

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee
MN800/2006
against

CASE NO.
UD1233/2006

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: Ms. M. McAveety
Members: Mr. B. O'Carroll
Mr P. Clarke

heard this claim at Roscommon on 12th March 2008 and 4th June 2008

Representation:

Claimant: Mr. Frank Gearty, E.C. Gearty & Co., Solicitors, 4/5 Church Street,
Longford, Co. Longford

Respondent: Mr. Niall O'Driscoll BL instructed by Mr. Kieran O'Driscoll,
Weston Dunne O'Driscoll, Solicitors, 53a Rathgar Avenue, Dublin 6

The determination of the Tribunal was as follows:

Claimant's case:

The Tribunal heard evidence from the Claimant. He worked for the Respondent and for the previous owner of the Respondent company. The Respondent is a supermarket. He worked part time four days per week and two hours per day. His work entailed opening the premises, turning off the alarm, checking the deliveries such as bread and vegetables. He would stamp invoices and write into a book. He did not do supervisory work. He very seldom got through checking all of the deliveries.

On Saturday 16th September he arrived into work at 7.00 a.m. and turned off the alarm. The newspapers were there and he would usually bring them in and someone else would usually sort them out. He had no responsibility for the newspapers. The headings of the old papers were retained, as there was a refund. The remainder of the papers were left in the back of the shop for recycling.

He took a property supplement from one of the papers that were to be recycled. If he had not taken

the supplement it would just have gone into the skip. There was no monetary value on the supplement as there was no bar code. Because he was working he left the paper on a freezer for later.

The next day he was called into the office and the owner asked him why he took property without permission. The Claimant was astonished and told him that it was a property supplement and that it had no value. The owner told him that he was suspending him without pay and investigating. He was told to return at a later date i.e. on Friday at 11.00 a.m.

He had a day off on Wednesday and did not go to work on Thursday as he was suspended. The owner told him that he would make a decision on Thursday 20th September. He went to the meeting with his brother in law. The Claimant told the owner that he did not believe that he caused him any loss. The owner said to him that he left the premises with company property and asked him what did he have to say about it. He told the owner that he had nothing more to say. The owner told him that he was now suspended with pay and that he would make a decision later on that day at 2.00 pm. Later on the owner told him that he was lifting the suspension and giving him a written warning. (A letter dated 20th September 2006 was opened to the Tribunal).

The Claimant felt that he was being criminalised. Regarding the grievance procedures the manager reported to the owner and the Claimant felt that there was no one to go to in order to appeal the disciplinary action. He continued to work for a time and then on the evening of the 25th October 2006 he returned the shop keys to the manager and Karen. He said it had been a pleasure to work there but in the circumstances he could not continue. Karen handed him a letter on 27th October dated the 24th October. He felt that the owner should have mended matters before that if he had wanted to.

Concluding remarks: The issue of Constructive Dismissal was not taken lightly by the Claimant, he had family responsibilities. The reason he left was because he was branded a thief. He gave a deadline for a retraction of the allegations against him, which expired, so he had to leave. To this day the Respondent was unwilling to say it was not theft. There is a doubt about the value of the item taken, and there was no audit check. He had never heard of any customer being charged by a shop for a day old paper.

Respondent's case:

CCTV footage was shown to the Tribunal. The owner (CD) gave evidence that an incident was reported to him by KC who saw the Claimant take an item from the stockroom on Saturday 16 September 2006. On reviewing the CCTV footage, he saw the Claimant take a newspaper, the Claimant asked for his wages which were given to him, then walked out with the paper unpaid for. He asked the Store Manager (BT) & KC had he paid for it or sought permission for it, they said no. The Claimant's job was to open up in the morning, check in deliveries and check items off. He held a stock meeting with staff including the Claimant, making them aware of procedures and that if anything was taken without permission they may be liable to prosecution or dismissal.

He met the Claimant with BT on 19 September 2006 and asked him had he taken anything, the Claimant answered yes but only a supplement of the paper, he admitted he hadn't paid, or sought permission for it. The following Thursday he met the Claimant again with BT and EM. He suspended him on full pay. He met him for the second time at 1 o'clock on the same day, and told him that a decision was made to issue him with a final warning, but he gave him the right of appeal,

as he did not want to dismiss him, because he was a valuable member of staff. The Claimant said he had taken legal advice and that the procedures adopted at the Tuesday meeting were incorrect. He stayed in the job until 25 October 2006.

He received a letter from the Claimant's solicitor saying that if he didn't retract the warning, further action would follow. A second letter gave 25 October as the deadline for the retraction. His solicitor advised him to come to some agreement with the Claimant. He met with the Claimant and said that he would change the final warning to a caution, and the Claimant said to send it to his solicitor. So he drew up a letter on 24 October 2006 offering only to caution him or to have an independent investigation into the incident. The Claimant collected the letter on 27 October 2006, and came in that day saying that, as he had heard nothing from him, he could no longer work there, that the deadline had passed, and he handed over the keys.

On being cross-examined, he said that the Claimant worked him for three years. He admitted that the Claimant was known and respected in the locality. He said that he couldn't say if the Claimant was trusted in the community but that he had trusted him until the incident, but when he saw the CCTV footage there was more than a newspaper taken, that there was also a magazine wrapped in plastic taken by him. Asked was it not an extreme measure to launch a disciplinary procedure for the taking of a property supplement, he said if that had been the only item, he would agree. He then said that the newspaper was capable of being sold if the bar code was still on it, and that sometimes customers would ask for a previous day's paper, and if the bar code was still on it, he would sell it to them. When asked would he not take the opportunity to change the record regarding the Claimant, he said that he still held that his action was dishonest. He accepted that the letter he had drawn up on 24 October 2006 was only received by the Claimant on 27 October 2006. If the Claimant had appealed, he could have done so to himself, BT or to the Regional Manager. He admitted that he had not put it to the Claimant that he had seen him taking a magazine also.

The Store Manager gave evidence that CD told him the Claimant had taken a newspaper and asked him had he given him permission, he said no. A meeting was held with him, the Claimant & CD where the Claimant admitted taking the supplement without permission. CD said that it was a serious matter, and suspended him on full pay. A further meeting was held with the Claimant, CD & EM, where CD repeated that the Claimant was suspended on full pay, but the Claimant thought he was suspended without pay. CD issued him with a final warning, the Claimant was not happy with this, and had got legal advice that the procedures were inappropriate. This was the witness's last direct involvement, but he had heard about the 25 October deadline, and that CD told him that he would talk to the Claimant to try and resolve the matter.

On being cross-examined, he said that, in his view, newspapers were still the property of the shop owner and not the publisher, even after mast heads, or bar codes were removed. Asked if, in the event of the Claimant appealing to him, how he could overrule CD, he said that he could have referred it on to the Area Manager. He saw the CCTV footage but could not be clear as to what was taken. The papers still had a value even if they were unsold on the date of issue. All staff were aware that they could not remove items from the store, that it would be a serious matter no matter what was taken, even a biro. He said that no audit or stock count was undertaken after the incident, in order to ascertain if anything was missing.

Concluding remarks: The Claimant accepted that he took a newspaper without consent. It was reasonable of the respondent to make a decision based on what he saw on the CCTV footage. Many

meetings were held with the Claimant, a grievance procedure and the right of appeal were offered to him. The onus was on the Claimant to avail of the grievance procedure, but he did not do so. He overreacted, and made no attempt to get a new job. Therefore, there was no Constructive Dismissal.

Determination:

The Tribunal accepts that there was a Constructive Dismissal. The Handbook was unclear regarding the appeal process, and to whom to make an appeal. The employer, by his own admission, accepts that if the case rested only upon a newspaper being taken, he would not have issued the final warning, but there is no evidence before the Tribunal of anything other than a newspaper being taken.

The Tribunal feels that the item in question had no monetary value, and finds that the action of the employer was wholly unreasonable and disproportionate, and, therefore, that the Claimant was constructively dismissed, but that he failed to mitigate his losses, so awards him €9000.00 under the Unfair Dismissals Acts, 1977 to 2001.

Because it was a Constructive Dismissal, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, automatically falls.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)