

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD145/2008  
MN142/2008

against

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: Mr P. Hurley

Members: Mr G. Phelan  
Mr T. Kennelly

heard this claim at Nenagh on 8th September 2008

### **Representation:**

Claimant : Mr Denis Keane B. C. L. instructed by  
MacGrath & Co, Solicitors, 51 Kenyon Street, Nenagh, Co. Tipperary

Respondent : Martin J. O'Brien, Solicitors, Hanly's Place, Nenagh, Co. Tipperary

The determination of the Tribunal was as follows:

### **Respondent's Case**

The respondent is a medium sized business engaged in the retail trade. Among its operations are drapery and paint stores. Their sole witness is a daughter of other principal owner of the respondent and acts as a restaurant manager. She was also the manager of other sections in the six months leading up to the cessation of the claimant's employment in late September 2007. In confirming she terminated the claimant's job at that time the witness acknowledged she was ignorant of the relevant laws governing dismissal.

In explaining her concept of a staff scheme called apro the witness referred to the claimant's terms and conditions of employment and a general notice to employees dated 3 August 2007. That scheme prohibited staff from removing merchandise from the respondent's premises without paying for them. The witness said she handed that notice to the claimant. Prior to that date the witness became aware that some employees were abusing this scheme. While she did not make her displeasure at this reported abuse generally known to staff the witness had reprimanded the claimant on at least two occasions for her input into misplaced stock. No warnings were issued to her and the witness agreed that the claimant's disciplinary record was unblemished.

On 25 September 2007 the witness summoned the claimant to an upstairs office in the drapery store on the pretence of meeting a sales representative. However, she quickly revealed the real reason for their meeting as she questioned the claimant about a recent paint transaction. The claimant did not have a clear memory of this transaction but stated that she had secured paint from one of the respondent's stores for another colleague. The witness stressed that staff had to pay for goods taken from the premises and since this was not the case in this instance the witness proceeded to dismiss the claimant. The claimant accepted she did not pay for the paint and was given an opportunity to explain herself. The manager felt that the claimant had breached her conditions of employment and acted in defiance of the relevant notice issued the previous month.

Following that dismissal announcement the witness told the claimant not to speak to anyone at the respondent and to leave the premises. She defended her pretence on the grounds that this was the only available way to talk to the claimant away from the other staff and customers. References were also made to an order for footwear that the claimant was involved in. The respondent considered that order as inappropriate and suggested that the claimant was responsible for it. Subsequent to the claimant's dismissal the drapery department was closed down and staff there were made redundant. According to the witness the claimant would have been eligible to a redundancy payment had she still been there.

### **Claimant's Case**

Prior to taking up a permanent position with the respondent in December 2000 the claimant had earlier worked for this enterprise on a temporary and part time basis. It was in that period that she signed her terms and conditions of employment. She worked in various sections of this establishment including the boutique, footwear and drapery outlets. The incident, which led to her dismissal, took place in late July 2007 when she removed paint on the apro system from the respondent's premises. At that time she understood that system to mean that staff were permitted to take goods away, subject to recording them in a book, and either to return or pay for them within a reasonable time.

In taking out that paint the claimant was responding to a request from one of her colleagues to collect that material on her behalf. That colleague had given a list of that material to the person in charge of the paint section and armed with that knowledge the claimant assumed that she had approval to remove that paint from the premises. Besides, the lady in charge of the paint section assisted her in assembling the goods and told her it was in order for her to go through the till area without obstruction.

While the witness had no clear memory of receiving the notice of 3 August in relation to the revised apro system she had no difficulty in complying with its contents. By September 2007 the claimant had returned from leave and later that month found herself confronted by the manager in an upstairs office in relation to that paint transaction. That manager accused her of the unauthorised removal of that material and added that she had acted contrary to her contract of employment and the earlier staff notice. When the claimant did not receive her requested letter of dismissal from the respondent she then sought legal advice. The witness had no recall of receiving reprimands and was never furnished with warnings from the respondent. Her job did involve the ordering of stock and while she was told not to go overboard on such orders it was necessary that she got clearances for orders from management. She noted that the manager's father was unpleasant to her following her return from holidays.

A former employee and colleague of the claimant who sought the paint confirmed she asked her to collect those goods as a favour. On the day in question the witness was not at work but had given a list of the products to the person responsible for the paint section. The person in charge of the paint section said she was no good with dates but added that the paint incident happened at the “end of September”. She acknowledged receiving a list of products from the claimant’s colleague and had to mix some paint in accordance with that list. The witness helped the claimant place the products in a trolley. She commented that apro did not apply that day and she had no recall of going to the checkout with the claimant.

## **Determination**

The Unfair Dismissals Acts impose a burden on the respondent to show that dismissal was not unfair. While there were some inconsistencies in the claimant’s evidence regarding the various transactions between the claimant and the Respondent using the ‘apro’ procedure, which could, if fully investigated, have led to a conclusion that the claimant’s dismissal was justified, the Tribunal is in no doubt that procedural fairness was not followed by the respondent in effecting the dismissal of the claimant.

Fair procedures include but are not limited to the right to representation, an investigation and appeal process, and notification as to the nature of a disciplinary meeting. The meeting that did take place was unevenly conducted and in the view of the tribunal proceeded on the basis of false and misleading information.

The Division would refer to a previous Determination in the case of *Gearon v Dunnes Stores Ltd* UD 367/88 where it was held that fair procedures in effecting a dismissal had not been followed. The Tribunal then held

“The right to defend herself and have her arguments listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or this Tribunal... the right is a fundamental one under natural and constitutional justice, it is not open to the Tribunal to forgive its breach”.

The Tribunal finds that such rights were not afforded to the Respondent.

In all the circumstances the Tribunal finds that this dismissal was unfair and awards the claimant €7000.00 as compensation under the Unfair Dismissals Acts, 1977 to 2001.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 succeeds and the claimant is awarded €1395.56 as compensation for four weeks notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

