

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee-*appellant* UD932/2008, WT393/2008

CASE NO.

against

Employer *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr B. Garvey B L

Members: Mr B. Kealy
Ms M. Mulcahy

heard this claim at Dublin on 18th December 2008 and 29th and 30th April 2009

Representation:

Claimant : Ms Cathy Maguire B L instructed by
Daniel Spring & Co, Solicitors, 50 Fitzwilliam Square, Dublin 2

Respondent : Mr. Ken Stafford, 7 Castletown Court, Celbridge, Co. Kildare

The determination of the Tribunal was as follows:

The appeal under the Organisation of Working Time Act, 1997 was withdrawn at the outset of this hearing.

Respondent's Case

The respondent was involved in the warehousing and retailing of ladies clothing. It had two branches in Dublin, a retail store in the city centre and premises in the southwestern suburb of Ballyfermot. The latter included distribution and warehouse operations. The respondent held local bi-annual sales from stock in that warehouse. Those sales, which took place in a local hotel, were an effective commercial way of offloading certain garments and contributed significantly to the company's turnover and profits.

Since commencing employment with the respondent in September 1995 the claimant carried the title of warehouse manager on those premises. He had access to the respondent's customer list and was familiar with many of its clients. By 2007 the claimant had enquired about taking out a lease

on another shop connected with the respondent. Those enquires did not lead to detailed discussions and at no stage did the respondent give the impression to him that he could both run another shop and at the same time remain on as an employee with the company.

The financial director outlined the background and circumstances that lead to the decision to dismiss the claimant in the summer of 2008. He referred to a scenario that came to the respondent's attention in late 2006. The claimant appeared to be carrying out some personal work on his own laptop computer while on the premises and during the company time. The witness noticed this and asked the claimant to desist from such activity. Despite that instruction the claimant continued on with that action. The managing director wrote him a letter dated 14 January 2007 expressing the concern of the respondent on this and other issues. This was not, however, regarded as a formal warning. He had been furnished with the company handbook that detailed all aspects of his relationship with his employer.

By spring 2008 the respondent became aware of a planned forthcoming sale of ladies clothes at the same hotel where it conducted their sales. The company established that the claimant was involved at some level in its organisation. That involvement seemed to consist of sending text messages to some of the respondent's customers informing and indeed inviting them to attend this sale. The respondent was most displeased at that development and following a series of meetings sanctioned the claimant over his role in that venture. That displeasure stemmed from the fact that the claimant appeared to assist a rival enterprise to compete against it and in addition that he attempted to attract their customers to that competitor. Apart from that this proposed sale was due to take place some two to three weeks prior to a similar type sale by the respondent. The claimant confirmed his role in the alternative sale and defended it on the grounds he was helping a customer and did not believe he was acting contrary to the respondent's interests.

The respondent commenced an investigation into this incident and also commissioned a report on it which was issued in early April 2008. A copy of that report was sent to the claimant who in turn responded to it by the middle of that month. Both the witness and the managing director met the claimant on 17 April and addressed this issue. While the respondent seriously considered dismissing the claimant for this incident account was taken of this long service and following a disciplinary meeting on 21 April the witness presented the claimant with his final written warning. That warning contained the following sentence: *If there is any future problem with any aspect of the performance of your job it is likely that you will be dismissed*. An appeal against that warning was set down for 28 May 2008 in front of the respondent's non-executive chairman. That appeal was unsuccessful in that the non-executive chairman upheld the respondent's warning. That decision was conveyed to the claimant in writing on 30 May.

By 19 May 2008 it came to the respondent's attention that the claimant was somehow actively engaged in the running of a ladies retail outlet in Finglas in north Dublin. He had abstained himself from work at the respondent that day and conveyed that to a colleague that morning. As a result of this situation the witness wrote to the claimant requesting him to attend a disciplinary hearing and reminded him that he was still on a final warning status. The writer also indicated to the claimant that this situation has the potential to be seen as a conflict of interest. The financial director, the managing director, the claimant, and a colleague who acted as a witness/representative attended that meeting on 22 May.

Following the chairman's rejection of the claimant's appeal against his final warning the respondent proceeded with a further disciplinary meeting with the claimant concerning his involvement in the Finglas shop. The chairman had not been informed of this separate process

while the appeal was still being considered. At this further meeting the witness asked the claimant had he anything else to say about his situation pertaining to the circumstances of his involvement in another shop. Apart from querying the involvement of a customer the claimant had no further comment to make. The witness then told the claimant that the respondent had no other option but to dismiss him. A written document confirming notice of that dismissal followed two days later. The witness cited two main reasons for this sanction. The respondent regarded the claimant's involvement in another ladies shop as a conflict of interest and contrary to the conditions as set out in their handbook. The company also concluded that the claimant's behaviour amounted to a breach in the necessary bond of trust and confidence it required in a working relationship with him.

The witness said that the claimant was dismissed for gross misconduct. The respondent told that claimant he was not required to report for work during his notice period for which he was paid in full up to 18 July 2008. The claimant appealed that decision on 8 July and despite the respondent's contention that this appeal was out of time acceded to it. That appeal hearing took place on 17 July.

The respondent declined an invitation to physically visit the shop in Finglas and to view its stock reasoning that its very existence and the claimant's involvement in it as a director was enough to consider it a competitor. At no time during the disciplinary process did the claimant mention difficulties his son was experiencing at school and his efforts in addressing those difficulties.

The managing director also referred to the above-mentioned incidents in her evidence. She expressed her annoyance and disappointment to the claimant towards his approach to some aspects of his work most particularly his use of his own computer. Her annoyance was even greater when she learned of his involvement in a nearby hotel sale hosted by a customer of the respondent's. The claimant's explanation for this involvement was unsatisfactory. The witness described that involvement as unbelievable. Despite the cancellation of that sale the respondent felt that disciplinary measures against the claimant were justified.

The witness regarded the claimant's input and participation in another ladies clothing shop in the north of the city as a conflict of interest. Added to that was the distrust it generated due to the nature and circumstances of that involvement.

Prior to hearing the claimant's appeal against his final written warning the non-executive chairman spoke to the financial about the subject matter of that appeal. The witness "had no axe to grind" and had little contact with the claimant up to this appeal. He then chaired the first appeal hearing on 28 May 2009 and said that the claimant was given a full and open forum to state this case. Included in the "essential facts" that the witness considered was that the competitor's hotel sale took place. Following that appeal and a review of the case the chairman upheld the respondent's decision. He felt that the claimant's behaviour in this instance was underhand and could have merited a dismissal. At all times during that process the witness was unaware of the claimant's connection with another shop in Finglas.

The witness was "gobsmacked" when he learned of the claimant's involvement in that shop. He felt personally deceived by the claimant in that he did not declare his interest and association in that shop during the appeal process. He again chaired the claimant's appeal against the company's decision in dismissing him. Before doing that he had consulted the financial manager and managing director about the issues in this case. That appeal hearing was heard on 17 July and two days later the witness wrote to the claimant informing him that "your dismissal from the company should stand".

Claimant's Case

An owner of another ladies outlet store who was a customer of the respondent's knew the claimant through their work contacts. Her shop was located in county Tyrone and wanted to host a sale for her "dead" stock in Dublin. In that respect the witness contacted the claimant and asked him about a premises and a few contacts for this proposed sale. While he was hesitant at first to co-operate he finally agreed. The claimant did not provide her with a list of names of potential customers. The witness arranged the sales room and the stock on sale contained very little of the respondent's clothing.

As a result of a phone call from the respondent's general manager the witness withdrew from her sale plan and consequently no sale took place as planned in Dublin. She had not realised her proposed sale was such a major issue for the respondent and had no intention to undermine their business.

As a warehouse manager the claimant reported to the financial controller and general manager. He described his working relationship with them as decent. The witness had detailed discussions with the respondent about operating a related clothing shop near their premises in Ballyfermot. There was no indication from the company that he could not do this and remain on as an employee. However due mainly to financial constraints that project never materialised.

The claimant accepted that the general manager and financial controller expressed their disapproval at certain aspects of his work behaviour particularly his use of his laptop at work. The witness concealed his use of that laptop from other staff. He did not respond to the managing director's letter in January 2007 on that subject, as he did not consider it as a warning.

It did not occur to the claimant at the time to seek permission from the respondent to use their customer list in contacting clients informing them of another customer's sale. The claimant undertook that task as a favour for that customer and he neither sought nor gained personal profit on that activity. While he used his own phone to text those dozens of customers the customer chose the hotel as the location for her sale. The witness received phone calls from the general manager who was very irate at his involvement in that sale. The financial controller also called him about this issue. The claimant responded to a report on his role into this incident. In that response he stated: *My intention was only to facilitate a customer and in hindsight I should have raised it with you first. However I had no involvement beyond that and apologise for any upset this has caused you. I would be grateful if you could consider my views on the above.* The witness commented that he really did not think he did anything wrong in facilitating that customer.

Two further meetings took place on this issue in April. It was never made clear to the claimant that the latter meeting on 21 April 2008 was a disciplinary hearing. The witness was furnished with two memorandum type documents that day the second of which consisted of a final warning and notifying him that any future problems and he was likely to be dismissed. The witness indicated that he could have been dismissed for that incident. At his appeal hearing before the non-executive chairman the claimant "explained everything" to him.

In April 2008 the claimant became involved in another female clothing enterprise. That shop which was located in Finglas opened in early May selling clothes to a younger segment of the market and at inexpensive prices. The claimant was listed as one of its directors. While there were two part-time staff employed there the witness also attended to business there particularly on Friday

afternoons when he was off work from the respondent. On 19 May the claimant contacted a colleague by text saying he would not be at work that day. According to him he had to oversee his son's arrival, attendance, and departure from school that day. While doing that he also visited the newly opened shop in Finglas. He received a letter from the respondent dated that day asking him to attend an initial disciplinary meeting.

The claimant could not believe that the respondent regarded his involvement with the Finglas shop as a conflict of interest. He reasoned that since this shop had a different geographical sphere, and was retailing clothing of lesser quality than the respondent's and its clientele was of a different group that shopped at the respondent then no conflict arose in this case. While he told the respondent he had personal issues to attend to on 19 May he gave no details.

The general manager informed the claimant at a second disciplinary hearing on 5 June that the respondent had no other option but to dismiss him. His appeal against that decision was unsuccessful.

Determination

The respondent's handbook clearly states that employees should not engage in activities which conflict with the interest of the company. It was the respondent's contention that the claimant's actions and behaviour amounted to such a conflict. That together with their belief that through those actions and behaviour he also broke the necessary trust and confidence needed to maintain and continue their reliance in him as an employee. There was certainly much merit in the respondent's case.

The claimant did not view his roles in the hotel sale and his subsequent and ongoing involvement in another shop as a conflict of interest. Despite being formally warned and notified of the possible consequences of further problems should he face disciplinary action again the claimant pursued his interest in another entity. He appeared to accept that his involvement in the first incident could have warranted his dismissal yet he chose not to take that into account as his participation in the Finglas shop demonstrated. His assertion that there was no conflict of interest there lacks credibility.

The respondent's procedures in dealing with this case were adequate in that the interests of natural justice and fairness generally applied. However, the second appeal process was somewhat flawed in that the chair of that appeal had earlier expressed adverse prejudicial comments about the claimant.

The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 fails as the respondent has shown that in the circumstances their dismissal of the claimant was justified.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

