

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD595/2008

Against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr S. Ó Riordain

Members: Mr W. Power  
Mr N. Broughall

heard this claim at Dublin on 30th September 2008

### Representation:

Claimant : Ms Aoife Coughlan B L instructed by  
Mr Stephen Fleming, Victor Blake & Co, Solicitors, 2 The Mall, Lucan, Co. Dublin

Respondent : Ms. Helen Barry, IBEC, Confederation House,  
Waterford Business Park, Cork Road, Waterford

The determination of the Tribunal was as follows:

### Respondent's Case

The respondent is a sole trader involved in the retailing of books and toys. Among its twenty outlets throughout the country are shops in Kilkenny and the Liffey Valley shopping centre in west Dublin. The claimant who is a foreign national was employed as a sales assistant in that Dublin store from August 2007 but commenced employment with the respondent in September 2006 in Kilkenny. The human resource manager who described the claimant as a good member of staff stated that she understood that a contract of employment issued to the claimant while she was in Kilkenny and understood that a copy of the respondent's handbook was also furnished to her. That witness referred to that booklet especially to its sections on honesty and integrity, and the disciplinary procedure. She highlighted that any form of theft irrespective of its monetary value is a dismissible offence and pointed out that involvement in theft or a conviction of a criminal offence, which impacted adversely on the interests of the business, was regarded as gross misconduct that could lead to summary dismissal.

The respondent's area manager contacted the witness on the last weekend in March 2008 with a message that a member of staff was caught stealing in a neighbouring store in the Liffey

Valley shopping centre. Those two ladies met on 31 March and decided to suspend the claimant that day pending an investigation into the reported offence. Two managers, namely the witness, and a loss prevention manager with a support manager later met the claimant and formally told her that her suspension was continuing. The support manager only acted in the role of a note taker at that meeting in which the claimant declined to have a representative. Those notes were submitted as evidence and among their contents was a conflict about the issuing of a caution by a Garda to the claimant related to her alleged theft. The notes indicate that the claimant denied at the meeting that she was issued with a caution and that the loss prevention manager "explained that she was and had signed it at the police station". The claimant accepted while she did not conceal goods for payment she nevertheless omitted to pay for them while passing through the checkout. She was unable to explain that action stating she could not clearly remember the incident. The loss prevention manager indicated to the claimant that the respondent viewed her action as shoplifting.

At the time of the incident the claimant who was on a lunch break from the store was wearing a jacket over the respondent's uniform. She apologised for the incident and asked for another chance citing her record with the respondent. The witness however stated that the claimant did admit to stealing during the course of that meeting and insisted that she was issued with a caution from a Garda for that theft.

Prior to a further meeting the witness spoke to a security guard at the relevant store and subsequently also satisfied herself that a caution did issue to the claimant from a Garda. On 2 April 2008 the claimant who again rejected the offer of representation met with the witness and other managers from the respondent. She was handed a letter of dismissal signed by the operations support manager and the support manager. That letter was also read out to her and she acknowledged she understood its contents. That letter justified the dismissal on a breakdown of trust and confidence between the respondent and the claimant and that, together with gross misconduct left the employer with no option but to terminate her employment with immediate effect.

An experienced and qualified loss prevention manager involved in this case stated that the claimant had been caught stealing from another store. That witness spoke to the person in that store who caught her and confirmed she had a number of items belonging to the store which she did not pay for when leaving that shop. Those goods amounted to the value of around thirty euro. The witness was adamant that the claimant was brought to a local Garda station where, what she termed as an adult caution, was issued to her. The witness explained that such cautions were issued only under certain conditions as in cases where it was a Garda's testimony that a criminal act had been committed. However, in further evidence the witness said that a Garda told her that such a caution "would be" issued to the claimant. Besides, the claimant admitted during the course of an interview with the management of the respondent that she had been issued with this caution and accepted she had been caught stealing from that shop.

Prior to this incident the claimant had never come to the attention of the witness. The witness in turn was part of the investigation into this situation with the aim of establishing the facts of the case.

An area manager who also had the title of a operations support manager and whose signature appeared on the claimant's dismissal letter said she was not involved into the investigation into the events leading to that dismissal. She did meet the claimant in early April 2008 to inform her of that decision and said that the claimant confirmed she understood "everything". That meeting was "very quick". She was not aware that the claimant did not have a contract of employment.

### **Claimant's Case**

The claimant said that she had gone to a neighbouring store during her lunch break on 29<sup>th</sup> March, 2008. She had put some food in her bag and had forgotten to pay for some items. When confronted by a security officer that day in the shop she told him that she had forgotten to pay for certain goods from that shop which were in her bag. That security officer contacted the respondent and the local Gardai. She was taken to the local Garda station. Her evidence was that she signed a letter there but later she stated the only document she signed was an unrelated letter in another Garda station. She denied that she had been cautioned

It emerged during her evidence that the claimant had a stroke and her representative submitted medical evidence that she had suffered a large cerebral infarct in April 2005, for which she was hospitalised, and that this had left her with significant language deficits and he suggested that her medical condition may have had some influence in her forgetting to pay for the items. In her evidence she indicated that she did not bring that issue to the attention of the respondent either during the course of her employment or as a part of the investigation into her mishandling of goods from that incident was due to forgetfulness and not wrongdoing. She was upset at this incident another shop. The witness had to take certain medication as part of her treatment for that ailment. In response to cross examination, asking if she had stolen items she replied that she had and agreed that theft was wrong but later she referred again to her having forgotten to pay and she had lost her job because of it.

The claimant accepted she stole from a neighbouring store while out shopping during her lunch break on 29 March 2008. However, when confronted by a security officer that day in the shop she told him that she had forgotten to pay for certain goods from that shop which were in her bag. That security officer contacted the respondent and the local Gardai. She was taken to the local Garda station. Her evidence was that she signed a letter there but later she stated the only document she signed was an unrelated letter in another Garda station.

Her appeal for another chance was disregarded by the management of the respondent. The claimant added that she had not been issued with a contract of employment and a copy of the respondent's handbook was only furnished to her when this incident arose. The claimant commented that there was no suitable person available to represent her at her meeting with that management. The respondents, in reply to questions from the Tribunal were unable to produce evidence of any contract or company handbook having been issued to her when she joined the company.

The claimant gave evidence of loss and attempts at mitigation but it emerged in cross-examination that she had not given details of some part time work in a butcher's establishment. She was unable to say what she had been paid.

## **Determination**

The claimant's employment was terminated by letter dated 3 April, 2008 on the basis that she had admitted stealing goods, while on lunch break from work and wearing a Byrne's uniform, from Marks & Spencer, Liffey Valley, on 29<sup>th</sup> March: that she had admitted being arrested and cautioned by the Gardai in this regard; that this was dishonest and constituted gross misconduct as set out in the staff handbook and had led to a breach of trust between employer and employee leaving the respondent with no option but to terminate her employment. The respondent indicated that the employer's disciplinary procedure was properly followed; that a right to representation had been offered to and repeatedly refused by the claimant; that the claimant had been fully advised of her right to appeal the decision to terminate her employment and that she had not done so. The respondent submitted that the dismissal was fair.

The claimant admitted in her evidence putting five items in her shopping bag in Marks & Spencers. She indicated that she paid for one item but forgot to pay for the other four. She had signed something in the Garda station but she denied that she had been cautioned. She had not been given a contract when she joined the firm and she was not aware that her actions could lead to dismissal. She had never been given a copy of the staff handbook and she was unaware of the disciplinary procedures until the event complained of. She had not stolen from her employer and she had asked Marks & Spencers to contact the respondent to confirm her honesty. This was the first occasion on which she had any difficulties and she believed that dismissal was a disproportionate response. Her representative also submitted medical evidence that she had suffered a large cerebral infarct in April 2005, for which she was hospitalised, and that this had left her with significant language deficits and he suggested that her medical condition may have had some influence in her forgetting to pay for the items.

The respondent placed reliance on a Garda caution having been issued and its relevance as proof that the claimant had accepted that she had stolen the items and referred in this regard to a criminal offence constituting gross misconduct for which dismissal was appropriate. The claimant has denied that a caution was issued and her representative has pointed out, supported by the reference to the matter in the official record of the suspension meeting, that it was the respondent who told the claimant that a caution had been issued and that, in the absence of a Garda witness, the respondent's evidence in this regard was based entirely on hearsay and has indicated that its inclusion as a basis for dismissal was wrong. The claimant, in response to what might be termed leading questions in her cross examination, seemed to accept that she had stolen the items although she did maintain in conclusion that she had forgotten to pay for them. This contradiction may have been down to language or understanding difficulties.

The Tribunal has carefully considered the evidence and arguments of both sides. While there is uncertainty about whether or not a caution was administered the reality is that there is no dispute about the central element, i.e. that the claimant failed to pay for four out of five items in Marks and Spencer's leading to her arrest and her being formally barred from entering that store. In a situation where she was wearing her firm's uniform there was a specific negative identification with the claimant and with the respondent firm which, unless they adequately addressed the matter, would be of an ongoing nature within the retail community in the Liffey Valley complex. The Tribunal considers that, unless there were compelling procedural or other reasons to the contrary, the sanction of dismissal is one, which would be foremost in the mind of a reasonable employer. So far as her evidence to the effect that she forgot to pay advanced at the Tribunal hearing is

concerned, the Tribunal is not required to make a determination on this but it would perhaps have been more persuasive if four items had been paid for and one left unpaid rather than the other way around. The Tribunal must, however, have regard to the fact that the claimant's evidence was misleading and unreliable in another aspect in that she failed, until cross examined, to indicate that post dismissal she had been employed part time in a butcher's shop and she had difficulty in giving details of the extent of her employment or remuneration in this regard. This, in the Tribunal's view, at least raises some question about the overall reliability of the claimant's evidence.

Turning now to procedural matters. While the respondent believes that the claimant had a contract and would have got a copy of the staff handbook and disciplinary procedures when she joined the company this is denied by the claimant and no proof has been offered by the respondent. The issue then arises as to whether the absence of these documents has led to a denial of the claimant's rights. The Tribunal considers that this is not the case. Firstly, it is common knowledge among employees in the retail trade that taking items without paying for them is a potential dismissal matter and, secondly, the procedures followed in this case protected the claimant's rights. The employer's agreed procedures were followed and these involved a fair process under which a decision to dismiss was taken only after the matter was investigated by the respondent and the claimant was made aware of what was alleged against her and given the opportunity to be represented and to respond. To the extent that any element of doubt might have arisen in relation to either the procedures or the decision to terminate employment, the claimant was advised orally and in writing of her right to appeal and the Tribunal must also have regard to the fact that the claimant decided not to appeal and confirmed in evidence that she had not wanted representation.

The claimant's representative tentatively suggested that failure to pay might have been influenced by the claimant's stroke. This, however, was not advanced in the disciplinary hearing; it is not supported by the 2005 medical certificate and in the absence of a current medical opinion it is not a matter, which in the Tribunal's view could overturn the dismissal decision.

The only remaining matter is the issue of proportionality of the sanction imposed. The Tribunal is satisfied that, given the claimant's action and its implications for both ongoing control of theft within their own stores and the need to be seen within the wider retail community in the Liffey Valley Centre dealing with possible theft related issues, the decision to dismiss is one which a reasonable employer would have made.

The Tribunal, in the circumstances, determines that the claimant was not unfairly dismissed under the terms of the Unfair Dismissals Act, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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



