

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD451/2008

MN409/2008

WT190/2008

Against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr F. Cunneen
Ms M. Mulcahy

heard this claim at Dublin on 26th August 2008

Representation:

Claimant(s) :

Mr. Patrick J. Ryan, Ryan & Ryan, Solicitors, 5 St. Brigids Road, Clondalkin, Dublin 22

Respondent(s) :

XXXX

The determination of the Tribunal was as follows:

Respondent's Case:

One of the Directors of the company gave evidence. In March 2008 they bought the dry cleaning business and all staff were kept on under Transfer of Undertakings legislation. They issued all employees with new Terms and Conditions of employment.

The previous owners had offered customers different discounts, as the new owners they had decided to discontinue these discounts with the exception of a concession for OAPS. Within the new contracts issued to staff a clause referred to discounts "no member of staff may grant discounts to any person or claim a discount in their own regard without advanced approval of their employer. If you are found to do so Disciplinary Action may take place resulting in dismissal for gross

misconduct”.

He explained that he met all employees on an individual basis and told them that all discounts would be discontinued other than the discount for senior citizens, he was satisfied that the claimant understood this.

Colleagues of the claimants brought it to his attention that allegedly the claimant was giving discounts to customers. Two A 4 sheets of copy dockets were produced at the hearing, these were discounts that the employer alleged that the claimant had given over the 8th, 9th 10th April, the discounts amounted to €70.00. The director explained that these dockets represented a loss to the business and a loss of trust of the claimant. He felt that they were being undermined and not being respected.

He called the claimant aside and went somewhere quiet to speak with her. He put it to her that she had been given discounts outside of the scheme, she admitted to this so he informed her that a disciplinary meeting would take place. He informed the claimant that she could have a representative at this meeting if she wished and told her that the meeting would reconvene in about fifteen minutes.

The claimant declined to have a representative with her, and the disciplinary meeting went ahead. At this meeting he outlined the alleged practises of the claimants by giving discounts outside of the agreed scheme. The claimant told him that she had given unauthorised discounts on two occasions and she realised that these discounts were in breach of her contract. The two occasions that the claimant told him about he was not aware of, he was concerned about other discounts given.

The claimant did not offer remorse or recompense at this stage. He told the claimant that he would consider the facts and the meeting was concluded. He discussed this with another director and he took the view that the actions of the claimant was theft. The company could not afford these discounts after spending 1.5million on both shops. He felt that he had to show staff that this practise could not be tolerated. He issued a letter to the claimant on the 15th April 2008 stating that he had no other option but to dismiss her for gross misconduct. Within this letter it allowed the claimant to lodge an appeal to another director within one week. This director was his wife. He was not aware of any interaction the claimant had with his employees during these seven days. No request for an appeal was lodged within this timeframe. The claimant was dismissed.

In relation to the claimant’s holiday pay, the previous owner had given them notice that all holiday pay due to employees was paid before they took over the business.

Under cross examination he explained that he had asked the other staff to put aside any dockets that the claimant had used and these were dockets he had presented.

He had discussed and deliberated on the situation with his business partner (wife) whether he should issue a warning letter or if it added up to gross misconduct. He explained it was cash based business and trust was needed; the claimant was in breach of her contract and her actions had amounted to theft the consequent of that was dismissal. He could not recall whether he had predetermined this decision with his wife.

He was not aware if the claimant had benefited financially from her actions. It was put to him that he had not given the claimant the opportunity to recompense the business; he said it was up to the claimant to offer recompense. The claimant had previously discussed her concerns with him in

respect of the discounts being discontinued.

Claimant's Case:

The claimant was employed in this drycleaners since 2004. When the new company took over the business she had signed the new terms and conditions of employment. During this period she had taken a weeks holiday and had been out sick for four days. She explained the previous owner had given their customers a variety of discounts.

She went through the two A 4 sheets of copy receipts, within these she said there two senior citizens discounts, one was for a jacket and she could have issued another docket for the trousers, and the last one was a discount she had given to a security guard. This security guard had let her back in to the shop one evening with the permission of the owner to pick up an item she had forgotten. She accepted that she should not have given this discount to the security guard.

She raised the issue of discounts with both directors as customers were complaining about the discontinuation of discounts and she felt that they were losing clients to another business within the area.

On the day of the disciplinary meeting it was about 11.30 when the director asked if he could have a chat with her and they went to a quiet area outside. He told her that it had come to his attention that she had been giving unauthorised discounts. She admitted that she had given discounts. She said she had told the director that she was sorry but did not offer to pay the losses. The director then told her that she could get one of her work colleagues to accompany her to meet with him again in about fifteen minutes. She did not ask one of her work colleagues as she felt it was not fair to involve them. When she met with him again he told her that her actions were gross misconduct and that she was dismissed. The director told her that she could appeal his decision to either his wife or another work colleague.

She rang the work colleague later that day and understood from the conversation she had with her, that she would not be welcomed back to the business.

She did not benefit personally at all from the discounts given, she was not thinking of herself but of the business. She said she was owed three weeks holidays plus one back week. She had never been disciplined before during the course of her employment; she had received no warning, nor her notice.

Under cross examination she could not recall how many times she had given unauthorised discounts, she had stood behind the counter listening to the complaints of loyal customers and knew that business was going down. It was her decision alone to give these discounts and that both directors were not aware of her giving them.

The claimant's legal representative raised the fairness of the appeals procedure within the company, as one of the people the claimant could appeal to be the director's wife.

Determination

The Tribunal found that the dismissal was not unfair particularly in the context of the business involved being cash based. The fact that the claimant did not appear to benefit from her action is irrelevant in that she was depriving the company of part of its income. It is for the employer to decide the commercial policy of his business and it is up to an employee to accept whether she agrees with this policy or not. Furthermore, the claimant was on notice having signed her new contract in March 2008, that the provision of discounts was discontinued in all circumstances save in the case of old age pensioners and the provision of same was deemed gross misconduct. Notwithstanding that she proceeded to give discounts within a month of signing this contract.

Having said that, while it is common that smaller businesses often fall short of what is legally required with regard to procedures, in this situation the opportunity and time given to her to get a representative, notwithstanding the fact she declined, was inadequate. The appeals procedure was defective in that one of the individuals to whom she could appeal was at a lower level in the organisation than the employer himself and the second person to whom she could appeal was party to the original decision.

In all the circumstances of the case she should have been advised that an independent third party could have been brought in to participate in the appeal process.

The Tribunal is of the view that while there were clear deficiencies in the procedures used by the employer, given the fact that the business was cash based and the claimant was fully aware that the provision of discounts was discontinued the claimant's case under the Unfair Dismissals Acts, 1977 to 2001 fails. Her claim under the Minimum Notice and Terms of Employment Acts 1973 – 2001 and the Organisation and Working Time Act 1997 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

