

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employer

CASE NO.
UD492/2008

against the recommendation of the Rights Commissioner in the case of:

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. J. Reid
Ms K. Garvey

heard this appeal at Dublin on 12th September 2008
and 19th November 2008

Representation:

Appellant(s) :

Mr David Keane, IBEC Confederation House, 84/86 Lower
Baggot Street, Dublin 2

Mr Alex White BL instructed by Arthur Cox, Solicitors, Earlsfort Tce, Dublin 2

Appellant(s) :

James O' Donnell BL instructed by Kent Carty, Solicitors, 47/48 Parnell Square, Dublin 1

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an employer appealing against the Recommendation of the Rights Commissioner ref r-053077-ud-07/RG

For clarification the appellant is the employer and the respondent is the employee in this case.

Appellant's Case

The accommodation manager gave evidence on behalf of the appellant. The group has employed her for eleven years. She employed the respondent who reported to her. The respondent was a floor manager who had responsibility of two floors consisting of thirty-seven rooms; he had about four to five staff working with him on a daily basis.

In February 2007 staff had complained to the assistant manager that when the respondent was working they did not receive any tips. Two staff raised the issue first and then another two complained. She explained that she was disappointed on hearing this, but needed proof, she noted the serial number of a ten-euro note and placed it in room 211 and put the "room out of order". This meant that the room was not assigned to a staff member to clean on that day, however it was customary for the respondent to check all rooms on his floors on a daily basis. She went back to the room and the money was gone, she checked with the desk manager to see who had accessed the room by reading the key cards. The only key cards used were the respondents, the guest who had departed and her own. Later she asked the respondent for a ten-euro note for two five-euro notes and he gave her the ten-euro note back.

She went to the HR manager and discussed it with her. She rang the respondent and told him that they needed to speak with him, she could not recall if she had told him it was in relation to a disciplinary issue. She asked the respondent as to what the procedure was for tips left in the rooms and who they were for. The respondent had responded by saying the tips were for the girls who cleaned the rooms. She asked him about the ten-euro note left in room 211 and about fifteen minutes later he admitted he had taken it.

Under cross-examination she confirmed that there was no written policy in place for tips. She could not recall if she explained the tipping policy to the respondent at his interview or at the time of his recruitment. Nor could she recall explaining the policy of tips left in "rooms out of order". She recalled that two members of staff had given her statements in relation to the complaint lodged against the respondent and the taking of their tips. She did not put these accusations to the respondent before placing the money in room 211.

She said the respondent was told why the meeting was convened. The respondent was given the opportunity to have a representative at the meeting. She did not take notes at this meeting but HR took minutes. The normal process is to notify a member of staff in writing about a disciplinary meeting, however this was stealing and a serious issue, she mentioned it to the respondent before he went in to the meeting. She said she was familiar with the disciplinary procedures and explained that the first stage of this procedure did not take place as the actions of the respondent amounted to gross misconduct.

She originally said that the meeting took place on the same day that the money went missing however later she said the meeting took place the following day. The money was placed in room 211 on the 2nd March 2007 and was taken the same day; the disciplinary meeting took place on the 9th of March 2007. As the events were over a year ago she had difficulty recalling same. HR arranged the meeting and notified her of it. She did not remember if she had given the statements from the two employees to HR and had not discussed putting the money in the room with HR.

At the meeting she asked the respondent the policy of the hotel for money left in rooms, more than once and eventually led up to the ten-euro note and the respondent had admitted taking it. The respondent claimed he was entitled to the money as it was in a room, she told him it was not his money to take as the room would be cleaned at a later stage by a member of staff. She could not recall the duration of the meeting. At the end of the meeting the HR manager and her both made the decision to dismiss the respondent as they felt it was an element of trust. She did not recall telling the respondent that he had a right to appeal their decision.

In replying to questions from the Tribunal she said she had a casual conversation with the

respondent and had told him that they needed to talk with HR about tips before the meeting took place

On the second day of the hearing the HR manager gave evidence on behalf of the respondent. She is responsible for recruitment, training and employee relations. The accommodation manager had brought the incident of the €10.00 note to her and explained to her why she had placed it in the room 211 and the events that occurred afterwards. She arranged the investigation/disciplinary meeting for the next available date 9th March 2007. The respondent was informed verbally of this meeting.

At the opening of the meeting she informed the respondent that it was a formal investigation/disciplinary meeting. She explained a serious charge had been made and he was entitled to have a representative or a colleague with him, the respondent declined this. When asked if he had taken the €10.00 from room 211, the respondent immediately admitted he had. She asked him about his understanding of the hotels tip policy, he responded by saying tips were for staff and not for management. However the €10.00 was in an off room and he understood that this was an exception to the tips policy.

Later on in the meeting he said that there was no tip policy in place. He said he had never taken tips previously. The respondent was laughing at this stage, but she explained to him the seriousness of the situation. He later became verbally aggressive, agitated and angry at the meeting. At no stage did he apologise or show remorse for his actions.

The HR manager explained while there was no written tips policy in place, theirs is based on a universal hotel tips policy, and management would never widely accept tips in hotels. She assumed that the respondent accepted this. The respondent who was a housekeeping supervisor would not normally be required to enter the bedrooms till it was cleaned. Supervisors are part of the management team. House keeping staff would normally sign a card and leave it on the pillow of the bed so the client would know who was responsible for the upkeep of their room. Any tips left in the room would be for the housekeeping staff.

There was a break in the meeting so she could take time to consider the respondent's actions. At that stage they had about thirty employees in their housekeeping department who relied on tips to supplement their wage. The accommodation manager had proved the respondent had taken tips on one occasion so it was reasonable to assume it had happened before. She also had to consider the hotel's reputation and they need to be able to trust their staff 150%.

The respondent did not apologise nor did he give her a commitment that this would never happen again. It was her decision to dismiss the respondent, no other issues apart from the €10.00 incident had influenced this decision. The respondent was employed as a fulltime permanent employee who worked five days over seven, he had every Friday off as he worked in a Pizza restaurant.

Under cross-examination she confirmed that the original notes taken at the disciplinary meeting on the 9th March 2007 were not retained. Four employees had complained informally about tips going missing, no written statements were taken. The memo of the meeting was created in the days following the meeting and this was for internal use only. She believed the respondents contract reflected his main duties. She never informed the respondent of the tips policy but re-iterated that she believed management would know that tips are for staff.

The respondent had distinguished between “on” and “off” rooms and had said he had never taken tips on other occasions. He would have cleaned rooms occasionally. The accommodation manager had not discussed placing the €10.00 in the bedroom with her before doing so. She had never spoken to the four employees who had informally complained about the respondent.

She could not recall when she decided to hold the disciplinary meeting; normally employees would be informed in writing. In this case the respondent had been invited and informed verbally of the meeting by the accommodation manager. She had discussed the situation with the accommodation manager before the meeting took place.

As the meeting commenced at 8.30 am she was asked as to where the respondent could have obtained a representative to attend with him. She explained that he had declined a representative immediately, she did not recall telling him the meeting could be postponed to enable him to get somebody to accompany him.

She did not have the opportunity to inform him that he had a right to appeal her decision as when she informed the respondent that he was dismissed, he replied by saying see you in the labour court and left immediately. She omitted to outline his right to appeal in the dismissal letter that she issued the following day. She expected to receive an appeal because as he was part of the management team he would be aware of the appeals procedure.

She had gone in to the meeting expecting to receive a valid reason for the respondent’s action and had not thought that it would result in his dismissal.

Respondent’s Case

The respondent gave evidence that he worked as accommodation supervisor his role included rosters, checking rooms, laundry. He was responsible for two floors; on each shift he would have four staff. None of his staff had ever told him that tips were going missing. The accommodation manager had never explained the hotel’s tips policy to him. He explained that if tips were left in an “on “ room, the house keeping staff who worked hard would be entitled to them. While tips in an “off” room where it would not be cleaned that day was different. On some occasions he would have to clean these rooms.

He had checked room 211 there was €10.00 on the desk as it was an “off” room he took the money. Later the accommodation manager asked him if he had a 10.00 note for two €5.00, he gave her the €10.00. At no stage before this had the accommodation manager mentioned tips to him.

On the morning of the meeting he received a page from the HR manager to come to her office. When he went to the office the HR manager, Accommodation Manager and her assistant were there. At the start of the meeting the HR manager explained that they were investigating money going missing from room 211. He told her that he took the tip of €10.00 and at no stage he never denied this. She told him this was theft, he disagreed with her, and she told him it was against their tip policy. She compared it to other examples, like taking money from a locker, he told her it was not the same.

The respondent said that the HR manager had not informed him that he could have representation at this meeting, nor did she offer to postpone the meeting so he could arrange somebody to accompany him. He said he was nervous when he realised he was at a disciplinary meeting.

They did not accept the difference between an “on “ and “off “ room. He explained he used his common sense, when tips were left in “on” rooms he left the tips for staff, while in “off “ rooms he could take the tips as he may have to clean them. They had never told him that other staff had made allegations against him. The HR manager did most of the talking, and they kept telling him it was theft. The meeting lasted about twenty-five to thirty minutes, and they asked him to leave the office. He was called back ten minutes later where they informed him that they had decided to terminate his job immediately. They did not inform him of the appeals process. He told the HR manager that he thought dismissal was unfair and that he would see her in the Labour Court. He confirmed that the company had written to him the next day and no appeal was mentioned in this letter.

He had requested the minutes of the dismissal meeting of the 9th March 2008 but did not receive them.

He gave evidence of loss to the Tribunal.

Under cross-examination he agreed with counsel for the applicant that everything could not be covered in an employment contract. He reiterated that he used his common sense when it came to tips; he finished at 4.00pm and if the room was still “off” there was nothing to say that the tips in this room were not for him. He disagreed that he was saying that unless he was told he was not entitled to it, then he was entitled to it. He said the tips issue should be in the contract.

He admitted that he took tips from off rooms about three times. It was part of his duties to check all rooms when he commenced work. Room 211 was not cleaned on the day he took the €10.00 it was still “off” the next day. He said if the room was still “off “ and not cleaned that day the money was meant for him. He does not accept he did anything wrong.

At the meeting when asked if he had taken the €10.00 he remember immediately and admitted it. He knew that he had a right to representation at disciplinary meetings, but on the morning of the meeting it did not occur to him that it was a formal meeting, and only during the meeting he realised how serious it was. At this stage they had kept asking him questions so he never thought of asking for a representative.

He confirmed that the meeting lasted no more than thirty minutes, after which he went home. He had a copy of the grievance procedure but did not appeal, he felt he had been set up, and his only focus was to get to court. He had received a reference from the respondent but he feels that this is a job certificate. He stated he did not work in a Pizza restaurant on a Friday.

Under redirection he stated he had received an employment contract when he commenced his employment. At no stage during the course of his employment was he involved in disciplining any of his staff. He disputed the minutes of the meeting.

In replying to questions from the Tribunal he confirmed that there was no comment card with the €10.00 in room 211. He thought that HR should issue guidelines on tips. He felt he was set up but could not understand why as he had a good relationship with management and had only ever received praise in relation to his performance.

Determination

Whilst the appellant does not have a written policy on tips for its employees including supervisors, we find that the respondent was aware of the unofficial policy that tips were for those who cleaned the room. The respondent freely admitted he had taken the €10.00 tip from room 211. Both parties agree that this was an off room on the date of 2nd March 2007.

The respondent had a right to be notified of the disciplinary meeting, and he should have been told about the appeal process. These were clear deficiencies in the company's procedures. However simply because there was a flaw in procedures does not automatically mean that a dismissal was unfair. When the Tribunal weighs the procedural deficiencies against the substantive issue i.e. theft of tips intended for employees under his supervision, the Tribunal considers that this matter outweighs the procedural defects.

Therefore the appeal succeeds and the Tribunal upsets the decision of the Rights Commissioner under the Unfair Dismissals Acts 1977 – 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

