

EMPLOYMENT APPEALS TRIBUNAL

Appeal of

Case No. UD1270/08

Employer

appellant

Against the recommendation of the Rights Commissioner in the case of

Employer

respondent

against

Employee

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O Leary BL

Members Mr. R. Prole
Mr. P. Woods

heard this claim at Dublin on 10 March 2009

Representation

Appellant: Mr. John Barry, Management Support Services (Ireland) Ltd,
The Courtyard, Hill Street, Dublin 1

Respondent Mr. Marcin Sculz, Maguire McClafferty, Solicitors, 8 Ontario
Terrace, Portobello, Bridge, Dublin 6

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an employer appealing the
recommendation of a rights commissioner reference r-061141-ud-08 JOC)

For clarification purposes the respondent will be referred to as the employee and the appellant as
the employer.

Employee's Case

The employee told the Tribunal that he commenced employment with the employer in February 2006 and his last day of employment was 10 July 2007. On the 4 July 2007 he returned to Poland for a few days as his mother was ill and he was on unpaid leave. He reported for work on 10 July 2007, he changed into his uniform and his friend told him he had to go home as another person was doing his job. After three and a half weeks his manager JG summoned him to the employer's office and he was not informed what the meeting was about. The employee asked if he could have a translator and he was informed that his English was not bad. JG and the HR manager asked him about a Sim card and he told them that he bought a Sim card from someone in another company so that he could contact his mother who was in hospital in Poland. He then sold the Sim card and at the time of the meeting he did not have the Sim card. After the meeting he was requested to sign his signature to a document. He felt stressed and he did not get a copy of the document that he signed.

The employee was then asked to go home and he was informed that the employer would contact him. He contacted the employer five days later and asked for his P45. From 10 July to beginning of August he did not work with the company. He asked for his P45 to enable him to go to social welfare to obtain job seekers benefit. After he requested his P45 he endeavoured to get work as a panel beater. In August 2007 he tried to get a loan to establish his own business. He was not given an employee handbook with company procedures on taking up employment. He did not receive any documentation informing him that he was in trouble.

In cross-examination he stated the Sim card he bought was not a new card. He did not receive a bill for the card. He did not know if it was normal to buy a Sim card from 02. He did not know if 02 was a subcontractor and he knew that the person he bought the Sim card from worked in 02. As a security guard he checked buildings and fire alarms and he had no access to rooms. The employee was a member of a trade union and he did not know if DG who was a supervisor and a shop steward bought one Sim card. He disagreed that he had two Sim cards. He had previously attended a disciplinary meeting in relation to crisps and he agreed that there was a suggestion he might have taken food. He could not remember if the HR manager offered him the right to representation at the meeting about crisps. The employee stated that he asked for a translator. When he was questioned about a Sim card and a telephone bill he denied any knowledge of it. When the telephone bill was presented to him with his mother's telephone number he admitted that he had the Sim card and that two managers put pressure on him. He then agreed he had two Sim cards. If he was aware that the Sim cards were stolen from 02 he would not have bought them. It was not possible that he indicated to the HR manager or JG that he wanted to resign.

He went to the union after the meeting and he did not go to the shop steward. Three and a half weeks after he was told to go home some manager told him to come to a meeting. He did not know about the €3,700 on his Sim card.

In re-examination he stated that he was not informed of stolen property before the meeting. He had a laptop in his locker. He could not recall when he went to the union. He worked in a garage for one and a half weeks after he left the employer.

Employer's Case

A supervisor DG told the Tribunal he was employed with the employer for four and a half years. The employee was employed as a security guard and DG was the employee's supervisor. DG received a call from PT the manager in 02 that Sim cards were used and he was unable to sort it out. At the time he remembered one number and he then established that two Sim cards were missing. He contacted his operations manager and IF who looks after facilities in 02. The employee was aware that the witness was a shop steward. The normal procedure was to undertake an investigation and employees were made aware of their right to have representation. The employee did not contact him about a grievance and the union did not contact him about the matter.

In cross-examination he stated that when he opened the locker that the employee used as far as he could recall the Sim card was not there. A number of people were in present when he opened the locker and he did not ask the employee to be present when this occurred. As far as he is aware the contents of the employee's locker are in Head Office. He was both the employee's supervisor and his shop steward and the employee did not have to go to him.

The second witness for the respondent CM told the Tribunal that at the time the incident occurred she was HR manager. The relationship the company had with the union was that one union would represent all employees. She became aware that there was misuse of a Sim card. She attended a meeting and was informed that a Sim card was stolen by a contractor in 02. The telephone number that the employee had given to the employer was for his mother in Poland. JG the employee's manager asked the employee to come to a meeting but the employee was minding his child who was sick at the time. She was present at a meeting with the employee and JG. She was absolutely positive that the employee did not ask for a translator at the meeting. The attendees at the meeting understood what the employee said. The employee was offered representation. It was company procedure to advise employees to bring a representative to a meeting. The employee indicated to her he did not want representation at the meeting. At the meeting it was put to the employee that Sim cards were stolen. The Sim card was traced and the number used was the contact number for the employee's mother in Poland. The employee denied this and when she showed him the telephone bill he admitted that he bought the Sim card for €50. There was no credit limit on this card and the employee was made aware that the amount of the bill was €3,700. The employee then accepted that this was his Sim card. At the time the employee told her he wanted to go and that he wanted to resign. After this JG made some attempts to contact the employee regarding his personal belongings.

In cross-examination she stated that the employer did collective agreements with the union. CM did not have the company handbook with her. JG informed the employee of the meeting and the employee was not furnished with a letter inviting him to a meeting. After 10 July attempts were made to contact the claimant.

At the disciplinary hearing she found the employees English excellent. All job applicants were subject to English comprehension tests and a large percentage of the test was oral. She left the company in January 2009 and the company did not dismiss the employee. She could not recall the date that the employee was suspended and he was suspended with pay. The employee submitted his resignation after he was

presented with evidence. She could not locate the employee's file. The Sim card was cancelled by 02 when the bill was submitted.

In answer to questions from the Tribunal she stated that she had worked in HR for ten years. If an employee wanted to resign it would be documented and the employee signed a piece of paper. It was company policy to pay employees who were suspended. She could not prove either way if the employee was or was not paid while he was suspended.

Determination:

The Tribunal determines that the employee was unfairly dismissed. In coming to this determination the Tribunal considered the procedures used in the case and the fact that there was a total lack of documentation produced to the Tribunal to substantiate the employer's case. The Tribunal on the balance of probability accepts that the employee was unfairly dismissed and that he was not paid during the period of suspension.

The Tribunal further determines that the employee did not write a resignation. However the Tribunal hold that the employee substantially contributed to his own dismissal. The Tribunal further holds that the most appropriate remedy in this case is compensation and it awards the employee compensation of €5,000 under the UnfairDismissals Acts, 1977 to 2001 and therefore varies the recommendation of the RightsCommissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd)_____