

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee
-Claimant

UD560/2008

Against

Employer
-Respondent

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S.C.

Members: Mr. T. Gill
Mr. P. McAleer

heard this appeal at Sligo on 30 September 2008
and 16 February 2009

Representation:

Claimant: Mr. Ciaran Campbell, Divisional Organiser,
MANDATE, Western Division, Mary Street, Galway

Respondent: Mr. Eamonn McCoy, IBEC,
Confederation House, 84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:

The claimant was employed from 26 June 2006 in the respondent's Sligo store as a retail assistant. The employment was uneventful until 8 May 2008 when the claimant was working as a checkout operator. The claimant was observed by the Front End Section Manager (FE) who was the claimant's line manager to leave his station, remove a can of cola from a nearby fridge in the store and return to his station, later on opening and drinking the cola. Hitherto the accepted procedure for staff on checkout to get a drink was to request a comfort break and walk to the staff canteen to get a drink. The staff canteen is about five minutes away from the checkout area. After this incident a water cooler was provided for staff.

The respondent's policy on register operation provides that "You must not be in possession of your privilege card, purse, any money, mobile phone or food and drink whilst on duty."
The respondent's policy on staff purchases provides that "All purchases must be produced and paid

for at the time of purchasing. No credit or IOU's are permitted.”

FE reported the matter to the Store Manager (SM) and later attended SM's office, when the claimant was called in to take notes of SM's meeting with the claimant. When the allegation surrounding the can of cola was put to the claimant he agreed that he had taken the can, not paid for it and had drunk its contents. The claimant stated that he had not had any opportunity to pay for the can and had not been stealing it and it was his intention to pay for it. The shop steward was then called to the meeting when the allegations were again put to the claimant. The claimant was then suspended with pay pending investigation into a possible breach of the respondent's honesty policy.

SM, the store personnel manager, a shop steward, the claimant's trade union official and the claimant attended a disciplinary hearing held on 21 May 2008. The claimant's trade union official put the case that the check-out area was known to be cold in cold weather and hot in hot weather, May 8 2008 had been a warm day and the only access to water had been the canteen.

SM wrote to the claimant on 23 May 2008 to inform the claimant of his immediate dismissal on the grounds of serious misconduct, having been in breach of the respondent's honesty policy such as to constitute a betrayal of the bond of trust. The Regional Development Manager, accompanied by the Personnel Manager, heard an appeal against the dismissal on 10 July 2008. The claimant was again accompanied by a shop steward and the claimant's trade union official at this hearing. The decision to uphold the dismissal was communicated at a meeting on 16 July 2008 and confirmed by letter dated 18 July 2008. The Personnel Manager stated that the claimant had the opportunity to pay and the opportunity to ask. She agreed when it was put to her, that that the claimant did not have the opportunity to pay as checkout operators are not permitted to carry personal cash while working at tills. It was further suggested that it might have been more appropriate if FE had asked the claimant at the time on May 8 2008 if he had paid for the cola he was drinking.

Determination:

The Tribunal has no hesitation in finding the dismissal unfair. We attach great importance to the Personnel Manager's evidence that the claimant had the opportunity to pay and the opportunity to ask. While we agree that he had the opportunity to ask, it is quite clear he did not have the opportunity to pay, as check out operators were forbidden to carry personal cash. From the outset the claimant said he intended to pay and hence we have no evidence to contradict him.

Because the respondent dismissed him for alleged breach of the honesty policy, and, as we have found, did so without evidence we are of the view that the only way he can be vindicated is by full reinstatement, which under the terms of the Act, is deemed to have taken place on the date of dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)