

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - Claimant

CASE NO.
RP383/2008
UD446/2008

MN404/2008

against

EMPLOYER – Respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly BL

Members: Mr. D. Morrison
Mr. G. Hunter

heard this claim at Letterkenny on 2nd February 2009
and 23rd April 2009
and 24th April 2009

Representation:

Claimant(s) : Mr. Garry Clarke, Garry Clarke, Solicitors,
McKendrick Place, Letterkenny, Co. Donegal

Respondent(s) : Ms. Fiona Buckley, Baker Tilly Ryan Glennon,
Trinity House, Charleston Road, Ranelagh, Dublin 6

The determination of the Tribunal was as follows:-

The appeal under the Redundancy Payments Acts, 1967 to 2007, was withdrawn at the beginning of the first day of hearing.

Respondent's Case

Giving sworn testimony, a witness for the respondent said that she had been thirteen years with the respondent, that she had been in management for six years and that she had been the respondent's

audit manager since December 2006. She had to make sure that there were no irregularities in sales and that there were no discrepancies in till performance. She had to ensure a cash balance. Her role had grown as the respondent had grown.

The respondent was the largest department store in the northwest of Ireland. It was a family-owned business which had been set up in 1971 by a man hereafter referred to as JM. The respondent operated from a ninety thousand square foot building and had eleven departments.

Asked if the respondent had a staff discount policy, the witness confirmed this saying that it had been there before she had started. Staff who had less than three months' service got ten per cent off. All other staff got a twenty-five per cent discount.

As for customer discount, the witness said that nurses and teachers got a ten per cent discount but that fifteen or twenty per cent discounts could be given. JM approved these discounts. The witness approved ten per cent discounts for customers.

The Tribunal was referred to a copy of the respondent's staff discount policy which stated:

"Abuse of this policy by any member of staff will lead to disciplinary procedure up to and including dismissal."

The witness told the Tribunal that this policy was given to the respondent's managers to give to staff and that NM had been the manager in cosmetics where the claimant had been a till operator.

When the Tribunal asked if NM was to give evidence the respondent's representative said no because the issue was not in dispute. Thereupon, the claimant's representative said that it was. When the Tribunal asked who would give evidence that this policy was within the claimant's knowledge the respondent's representative replied that the witness's evidence was that it had been given to the claimant's manager but that the respondent could get NM to give evidence if there was a dispute.

Resuming her testimony the witness said that staff could nominate family members for discounts and referred the Tribunal to a 24 May 2005 newsletter which contained the following:

"All new staff please remember the policy surrounding the staff discount available. As new members of staff it will take some time for till operators to become familiar with you. If you have any queries, please contact your dept. manager."

A staff newsletter dated 14 June 2005 contained the following:

"Staff Purchases – the company policy relating to staff purchases is that they must be paid for in the relevant department and not taken to another department to be paid for. This remains the policy, so can all staff members please abide by this procedure. It is unfair to put other staff members in a comprising(sic) position by removing goods from their department to pay for them elsewhere." _

The Tribunal was next referred to a respondent letter dated 15 June 2005 outlining the company policy on staff purchases and stating that the company expected all employees to adhere to this policy. It added:

"When purchasing goods in any of the departments within the store, these goods must be paid for

within that department. It is not acceptable that goods are removed to another department for payment. This applies to all areas of the store and it is the responsibility of each employee to follow this policy. Where items have to be removed for the purpose of matching outfits, e.g. bags, shoes, accessories, the removal of these unpaid goods must be authorised by the department manager or assistant manager.

Each employee must ask their own department manager to sign receipts for all purchases before leaving the store.”

A staff newsletter dated 2 August 2005 contained the following paragraph:

“Policies and Procedures

Please be aware that policies and procedures in an organisation are put in place for a reason. They may be to meet H & S requirements or to meet other legislation requirements. Whatever the purpose it is necessary that all of them are adhered to and that breeches(sic) of any policy can lead to disciplinary procedures.”

After reading this paragraph the witness said: “It’s gross misconduct to break it.” Asked where this was stated she did not claim that it was so stated but said that the respondent’s policies and procedures had “always” existed and that when she had taken over the audit function around December 2006 the respondent had wanted to protect itself from loss and unauthorised discounts. She added that outside the summer and winter sales it had not been possible to calculate what discounts were adhered to or not.

A 6 April 2006 memo from the respondent’s HR department to all employees stated:

“We are currently initiating partnership cards to all our colleagues and their immediate family members; this will be the first step in introducing our partnership card nationwide. Its main function will be to track our discount facility and to help us maintain a profile on our most loyal customers who of course include a lot of our colleagues.

It will become mandatory in the future to avail of company discount that you will need to produce your partnership card. Please fill out your own name and address and the names and addresses of your immediate family who would be entitled to company discount.”

The Tribunal was also referred to another document which contained the following:

“Please Note If you have a brother and their wife is the main shoppers(sic), then the wife’s name and photo will go onto card and likewise for any staff members who have sisters that husbands are the main shoppers.”

The witness stated that that this had been an offer made by JM.

The Tribunal was referred to a November 2006 staff discount policy document which stated:

“Extended family discount applies as follows. During the first 3 months of employment family members may avail of 10% discount and this will increase to 20% on completion of 3 months

employment by the employee.

To avail of 25% staff discount, the staff member must be present at the time of purchase and present their partnership identification card.”

The document concluded as follows:

“Abuse of this policy by any member of staff will lead to disciplinary procedure up to and including dismissal.”

The witness told the Tribunal: “There’s no provision for friends.” She added that even JM’s closest friends did not get a twenty-five per cent discount and that they and the respondent’s best customers got twenty per cent discounts.

Asked who had dealt with the claimant regarding training on use of the partnership card, the witness replied: “I’d have to find that out.” However, she added that the claimant had indeed known how to use her card, that this was “what the case comes from” and that each card stated that it would only be accepted when presented by the named cardholder.

The witness told the Tribunal that on 6 March 2008 she had learned that on 23 February 2008 a customer had come in, had purchased shoes and had requested that the shoes be taken to the cosmetics department for payment. She also learned that goods had been taken from the ladies’ fashions department and that a total sale to the value of over a thousand euro had gone through in the cosmetics department. The sale had included items from ladies’ fashion, gents, lingerie and shoes (which were on different floors) but no cosmetics. The witness believed that the claimant’s card had been swiped in the cosmetics department and that a €269.96 discount had been given to a customer who was not entitled to receive it.

The Tribunal was now referred to a copy of a till receipt on which the claimant’s name had been recorded as customer and salesperson.

The witness stated that, two days prior to this transaction, the same customer had come to ladies’ fashions, had selected outfits, had gone to a cashier and had given the claimant’s card for a discount but had been declined whereupon the customer had left only to return on 23 February with the card. The respondent did not know if the card had been passed around.

The Tribunal was referred to minutes of a meeting attended by the witness and the claimant on 6 March 2008 at which the claimant said that she knew what were the correct procedures for giving customers a discount. At the meeting the witness put it to the claimant that on 23 February she had processed a transaction for a female customer during which she had swiped her partnership card giving the customer the claimant’s twenty-five per cent staff discount. The claimant’s response was that this customer was a very good friend and customer who had, a few weeks before, spent €1,400.00 without any discount whereupon the claimant had said that she would look into getting this customer a discount card. At the meeting the claimant admitted that she had not approached anyone but had given the customer her card despite having been aware of the procedures. The witness told the Tribunal that the claimant held her hands up, admitted that she did not have an excuse and said that she should not have done it.

The witness told the Tribunal that the respondent would have given a discount to the customer because of the amount she was spending but that the discount would not have been twenty-five per cent.

The Tribunal was referred to a document to prove that there had been someone on duty on 23 February whom the claimant could have approached and consulted. The witness said that the claimant could also have approached another manager or even JM himself but that it would have been very serious if the customer had passed the claimant's card on to someone else.

The Department Manager and buyer for the cosmetics department gave evidence.

Staff were very aware of the staff discount of 25%, family members received 20% which had been documented in the company handbook and various memos. On Monday afternoons management meetings took place and matters of the store were discussed. At the time staff meetings were Tuesday mornings before the store opened at 10 a.m. but now meetings are held with staff on a one-to-one basis to discuss relevant issues of sales, products, marketing, merchandising, housekeeping or other issues brought up at management meetings.

Memos and weekly newsletters were displayed on staff notice boards and some memos were verbally told to staff. Rosters, targets and lunch rosters were also displayed there. Staff signed off when they had seen the newsletters and they were then filed away. In the witness's absence the Assistant Manager of the department took over the role.

Staff were given a 2-day training in the use of the cash till. She felt all staff were adequately trained. When staff sales were made no staff swiped their own discount card through the till. If you wished to receive a staff discount another member of staff put the sale through the till although staff were allowed, including the claimant, to give discounts of 10-20% to customers but had to seek a Managers authorisation. Discount to customers could only be given in your own department, if the customer had items from another department a call would be made to that department to authorise the discount.

On cross-examination she stated she had worked 4 years with the claimant who was a superb worker. She had job-shared on the Clarins counter. The only issue she had with the claimant and her job-sharing partner was they worked back to back and she never knew where one had left off and the other started. The claimant did work on Tuesday mornings but she would meet up with her on a one-to-one basis before the end of the week to discuss various matters. When asked, she said she could not be specific how many newsletters the claimant had signed off on. She again stated that she had verbally delivered the details of company memos and newsletters or they would be passed around the staff. The onus was on her to make sure everyone saw them.

When asked, she stated the Senior Manager trained staff on how to use the staff partnership discount card. When asked, she replied that you would be aware if people were family members and therefore entitled to a discount. When put to her that the claimant was on sick leave when the training was carried out, she replied that the claimant would have been given a return to work procedure course. Staff could not carry out the procedure if they were not trained.

She was not present on the day in question, February 27th but was made aware of it the following day. She in turn went to senior management and informed them. She did not speak to the claimant that day.

When asked she said that customers would ask for discount and it was up to the staff member whether to give up to 20%. The owner of the respondent company had given some of his regular customers business cards to use. When put to her that her that the claimant had given discount to the regular customer as she was spending a lot of money she replied that the customer had not purchased any cosmetics and was not entitled to a 25% discount. The average discount given to customers was 10%.

On re-direction she explained the discount system was in place for 4 years and the card system was introduced in 2007. When put to her that the claimant did not know how to use the discount card for the customer she replied that the claimant had swiped the card and given the discount.

When asked by the Tribunal she stated that she had underlined the importance of the newsletter of July 16th 2007 regarding *“merchandising team, buyer and department Manager (were applicable) are the only people within the store who have authority to set promotional or sale prices. It is a serious offence for any other member to change the selling price or increase the discount of goods unless authorised. Any abuse of this will lead to disciplinary procedures up to and including dismissal.”*

She stated that it was unusual for customers to bring items from other departments to the cosmetic department to purchase them. Usually they picked up cosmetics first and were escorted to the department they would purchase them. The claimant did not hold a Manager’s card in order to give customers discount. She explained that there had been a problem in the past with adhoc discounts. Discounts were given, the customer returned the item for a refund and was given the full amount in return.

The Assistant Manager of the cosmetics department gave evidence. When the Manager was absent she relayed memos and newsletters to staff in her department. All staff were well trained in all the procedures. She had never come across any staff member give 25% discount in the past or swiped their own staff discount card. It was unusual for customers to pay for different stock at the cosmetics department. Staff were well aware of the consequences of misuse of their staff card.

She was on leave on the day in question but was informed by her colleagues and then informed senior management. A customer had contacted the store stating she had paid for a feather but had not received it. On investigation it was highlighted she was given a 25% discount on her purchases.

The Assistant Manager of the shoe department gave evidence. It was clear to all staff what company policy was. The most discount she had given in the past was 10% and had never heard of any staff member swipe their own card in the past. She had been trained how to use the cash till by the Senior Manager.

On February 23rd she was present in the shoe department. A customer arrived and wished to pay for shoes and ladies clothes but not in her department. She escorted the customer to the cosmetics floor who said she wished to purchase some cosmetics from the claimant. The claimant was not present in the cosmetics department when they arrived. She did not see the sale take place.

The General Manager and son of the owner of the respondent company gave evidence.

The staff partnership discount was introduced and all staff were trained and informed of the consequences of its misuse. As it was a cash business there was zero tolerance with dishonesty. If a customer asked for a discount it was the culture to round the figure off or give 5%. The staff card

was very helpful to the staff and it could be awkward when customers asked for a discount.

The Senior Manager informed of the claimant's unusual transactions. This was after the investigation. The claimant was notified in advance of the meeting she was requested to attend on March 8th 2008. The HR manager also attended. She was informed it was a disciplinary hearing and was told she had the right to be represented. She declined. The minutes of the disciplinary hearing was read into evidence. The claimant had met the customer, and friend, outside the store some weeks previous, had told her she had spent € 1,400 and was not given any discount. She agreed she should have been given a discount and told her to take her discount friend on her next visit, would show the card to the assistant serving her and receive a discount. She agreed she should not have done it and should have gone to the office to get authorisation. She had no intention of breaking the rules and would never do it again.

The witness said that he could not believe the story of the customer being a friend, as this had not been revealed at the investigation meeting. The witness felt the claimant was well aware of company policies and felt there had been a level of collusion with the customer. On the day in question 8 Managers including himself were present and permission to give discount could have been requested.

He solely made the decision to dismiss the claimant as she had stated she had been working for the respondent for 8 years, was aware of the policies and procedures, admitted she should have gone to management and he felt she had premeditated collusion with the customer. She also had contradicted what she had said at the investigation meeting with the Senior Manager. He said he was very shocked and disappointed this has happened but there was no alternative in this situation.

When put to him he said that the issuing of 10-20% discount in the past was before his time. When asked he said that the respondent company did not recognise unions but the claimant had been offered a witness at the meeting and he was not aware if she was a member of any union. He was not aware if the claimant had been given a copy of the company's grievance procedures. She was advised of her rights at the investigation meeting. She was given the right to appeal his decision within 5 working days to the owner of the company. When asked he said that it did not matter how many years service a person had, dishonesty equalled dismissal.

The HR Manager gave evidence but she explained that she had not been the HR Manager when the claimant had been hired.

On submitting the claimant's recent contract of employment into evidence the witness read out the reasons why an employee would be dismissed and the procedure taken before the decision is made. She stated the Senior Manager did a full investigation into the matter. The claimant had allowed a discount of € 269 to the customer. She stated that the claimant was well aware of all policies and procedures and had personally stapled a copy of the disciplinary and appeals policy to all employees' payslips.

She stated the claimant was given every opportunity to have a representative at every meeting. On March 6th 2008 the claimant was suspended with pay pending an investigation. The Senior Manager's conclusion was submitted to the General Manager in order for him to make his decision.

On March 8th 2008 she was informed by letter that she was dismissed but could appeal the decision within 5 working days. She was also given a copy of the minutes of the meeting. The appeal took

place on May 1st 2008 but the claimant was told she could not bring her solicitor only a colleague or union representative. The claimant did not attend.

On cross-examination she stated she had handed a copy of the Disciplinary policy to the claimant on 3 occasions and therefore she was well aware of company policy. When put to her if she was sure the claimant got the original copy of the policy when she was on sick leave she replied that if payslips were not collected it was common practice for their Managers to post them out to them. She stated the claimant was very hostile and angry towards the Senior Manager with the meetings.

When asked if she had looked for advice after the claimant was dismissed she replied that she had informed her respondent's representative.

Claimant's Case:

The claimant gave evidence. She commenced full time employment in August 2000 as a Manager on the cosmetics Clarins counter. After some maternity and some sick leave periods she worked on a part time basis.

She explained when she first worked for the respondent company there were 2 buttons on the cash till to give a 10% or 20% discount to customers, never a button for 5%. She stated the staff were authorised to give a customer a 10% discount. The owner of the respondent company had a gold card system for certain customers entitling them to a discount of 20%. She was aware the new staff partnership card was to be introduced but had not seen any of the vast documentation concerning the procedures submitted to the Tribunal.

When put to her that her signature was on one of the newsletters in question, she replied that the newsletter would be circulated during the working day, you may not get time to read it but would just sign it. Staff were not given any direct instruction to view any documentation posted on the noticeboards but she did look for any new memos when she returned to work on her week on. When put to her she said that she could not recall seeing the newsletters dated May 24th 2005, June 14th and stated she had not see the newsletters dated June 15th 2005 and March 19th 2007.

Staff members had briefed her on the introduction of the Managers card and that if a customer wanted a 20% discount she was to get management permission if there was a Manager available. She was not told what to do if there was no Manager present or if the office was closed. When asked why she had telephoned the office, she replied that she had been told that they were counting cash and were discouraged to contact them as most of the office staff had left by 6 p.m.

When asked she explained that staff purchases were to be made through another staff member and not the person making the purchase. Two memos concerning the partnership card dated April 6th 2006 and August 5th 2006 were put to the claimant who stated she had not seen them before. She stated that she had been absent on sick leave in August 2007 when a memo concerning the partnership card was circulated to all staff. On her return colleagues informed of the partnership card and the policies and procedures were not explained to her.

When asked she explained that the customer in question minded her first child in the past but they had lost touch. The customer called to her house explaining that one son had married and another was to marry and would go to the respondent to purchase the outfit. The customer in question explained that she had made a considerable purchase for the first wedding and had not been offered a discount by the respondent's staff member. The claimant said she felt the customer should have

received a discount and told her to come into the store and have a look around. She gave the customer her partnership card to show the staff member that she was related to her and would maybe receive a discount. The card would not be swiped through the till. In the past customers would inform staff which staff member they were related to and would maybe receive a 10%-20% discount. Time pasted and she forgot the incident.

The customer rang her, told her she had picked out an outfit, presented the card but had not received a discount. She told the customer to come into the store to her the following Thursday and she would see what she could do. The following Saturday she met the customer in the store and again had not received a discount on her purchases. She told her to drop down to her at the cosmetics counter. No Managers or Assistant Managers were present to discuss the purchase and she felt the customer should receive 20%, which she gave her. She felt if the owner knew how this person was such a long serving customer he would have given her a 20% discount gold card. She never felt it would lead to disciplinary action and was shocked when she was approached to attend an investigation meeting. If she had known the incident would have lead to dismissal she never would have done it. Although after the incident had occurred she did question whether she should have done it. The first time she had seen the appeal policy was after a meeting but was unsure if it was the first meeting or the dismissal meeting. At she meetings she was offered a witness but did not want to have a colleague present. At the meetings she said she felt trapped, could not think straight and was amazed the Senior Manager thought she had been colluding with the customer in question.

On cross-examination she said that she felt management were approachable except the General Manager. She felt what she had done was justified. When put to her there were 10 other Managers available to speak to on the day in question she replied that she would not be regularly on the telephone to other Managers looking for discount. She would send the customer to the office to look for a discount. The Deputy Manager had discouraged the staff from going to the office after 6 p.m. as all the full-time staff would have gone home.

When asked she agreed the discount buttons on the tills had been inactivated in 2006 to tighten up the discount policy. When asked she stated that she only ever intended to give the discount once and had given her card to the customer only to prove to staff that she knew her. She was aware staff could be dismissed for theft, bullying or repeat offences, amongst other issues. She told the tribunal she had informed the Deputy Manager what she had done that evening but did not comment on it.

When put to her she said he had never signed a written contract of employment. When put to her she stated that she knew how the card was to be used, knew it was for her use only but was not aware of the consequences of its misuse. She had no intention of defrauding the respondent. After it had been investigation she felt she would have been given a written warning.

When put to her by the Tribunal how she felt she had been bullied and victimised she replied that she felt there had been no question of her being innocent before being proved guilty. She gave evidence of loss.

Determination:

Having heard all the evidence adduced by both parties over a number of days the Tribunal finds that the procedures adhered to by the respondent were fair in all the circumstances of the claimant

claimants clear misuse of her staff discount card. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and Redundancy Payments Acts, 1967 to 2007 were dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)