

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee
– *claimant*

CASE NO.

UD695/2008
MN632/2008

against

Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. D. Moore
Ms. M. Finnerty

heard this claim at Dublin on 3rd November 2008
and 3rd February 2009

Representation:

Claimant(s): Mr Christopher Horrigan, Blake Horrigan, Solicitors,
McKeever House, 4/5 Ushers Court, Ushers Quay, Dublin 8

Respondent(s): Mr. Alan Barry, IR/HR Officer, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The first witness (*hereinafter referred to as S1*) said that he was employed as store manager in the store (*hereinafter referred to as the LV store*) and had four years experience with the respondent.

On 31 May 2008 there was a shortfall of €200.00 when he checked the tills and again on 4 June 2008, there was a shortfall of €250.00 when he checked the tills. On both occasions, S1 looked at CCTV footage and discovered unusual activity around the counter cash area. The counter cash is a sealed unit stored underneath the counter

and is used by employees to store large amounts of money. S1 saw the claimant putting money into the counter cash and two to three minutes later, the claimant put his left hand down to the counter cash and then left the till area with his left fist clenched. Despite viewing some nine hours of video footage, S1 only noticed this behaviour from the claimant on occasions when money was missing.

On 13 June 2008, S1 viewed more CCTV footage that showed the claimant behaving in a similar manner around the counter cash area. S1 did a spot check on the till and discovered the till to be short by €50.00. (*In fact the till shortage on this date was €62.14 but as the respondent continuously referred to a "€50" shortage on 13 June 2008, for the purpose of this Determination, the Tribunal will also refer to a "€50" shortage*). S1 brought the claimant to the canteen, did a staff search on him and showed him the CCTV footage. S1 discovered a crumpled €50 note on the claimant's person. The claimant's explanation for the shortfall in the till was that he had possibly given wrong change to a customer. S1 then informed the claimant that he was being suspended on full pay pending a formal investigation. The claimant was informed that he had the right of representation at the investigation and was given a copy of an employee's handbook outlining grievance procedures.

Under cross-examination, S1 confirmed that free access to all video footage was made available to the claimant and he was not part of the investigation process apart from preparing a report.

S2 gave evidence that he was employed as a store manager in another of the respondent's stores and had twenty-one years experience with the respondent. The H.R. department requested that he carry out an investigation into the matter. As part of that investigation, S2 viewed many hours of CCTV footage and came to the conclusion that the claimant's actions around the counter cash area were suspicious. He asked the claimant for an explanation about the shortfall in the monies and the claimant suggested that the counter cash unit might be faulty. S2 checked the unit and discovered that it was not faulty. He was of the opinion that the claimant had misappropriated the money and he dismissed the claimant. He informed the claimant of this in writing on 23 June 2008 and notified him of his right to appeal.

Under cross-examination, S2 confirmed that he had never met the claimant prior to conducting the investigation. He agreed that the counter cash unit could become jammed if there is an attempt to put too much money in it and a spring mechanism can be operated to free the blockage. He confirmed that the counter cash is operated by money being dropped downwards into the unit.

In reply to questions from the Tribunal, S2 confirmed that the claimant was not the only employee with access to the till and that he had never received a complaint about a fault with the counter cash unit.

On the second day of the hearing of this case, S1 was recalled to give a demonstration on the workings of the counter cash unit.

S1 explained that the unit is secured and fixed under the counter. It cannot be removed and only slides forward from its position so as to allow money to be taken out of it. To operate, notes are dropped into it and the lever is pressed to push the money back into

the unit. The money is removed from the unit in the evening. The counter cash unit is purely for security purposes so as not to have large sums of money remain in the cash registers. The unit that S1 demonstrated at the hearing was the same unit that had been in the store on 13 June. It had not been broken, as the claimant had contended.

S1's contention was that it was possible to rest money on top of the unit and that the claimant had removed €50.00 as a crumpled note. S1 had checked the CCTV footage on the day in question and had also checked the four cashiers and the claimant. On that day, the claimant had looked at the counter cash unit and on no other day had he displayed such behaviour.

The respondent's second witness – S2 – was also recalled to conclude his evidence. He summarised the factors involved in his decision to dismiss the claimant. Following the fact-finding meeting, the parties had adjourned for a half hour. The behaviour of the claimant around the counter cash unit on 13 June and on the days when no till shortages were found, was considered, as was the claimant's competency as an operator of a cash register. No fault had been found in the counter cash unit as alleged by the claimant and none of the other staff had complained about a fault in it.

On 13 June, a discrepancy in money had been found, the claimant had displayed unusual behaviour and on searching him, a crumpled €50.00 note had been found on his person so therefore it was considered that the claimant had taken the cash. S2 confirmed that he had dismissed the claimant. The letter confirming the dismissal had issued from the H.R. department and within same, the claimant had been allowed five days to appeal against that decision. The claimant had not exercised this appeal.

In cross-examination, S2 explained that any large notes should be lodged into the counter cash unit. He confirmed that if a note is actually in the unit, it cannot be retrieved. It was put to S2 that, hypothetically if the claimant had put several notes into the cash counter unit at one time, it might be possible that he inserted a crumpled note so as to get it stuck and so be able to retrieve it. When asked, S2 confirmed that as it was evening time, the store had not been that busy. The claimant's representative highlighted that if the store had not been busy, the claimant had time to put the notes into the counter cash unit. It had not been possible to see the cash register from the CCTV footage so only the behaviour of the claimant had been looked at.

It had not been possible to determine the denomination of notes that had been tendered by customers on 13 June from the CCTV footage and S2 was unable to say how many €50.00 notes had come across the counter from customers that evening. However, more than one €50.00 note had been tendered that evening and a crumpled €50.00 note had been found on the claimant.

If a single uncrumpled note was put into the counter cash unit, it could not be retrieved.

On the CCTV footage, the claimant had been seen playing with the unit. S2 confirmed that he had not seen the claimant crumple a note so as to jam the counter cash unit but said that this could have been done when moving the notes from the cash register to the unit.

It was put to S2 that his investigation had presupposed a belief as to what the claimant had done. In reply, S2 said that there was no need for a person to play with the counter cash unit and that money should be put into it in one drop. On the CCTV footage, the

claimant had been seen playing with the unit and standing over the unit and this was abnormal behaviour. When all the circumstances were considered, it was his belief that the claimant had been playing with the notes so as to crumple them before putting them into the unit so as to be able to later retrieve them. S2 had not seen this but it was his belief. He did agree that it was possible that a customer might have received incorrect change.

Replying to the Tribunal, S2 confirmed that a till shortage would not be seen on the cash register report and no one other than the claimant had used that cash register that evening. A cash register can only be opened in the presence of a supervisor when a sale is not happening. In the event that a customer tendered a large sum of notes, this money would be deposited to the counter cash unit and a number of notes could be inserted into the unit. S2 said that during the course of the evening, the claimant had been constantly playing with cash and could have been inserting crumpled notes so as to be able to subsequently retrieve them. It was the belief of S2 that the claimant had primed the cash counter unit with crumpled notes and had then levered out a €50.00 note.

The claimant's actions around the counter cash unit were put to him during the investigation and he had been allowed to view the CCTV footage. It had been S2 who dismissed the claimant. He had faxed his decision to the H.R. department and they had issued the letter of dismissal. This letter also advised the claimant of his right to appeal against the dismissal decision within five days to the area manager.

In sworn evidence, S3 said that he had worked on the shop floor and had been a store manager in five stores. His current role is in audit and loss prevention, and in the investigation of stock and cash loss in all of the respondent's Irish stores. In performing this task, S3 is able to log remotely through CCTV to view all stores.

When S3 received a call from S1 telling him about the cash losses in the LV store, S3 suggested that he look back at the types of notes that were tendered, cash floats, cash transfers between cash registers, vouchers, logged-on operators who made no sales, credit card transactions, to see if the missing money could be accounted for. S3 also logged on remotely to study the LV store and everyone in the store. Though he was unable to see all of the cash registers, he was able to see the people who were operating the cash registers. After this initial investigation, S3 went to the LV store to conduct his own investigation to ensure compliance with procedures. He had no dealings with the claimant but coached the managers in what they should be doing in relation to the cash loss. At the end of the month, he checked back with the LV store to see if the lost money had been found. S3 could offer no explanation for where the money might have been lost. All other avenues had been investigated.

S3 examined the claimant's cash register receipts and the cash float he had received at the start of his shift on the 13 June so as to do a reconciliation. He found that the cash was fine when the claimant commenced his shift but was short over €50.00 at the end of the shift. A typical shortage on a cash register would be €10.00 and if the variance is greater than this, S3 would be notified. S3 said that in 90% of cases, he is able to account for lost money but he had been unable to account for the lost money in this case. Operators of cash registers make mistakes but the variances of €200.00, €250.00 and €50.00 could not be explained away as a mistake in change given out to

customers. The LV store was one of the respondent's longest established stores and there had been no problems before or since these incidents. To date, the missing money had not been found. When asked if he was satisfied where the money had gone from his investigation, S3 replied that money had disappeared and no other reason had been found for its disappearance.

In cross-examination, S3 agreed that a loss of cash of greater than €10.00 is flagged. €10.00 is the cut-off point and he would not know of losses of less than this amount. Other losses had occurred while the claimant had been working at the LV store but these losses had been accounted for. S3 visited the LV store once a month to investigate things and in the last year, S3 had been asked ten times to investigate incidents in this store. All ten incidents had been accounted for without exception. The respondent's procedures attempt to minimise risk as much as possible.

There had been a number of instances of cash loss prior to 2007, which was before S3 came into his role, thus he could not offer an explanation for these losses. The problem with the LV store prior to 2007 had been its need of a manager. All stores experience lost money and such loss remains unaccounted. S3 agreed that money had gone missing prior to the claimant commencing employment with the respondent but his investigations had shown that such money had been stolen and had not been as a result of errors.

S3 did not know how many €50.00 notes had been tendered on 13 June as the cash register receipt only records the total amount of money tendered and not the actual notes. He did not know how much money was available for transfer from the cash register to the cash counter unit. There was no evidence of the claimant taking the money but there was a lot of body language and unusual activity around the counter cash unit. S3 had not been investigating the claimant. However, there was money that was unaccounted for and factors that indicated that the claimant had taken it.

Claimant's case:

In sworn evidence, the claimant explained that he had done two weeks work experience with the respondent. At that time, a manager has told him that when he turned sixteen years, there would be a job for him. A few days after giving in his curriculum vitae, the claimant received a call with an offer of a job.

The claimant got a part time position on the shop floor. Initially he worked from 5.00 until the LV store closed, and on weekends. He worked when he was available and he made himself available for work. He had good friends at the store and enjoyed his job. If he had nothing else on, the claimant would go in to work.

It was about two to three months after commencing employment before the claimant worked on the cash register. Even at that stage, if the store and tills were not busy, the claimant went working on the shop floor. The claimant was never trained in the use of the cash register but learned about it from watching other staff. On a busy day in the store, he put the money tendered by customers into the cash register and afterwards moved it from the cash register to the counter cash unit. He was never told how much money to move to the counter cash unit but applied common sense.

When put to the claimant that the respondent's evidence had been that he had put money into the counter cash unit by snagging and crumpling it, the claimant explained that he had been unable to answer the queries of the respondent's in relation to this because he had been taken off the shop floor by two managers and shown CCTV footage. The claimant denied that he had stolen money from the respondent. The claimant was reminded that he was giving his evidence under oath. He denied that he stole the €50.00 that was the basis of his dismissal or that he had stolen greater amounts of money.

In cross-examination, the claimant confirmed that he had no problems with cash handling on the days in question. He agreed that he was happy that he knew how to use the cash register. He also agreed that he had been on duty on the three occasions when money had gone missing but highlighted that others staff were also on duty and that the cash registers had not been checked until the end of the day. The cash registers operate from the start of the day until the store closes and staff are never shown the money being counted for reconciliation purposes.

It was put to the claimant that, in evidence, three managers had said that the cash in the register had been cashed-up prior to him coming on duty but the claimant contended that the register had not been cashed-up and while he had been there all day, the register had not been checked. He agreed that the respondent was anxious that the same till operator operates on the same cash register so as to have accountability but floor staff also use the machines. It was possible that a floor person and a till operator could use the same cash register. It was when the claimant was taken off the shop floor on 13 June that he was told that the cash float in the register had been checked prior to his coming on duty.

Three managers had described the claimant's behaviour as unusual but the claimant contended that it was his normal behaviour. He said that he was ensuring that the money in the counter cash unit was secure and under the spring. This is what he had said during the investigation.

The claimant had been shown the CCTV footage from the 13 June. He had requested to view the CCTV footage in relation to the other days so as to compare his behaviour. Someone had been with him on the other days and he had not seen any difference in his behaviour between the days. He had been dealing with customers and thought that it had been his normal behaviour. He had put the money in the counter cash unit and then left the counter.

When put to the claimant that his cash handling had been fine except for the three days in question, the claimant replied that he had never had a difficulty with cash handling on any day. He could have handed back incorrect change to a customer if the store had been busy. €20 notes and €50 notes are kept in the same till box in the cash register. When asked to explain the €250.00 discrepancy, the claimant said that the cash register in question had operated all day so he might not have been the cause of the discrepancy and he did not know if the money was taken as he had only been told this at the investigation.

The claimant accepted the respondent's conclusions when they discovered the missing

€50.00 and then found €50.00 on his person but maintained that he could not understand why they had accused him as anyone could have €50.00 in their pocket. He explained that before going to work on the morning of 13 June, his mother had given him €70.00 because he was going to a birthday party that night. That evening before going to work, he had spent money on a haircut and a meal and so had €51 remaining. He had not gone to the birthday party as the accusation had left him emotionally shocked so that he was unable to function.

The claimant confirmed that he had been represented at the disciplinary meeting by his aunt and had been given the opportunity to appeal against the decision to dismiss him. He had not appealed the decision on the advice of his uncle. His uncle had advised him to contact a solicitor instead as the respondent would not overturn their decision. Had he appealed and been successful, the claimant was unsure if he would have returned to work with the respondent because of his loss of confidence. He had gone to a solicitor because he felt that the decision would not be overturned.

The claimant's representative contended that while accepting that the respondent's procedures were sound, their conclusion to dismiss the claimant was not.

On being examined on his loss, the claimant said that he had not sought employment during the summer as he had other engagements. He had sought employment from September and had secured alternative employment six months after his dismissal.

Determination:

There were three incidents of till shortages in the amounts of €200.00 (*the actual shortage was €198.19*) on 31 May 2008, €250.00 (*the actual shortage was €256.88*) on 4 June 2008 and €50.00 (*the actual shortage was €62.14*) on 13 June 2008. However, it was the till shortage of the 13 June in the amount of €50.00 for which the claimant was dismissed and his dismissal was on grounds of gross misconduct. The claimant had not been accused of the incidents involving the other till shortages. On those occasions, the monies in the cash register had not been cashed-up prior to the claimant going on duty.

The respondent believed that the claimant stole the money because when they cashed-up the cash register there was a discrepancy and they then found a crumpled €50.00 note on the claimant's person. The claimant was the only person who had been working at the cash register on the evening of 13 June 2008. However, the claimant's evidence was that his mother had given him money on the day in question.

The Tribunal must look to what a reasonable employer would do in the circumstances. Some of the claimant's behaviour and activity would have aroused the suspicions of a reasonable employer. Because of the circumstances of the claimant's behaviour on 13 June, a reasonable employer would have taken some action. However, the "unusual activity" around the cash register that the claimant had been accused of could simply have been the claimant fidgeting around the cash register.

In finding that the dismissal of the claimant was unfair, the Tribunal also finds that by his behaviour on the day, the claimant contributed to his dismissal. Accordingly, the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds

and awards the claimant the sum of €1000.00. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 also succeeds and the Tribunal awards the claimant €41.54, this being the equivalent of one week's pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)