did not make the claimant aware at the commencement of the disciplinary hearing of the seriousness of the gross misconduct and that it could lead to her dismissal. He was aware that the claimant had in excess of €400 left in her uniform account and that the net value of the item was only €24 but it was the fact of her taking

the item without paying for it which he took into account. He accepted that the claimant had a previously unblemished record but this was not a matter, which he took into consideration. He took into account the facts on the day. There was zero tolerance in the company for non-payment of items and removal from the store. The claimant accepted that the situation was a serious one. He consulted the HR department to discuss the matter with them and sought their support.

The Senior Store Manager told the Tribunal during the first two adjournments of the disciplinary meeting he reviewed his notes and on the third adjournment he spoke to HR and informed them of his decision. It was solely his independent decision to dismiss the claimant. He explained that an employee should not wear an item prior to payment. It is not one's property until it is paid for.

He told the Tribunal that he had received training from HR on how to conduct disciplinary meetings. He consulted the company handbook and followed through on procedural aspects. He was aware of the sanctions to be imposed on an employee for gross misconduct. Because the claimant was an experienced manager and had removed an item from the store he felt he had no alternative but to dismiss the claimant. He did not consider any sanction less than dismissal.

The Area Manager for Ireland South gave evidence. She was responsible for thirteen stores in the Republic. She worked in the company for fifteen years the latter two as Area Manager. HR Department arranged the claimant's appeal and contacted her to conduct the appeal. She was furnished with a copy of both the investigatory notes and the disciplinary notes and the claimant's letter of appeal.

Present at that meeting were herself, the Regional HR Manager, the claimant and her work colleague. The Area Manager explained the purpose of the appeal meeting was to give the claimant an opportunity to bring additional or new information to the meeting. The claimant admitted to taking the jacket but said she had two brief discussions with two members of staff one being a Women's Wear Manager Grade 5 and another Manager who did not work on the shop floor. She had intended paying for the jacket. The payment for the jacket had slipped her mind.

The Area Manager believed the claimant had not brought any significant information to the appeal hearing. The only additional information was that the claimant said she had had conversations with two other Managers in the Store about the jacket she had chosen. The Area Manager believed these discussions were irrelevant. Her decision was that no new information was brought to the appeal hearing and that she had no option but to uphold the Store Manager's decision.

Under cross-examination the Area Manager gave evidence in relation to the claimant's career history with the company in which she agreed that, on occasion, the claimant was struggling to keep up her managerial responsibilities and was an employee under pressure. She said that she believed the Senior Store Manager's ultimate decision to dismiss the claimant was fair and she believed he followed company procedures. As she felt the Senior Store Manager's decision was correct she did not consider the claimant's previous unblemished record in the company. The decision she made was based on what she had heard at the appeal hearing. Credence was given to the claimant's mistake but because of the length of time that had passed and the jacket had not been paid for she found it difficult to comprehend that the payment for the jacket had actually slipped the claimant's mind. Based on what she had heard at the appeal hearing and the witness statements furnished, her conclusion was that the claimant had stolen the jacket and had no intention of paying for it.

Witness statements were taken after the claimant's appeal hearing and these were subsequently given to the claimant.

Ms E. gave evidence. She was employed as a Ladies Wear Manager. Her recollection of speaking to the claimant was about the colour and how nice the jacket was but she was not asked by the claimant to process the payment of the jacket.

Ms S, an office manager gave evidence. Her responsibilities were to print off uniform reports and pass to each department. She had a discussion with the claimant regarding clothes to match the jacket. She subsequently saw the claimant wearing the jacket in the store. The purchase of the jacket was not listed on the uniform report.

### **Claimant's Case:**

The claimant commenced employment with the company in 1999. She was a key holder for the company and had access to the store and to merchandise at all times. Security issues were frequent within the store and in the Centre. Her access as a key holder was not subject to CCTV or security guards.

She had purchased twelve items, six on 9<sup>th</sup> May 2007 and six on 11<sup>th</sup> May, from the store prior to her departure on holidays for over two weeks. She had deadlines to meet before the holidays. She had got everything running smoothly and had received a positive note from her Manager. On Monday, 7<sup>th</sup> May 2007 she put a jacket on hold for herself. The next morning she took possession of the jacket. She was aware she had breached company policies. Because she had been under enormous pressure coming up to her holidays the payment for the jacket had slipped her mind.

The claimant wore the jacket on Tuesday, 8<sup>th</sup> May 2007, had a day off Wednesday, 9<sup>th</sup> May 2007, did not wear it on Thursday, 10<sup>th</sup> May 2007 and brought it to work on Friday, 11<sup>th</sup> May 2007 with the intention of paying for it. She completely forgot to pay for it but had paid for other items. She travelled to South Africa on holidays and because she was staying with people she did not wish to use their phone to contact the office.

Her recollection of events when she returned from holidays was that she returned to work at 6 pm on Monday, 28<sup>th</sup> May 2007 and worked until 4 o'clock the following morning. She had a brief discussion with the Store Manager. She had not been given an update on business in her absence on holidays. At 12.45 the following day, Tuesday, 29<sup>th</sup> May 2007 she was paged to come down for discussions. The jacket was on her mind. She had a meeting with Regional Security Manager and told him she knew that this discussion was about the jacket. She accepted the removal of the jacket from the store without payment was a breach of company policy but it had slipped her mind especially as she had just returned from holidays the day before and started her shift at 6 pm that day. She had tried to talk to the Store Manager but had been interrupted. Interviews were being conducted at that time.

The claimant had been a dedicated hard worker. She had received good reviews. She never believed she would be dismissed as she had had an exemplary record and the disciplinary procedures provided for a range of penalties beginning with a warning. In a break in the investigatory meeting, she had asked the Regional Security Manager, whom she knew, if she was in trouble and he had told her to just tell the truth and that it would be ok. She realised the taking of the jacket without payment had been a very foolish thing to do. She knew there was a 75% discount on a uniform jacket. She had in excess of €400 in her uniform account and she

was not stuck for a uniform allowance.

The claimant was not a member of a Trade Union and was precluded from having a legal representative present at her appeal hearing.

The claimant established loss for the Tribunal.

Under cross-examination the claimant said she knew it was her responsibility to pay for the jacket. She did not emphasise the issue of the pressure she was under both at work and in her personal life at the appeal hearing. The claimant understood the severity of her suspension but never believed it would lead to her dismissal. She did not believe the dismissal to be fair because it had always been her intention to pay for the jacket.

## **Determination**

This case is one in which the respondent has submitted that the dismissal of the claimant is a fair dismissal within the meaning of section 6 (4) (b) of the Unfair Dismissals Act, 1977, i.e. that it arose from the conduct of the employee which, it is alleged in this case, constituted gross misconduct in her wearing and taking an item of clothing (a yellow jacket used as a “uniform”) without authorisation and without making payment.

The case was heard by the Tribunal over a period of two days. There were, as outlined in evidence under oath, five witnesses on behalf of the company and the claimant also gave evidence under oath. A brief summary of the respective positions of the parties is as follows:

It was submitted on behalf of the respondent that there had been a clear breach of company policy in relation to the uniform [Staff Handbook – “Uniform Policy”] and that such behaviour was specifically identified as gross misconduct in the company’s Staff Handbook. The matter had initially been investigated by the company and the claimant had been suspended on pay. Subsequently, the company had conducted a fair disciplinary process at which the decision to dismiss was taken and a fair appeal process was conducted at which the dismissal was upheld. The claimant was represented at the disciplinary hearing and appeal. The dismissal, in the respondent’s view, was fair.

It was submitted on behalf of the claimant that the dismissal was unfair in that, while the claimant at all times accepted that she had omitted to pay for the item in breach of company policies, the claimant had intended to pay for the item and this was clear from the fact that she openly wore the item in the store and discussed the matter with work colleagues; that it was further unreasonable, in a situation where the price of the uniform jacket after her entitlement to a 75% uniform discount was taken into account was only €24 and where €400 remained in her uniform account, to conclude that she had intended not to pay. It was submitted on behalf of the claimant that the failure to pay arose from a combination of work and personal pressures. It was further submitted that the procedures adopted by the company were unfair and that, bearing in mind the excellent service and unblemished record of the claimant, almost eight year’s employment, coupled with the previously mentioned matters, a sanction less than dismissal was called for and the decision to dismiss was unfair.

There were three stages in the case, firstly, the investigation by the Regional Security Manager; secondly, the disciplinary hearing conducted by Senior Store Manager and, thirdly, the appeal conducted by the Area Manager.

The Tribunal is satisfied that the initial investigation was conducted in a fair manner. In particular, the lack of judgement of the Regional Security Manager about any intention of the claimant to pay for the jacket is not important. A *prima facie* case was established that the jacket had been taken and worn without having been paid for. The claimant was properly suspended and a disciplinary process was correctly put in train.

There were, however, aspects of the disciplinary process, which, in the Tribunal's view, were flawed. The Tribunal regards it as essential that the claimant should have been told at the outset by the Senior Store Manager conducting the disciplinary hearing that the procedure could lead to dismissal. The disciplinary policies and procedures potentially allow a range of five sanctions, i.e. disciplinary transfer, demotion, loss of seniority, reduction of pay and dismissal for gross misconduct, and the claimant's evidence was that she believed that, given her unblemished record and her intention to pay, dismissal was not in prospect. The Tribunal also notes in this regard that uncontested evidence was given by the claimant that, during a break in the original investigation, she raised the seriousness of her position with the Regional Security Manager, whom she knew over the years, and he told her that it would be ok if she told the truth.

The importance of telling the claimant that the disciplinary process could lead to dismissal was of even greater importance than normal in a case such as this where the claimant was precluded from having legal representation and did not have trade union or other professional representation who might have advised on how the claimant should proceed and, in particular, on the issue of mitigation. The claimant even referred to the work colleague who accompanied her as her "witness" rather than as her representative. Indeed, depending on how individual hearings develop, the absolute prohibition on legal representation in cases of a potentially criminal nature where character and reputation are at risk may itself represent a fundamental unfairness.

There are further aspects of the disciplinary process which concerned the Tribunal. It is clear on the evidence that the Senior Store Manager conducting the disciplinary process did not consider the claimant's unblemished record, her trusted status as a key holder, the small value of the item, the fact that she wore the uniform openly, the substantial money remaining in her uniform account, the work or other pressures or the potential for a sanction lesser than dismissal in arriving at his decision. His view, very simply, appears to have been that once the claimant admitted taking the item and not paying for it over a three week period that was it: zero tolerance would apply and that was company policy as far as he was concerned.

A critical issue in this case was whether the claimant intended to pay for the item. Clearly, if she had so intended but it had, as she said in evidence, "slipped her mind" then the issue of mitigation should in the Tribunal's view properly have been considered under disciplinary policies and procedures which provided for a range of sanctions for dealing with instances of gross misconduct, especially, against a background in which she was not told that the only penalty would be dismissal. It is not for the Tribunal to come to any view on "*mens rea*" or, having regard to such cases as *Mc Gee v. Peamount Hospital* UD 136/84 and *Looney and Co v Looney* UD 834/1984 (referred to by the representative for the respondent), to substitute its own decision for that of the disciplinary body, but the Tribunal has to be satisfied that the relevant factors referred to in the preceding paragraph were taken into account in determining whether the claimant was or was not telling the truth, when she said that she intended to pay for the item but it slipped her mind, and in deciding on a penalty. The Tribunal is not so satisfied on the evidence presented by the respondent.

There is a third element of the disciplinary procedure which, in the Tribunal's view, might better have been avoided. The Senior Store Manager referred in his evidence to speaking to HR during a break in the disciplinary process. While he did confirm in evidence that he only advised HR of his own decision to dismiss, it would be better, at least for best practice, if disciplinary processes were conducted from beginning to end without any third party involvement. HR can always be involved on conclusion of disciplinary proceedings.

Turning now to the appeal conducted by the Area Manager. The Area Manager assumed that the procedures followed by the Senior Store Manager in the disciplinary process were fair on the basis of the written notes. It was indicated in evidence that the focus of the appeal was on whether new evidence was offered by the claimant and that, for all practical purposes, any discussions the claimant had with two of her colleagues in no way reduced the responsibility of the claimant to pay for the yellow jacket. No serious consideration appears to have been given to the claimant's unblemished record or other mitigating factors. The determining factor in upholding the dismissal was the failure to pay after three weeks. Subsequent statements were, however, taken from the claimant's two colleagues but she was not given any opportunity to see these statements or to cross-examine these witnesses at the time the statements were taken.

The Tribunal considers that the disciplinary procedures followed in this case were unfair to the claimant and, for that reason, determines that her dismissal was unfair and allows her appeal under the Unfair Dismissals Acts, 1977 to 2001.

The claimant originally had sought reinstatement by way of remedy but this was changed at the hearing to compensation. It is obvious that the claimant, although having suffered loss, contributed greatly through her conduct to her situation. The Tribunal, therefore, has determined that her compensation should be limited to €750.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)





