

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD867/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes BL

Members: Mr. D. Moore
Mr. S. O'Donnell

heard this claim at Dublin on 31st January 2008, 24th April 2008, 25th April 2008, 3rd July 2008, 4th July, 2008 and 16th September 2008.

Representation:

Claimant: Ms Christina Ryan BL, instructed by Mr. Fergal Dowling, Seamus Maguire & Co., Solicitors, 10 Main Street, Blanchardstown, Dublin 15.

Respondent: Mr. Brian Morgan, Morgan McManus, Solicitors, Law Chambers, The Diamond, Clones, Co. Monaghan.

The determination of the Tribunal was as follows:-

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Determination:

The Respondent is a freight and parcel delivery company. On a daily basis it deals with between four and five thousand packages. It has twelve depots in Ireland. The claimant was an operations manager employed in the company's central depot in Dublin. He commenced employment in 1997 as a warehouse operative. He was dismissed in August 2007 for gross misconduct.

The salient evidence in this case is as follows. On the 13th July 2007 a consignment of seven cartons and one pallet was received into the Dublin depot for onward delivery. The seven cartons all had the correct scanning documents attached and were scanned into the system. The pallet did not have scanning documents and was not scanned into the system. On the 16th July the seven cartons were delivered to their intended destination. The pallet was not. On the 17th July an inquiry was made by the customer as to the missing pallet. A review was commenced so as to

ascertain its whereabouts. As part of this review CCTV footage was watched. It was ascertained that, after the deliveries had gone on the 16th July, a bay check had been performed by the claimant. A bay check is a routine procedure whereby items that have not gone out for delivery are recorded. On the 16th July, this was done by the claimant. The missing pallet was not recorded on the bay check. The missing pallet was subsequently moved into an incorrect bay at the apparent direction of the claimant. The claimant subsequently removed a label from the pallet and appeared to place it in a bin. He re-wrapped the pallet with shrink-wrap. The pallet was subsequently loaded by CJ onto EB's vehicle. It did not have any delivery documentation attached. EB was told by CJ that he would be telephoned with regard to instructions for its delivery. He was told, by CJ, that this was on the claimant's instruction. EB received a telephone call and met PM, a former employee of the Respondent, by the roadside. PM took delivery of the pallet. The pallet was subsequently recovered from a van outside PM's house. Approximately one-third of its contents was missing. During the course of the 16th July the claimant had made several telephone calls to both CJ and PM.

The claimant was suspended during the investigation conducted by the Respondent. He subsequently attended a disciplinary hearing and was dismissed. He appealed this decision and the dismissal was confirmed.

It was the Respondent's case that the claimant was involved in the theft of the pallet. Account was taken of the failure to record the pallet in the bay check, its subsequent removal to an incorrect bay, the removal of the label, the re-wrapping of the pallet and the instruction given by CJ to EB. Account was also taken of, what was considered to be, the large number of telephone calls made by the claimant to both CJ and PM on the 16th July. When the regional manager, CM, went to seek the return of the pallet from PM, PM would not answer the door. CM telephoned the claimant and asked for PM's number. The claimant declined to give it. This was also taken into account as were, what were considered to be, his vague and sometimes misleading answers during the investigation and the prior search for the pallet.

The claimant told the Tribunal that he had been vague and cautious in his answers during the investigation because he did not like, what he considered to be, the misrepresentation of his answers in the first interview. He agreed that he had removed a label from the pallet but told the Tribunal that this was to allow him to check the details in the office. This, however, he did not do. He re-wrapped the pallet because it was, he said, damaged. Other witnesses insisted that it was not. He said that the pallet had been removed so as to allow access to other pallets and that pallets could often be found in incorrect locations. He did not account for his failure to record the missing pallet in the bay check. He said that he had not given PM's telephone number to CM because it had not been explained to him why it was sought and that he was not in the habit of giving out telephone numbers. He said that personal matters, which he explained, necessitated his telephoning PM and that CJ was interested in buying a sofa from his mother for which reason he was telephoning CJ. He was experiencing a lot of dropped calls on his mobile phone which meant that there were more calls than normal.

The question for the Tribunal is not whether it is satisfied that an employee was guilty of the misconduct alleged against him. Rather, it is for the Tribunal to satisfy itself that there existed evidence such as would allow a reasonable employer to reach the decision that was in fact reached.

The Tribunal is satisfied that the claimant failed to record the pallet on the bay check. We are also satisfied that he removed the label from the pallet and did not replace it. We are satisfied that the claimant was in telephone contact with both CJ and PM on the day in question. The claimant

alleged that his mobile phone network was experiencing problems causing a lot of dropped calls. No evidence was adduced in this respect, other than the claimant's own assertions. The claimant refused to give CM PM's telephone number. None of these matters when taken by themselves would likely have given rise to a finding of misconduct. However, when taken together and in the context of the, what he admits to be, vague answers given by the claimant, the Tribunal is satisfied that the Respondent was entitled to take the decision that it did.

It is not open to an employee to be coy during the investigative or disciplinary process and to be subsequently forthcoming before the Tribunal. The Tribunal's function is not to conduct a *de novo* hearing of the disciplinary case.

The claimant made complaints about the manner in which the entire disciplinary process was conducted. It is, of course, the case that where the procedures used to dismiss an employee are unfair the dismissal itself can be rendered unfair by that fact. This is not to say that a disciplinary procedure must be a counsel of perfection. They must be fair.

The claimant was at all times afforded the opportunity to be represented although he was denied the facility to be represented by his solicitor. Counsel for the claimant urged the Tribunal to find that this was unfair given that the alleged wrong was potentially criminal in nature and could have serious consequences for the claimant. The Tribunal is not satisfied that there exists a right to be legally represented during an internal disciplinary process. Redmond in *Dismissal Law in Ireland* does say that it might be prudent in cases of a potentially criminal nature. She does not say that it is necessary. Further, any case in which dismissal is a potential outcome of a disciplinary process could be said to have serious consequences for an employee. The Tribunal is not satisfied that it would be helpful to overly legalise the workplace in this way. The Tribunal is satisfied that the refusal to allow legal representation did not constitute an unfairness.

The Tribunal is satisfied that the investigative and disciplinary procedures were substantially fair. Much was made in cross-examination about the investigation being less than exhaustive. The Tribunal is satisfied that it was sufficiently thorough. This was an employer investigating a claim of misconduct. Such investigations are not criminal investigations and they are not required to meet that standard. As one witness put it, the FBI cannot be called in. This is not to say that a slipshod investigation will do. It must be sufficiently thorough as to allow the necessary evidence be placed before the decision maker. In this context, the claimant's admitted vagueness did not assist him.

There were several matters which led the claimant to believe that a decision to dismiss him had been prematurely made. Firstly, he did not receive a payment of wages while on suspension, although he was subsequently paid. Secondly, a customer of the Respondent was told that he no longer worked for the company. The claimant refused to give the customer's identity to the Respondent or to say to whom she had spoken. The Respondent sought this information so as to enable it to investigate the claimant's allegation. As a result of the claimant's refusal it was unable to do so. Thirdly, the matter was reported to An Garda Síochána who subsequently searched his house. The Tribunal was told that it was a condition of the Respondent's insurance that, in cases of theft or potential theft, the Gardaí be immediately notified.

The Tribunal is satisfied that the claimant's dismissal was procedurally fair.

In all the circumstances, the claim pursuant to the Unfair Dismissals Acts, 1977 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)