

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

-Claimant

UD764/2008

MN709/2008

WT316/2008

against

Employer- Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. Behan B.L.

Members: Mr. P. Casey
Mr. J. McDonnell

heard this claim at Mallow on 16th February 2009 and 20th April 2009

Representation:

Claimant:

Mr Patrick G McDonnell, James Binchy & Son, Solicitors,
Main Street, Charleville, Co Cork

Respondent: Mr. David Browne, McNulty Boylan & Partners, Solicitors,
26/28 South Terrace, Cork

The determination of the Tribunal was as follows:

Dismissal as a fact was not in dispute between the parties. CCTV evidence was opened to the Tribunal.

Respondent's Case:

The first witness for the respondent worked for the respondent as a supervisor and till operator. The witness gave evidence that she usually worked on opposite shifts to the claimant who was a trainee manager.

As part of their duties the witness and the claimant prepared a procedures booklet, which included

the procedure for staff purchases. The witness outlined the procedure to the Tribunal. An employee should present at the opposite side of the counter and pay another member of staff for the item they wish to purchase. A receipt should be given but where this was not provided the CCTV could be zoomed in if necessary to verify a purchase if a query arose.

Staff members were not allowed to purchase lottery tickets when they were working but they could purchase them during their lunch break. During her employment the witness developed an addiction to lottery tickets. She would take a number of cards from the shop and only pay for some of the tickets. If she won on the lottery tickets she would pay for the remainder of the cards. The claimant and other staff members were aware of what the witness was doing.

During the last five months of her employment with the respondent the witness would leave her work area on the deli and take lottery tickets. The claimant and other staff members saw her take the tickets and openly scratch them at the till area. The witness recalled one specific incident where she won €10.00. The claimant split the €10.00 between the witness and herself. The respondent was suffering a loss as not all of the scratch cards were paid for.

On the 11th April 2008 the manager observed the witness scratching lottery tickets and he discovered a number of scratched cards in the bin. The manager proceeded to investigate the matter and he called the witness to a meeting at which she was suspended for three days with pay. The witness was informed that she could bring witnesses and representation to the next meeting with the manager.

At the next meeting the manager outlined a number of dates and times to the witness and gave her an opportunity to make her case. The witness knew she was in the wrong and felt that the meetings with the manager were fair. The manager asked her if she wanted to view the evidence he had but she knew there was no point trying to talk her way out of it. At the meeting the manager told the witness she was not to discuss the involvement of any other staff members. The witness' employment was terminated.

The claimant was aware of what the witness did with the lottery tickets. The claimant saw the witness take the lottery tickets and she took them herself. The witness recalled one incident where they paid for ten cards but actually sent thirty cards to the TV show. The witness first spoke to the manager about the claimant's involvement a number of weeks prior to the hearing.

During cross-examination the witness stated there might have been a few occasions where staff purchased items at the side of the till rather than outside the till. On numerous occasions the witness purchased lotto tickets at the employees' side of the till.

The witness and the claimant were responsible for stock takes, including completing stock takes on the lottery tickets but they did not carry out this duty. They were repeatedly asked at staff meetings to present stock takes.

In reply to questions from the Tribunal, the witness stated that in May 2008 the claimant contacted her and said she had been suspended. At the meeting with the manager five occasions were outlined to the witness. The witness told the manager about the incident where she and the claimant had split €10 but she withheld other information as the manager said he did not want to know of any other incidents.

The witness having viewed the CCTV stated she did not tell the claimant she had paid for the

lottery tickets. Even though the claimant was not directly looking at witness she would have had a sense of witness was doing. She did not discuss with the claimant her addiction to scratch cards.

The manager of the respondent gave evidence to the Tribunal. The claimant's position as trainee manager included supervising staff, ordering stock and ensuring both the shop and the staff were properly presented. The manager sent a letter to the claimant in September 2007 outlining her duties.

In mid-April 2008 the manager noticed the first witness validating a number of tickets. It was unusual that she was validating approximately ten tickets at the one time as only winning tickets are validated. The manager asked another member of staff to monitor the situation and the manager reviewed the CCTV. The manager confirmed to the Tribunal the procedure for staff purchases and the necessity for this procedure. All lottery tickets should be scanned, paid for and then validated later. The manager confirmed that he did not discuss any other members of staff with the first witness. It was when he reviewed the CCTV in connection with the first witness that he observed CCTV relating to the claimant.

While viewing the CCTV the manager observed the first witness removing a number of tickets and placing them on the counter top. The tickets were not paid for although the claimant was standing by the till. The CCTV showed the first witness scratching the lottery tickets and the claimant assisting her with this. The footage showed the first witness take a further number of tickets and the claimant moving to the lotto machine.

After the first witness was dismissed the manager was concerned that there were irregularities and it seemed very clear to him from the CCTV footage that the claimant had knowledge of the discrepancies. He organised a meeting with the claimant to see if there was a simple explanation as it seemed from the evidence that the claimant was aware of what the first witness had been doing and as a member of management, the claimant needed to follow procedures.

On the 30th April 2008 the manager held a meeting with the claimant at which she was shown the CCTV footage dated the 11th April 2008. The claimant was informed that she was entitled to have a representative at the meeting. The claimant's reaction was that she had scratched only one ticket, which the first witness had given to her, and that the first witness had informed the claimant the ticket was paid for.

The manager wanted to review the CCTV further to clarify the actions. While he investigated further he suspended the claimant with pay. Between the 30th April 2008 and the 2nd May 2008 the manager reviewed the CCTV with another member of management and with the managing director.

On the 2nd May 2008 the manager held another meeting with the claimant. He presented the claimant with the details and written outline of the respondent's concerns. He played the CCTV to the claimant and showed her that the first witness had breached procedure and removed a number of tickets. The claimant did not provide much of a response to this but she said that she felt everyone had an equal responsibility. The claimant felt there was not an issue and that she had equal responsibility to any other member of staff. The central point for the respondent was that the claimant was aware that the first witness was removing quantities of lottery tickets and not paying for them or not paying for them in full. This was the respondent's central tenet that the claimant was aware of a very serious breach, which resulted in a loss to the respondent. It would have been easier for the respondent to ascertain the exact quantity of lotto tickets removed if the stock taken had been carried out. The CCTV showed the claimant working in close proximity

to the first witness who placed a number of lotto tickets on the counter beside the claimant.

The claimant failed to provide a reasonable or satisfactory explanation and due to the fact that she was complicit the manager reached a decision to dismiss the claimant from her employment. The claimant had absolute knowledge of the breach of procedure and failed to bring that knowledge to the attention of management. The claimant was paid up to date and any outstanding holiday pay was also paid to her. Two further staff members were also dismissed.

During cross-examination the manager stated that he had joined the store six months prior to the claimant's dismissal. At the first meeting of 30th April 2008 the claimant was shown some of the CCTV footage and a copy of the CCTV was not requested. The respondent was looking for the claimant's response to the CCTV and she had 2/3 days to give consideration prior to the next meeting on 2nd May 2008. While the first meeting was brief witness would admit that it could be intimidating. Part of management function was security. The claimant had an intimate knowledge of what was going on in the store and she did not take action.

In answer to questions from the Tribunal witness was asked if others were on their own with the first witness when lottery tickets were taken and he responded, it would be a logical conclusion.

The Tribunal also heard evidence from MD who works as manager and is mother of the first witness. She stated that the claimant was like a daughter to her and she was a diligent worker. This witness attended the first meeting with the claimant on 30th April 2008 but did not attend the second meeting on 2nd May 2008. On 30th April 2008 she was in the shop with the claimant when the manager called witness to the office. He then called the claimant to the office. The claimant was asked if she wished to have a witness present and she declined. She felt that it was clear that the purpose of the meeting was to show the claimant the CCTV. From the CCTV witness could see her daughter and the claimant scratching lottery tickets and at no time could she see the till being opened except to get a coin to scratch the tickets. The system that was in place for the purchasing of goods was that the staff member went to the other side of the counter and the receipt should be stamped by management. This system was not always followed. She enquired on numerous occasions and was told that the tickets/cards were paid for. She accepted her daughter's word. Her daughter was dismissed. She felt that everybody should be responsible for till discrepancies.

In cross-examination witness explained that a specific system was in place for the purchase of scratch cards in that the card is scanned and one has to go to the lotto machine to validate the card and the pay out is from the till. It was important to follow this procedure.

In answer to questions from the Tribunal witness stated that the claimant was cool, calm and collected when the CCTV footage was shown on 30th April 2008. It's possible she was shocked. The claimant was a trainee manager and she was not aware if she was paid additional remuneration in this regard.

The witness having viewed the CCTV stated she did not tell the claimant she had paid for the lottery tickets/scratch cards. The claimant knew she had not paid for the scratch cards and even though the claimant was not looking at her directly she would have had a sense if what witness was doing. She did not discuss with the claimant her addiction to scratch cards.

Claimant's case:

The claimant in her evidence on viewing the CCTV told the Tribunal that she did not see the lottery tickets/scratch cards being taken. The first witness told her she had paid for the lottery tickets and she took her word. She gave the claimant three or four tickets and she validated them. She did not take the money at the time as there was a customer waiting to be served but she took it after the customer was served. She was not aware she took the second set of tickets and in relation to the third set the claimant was not aware she had not paid for them. The first witness had never given the claimant lottery tickets/ scratch cards before. She would often come in on her day off and buy scratch cards however the claimant was not aware that she was addicted to buying scratch cards.

On 30th April 2008 the manager called her in to the office and MD was also there. She was shown a few seconds of the CCTV and the manager said to the claimant on looking at the CCTV that she and the first witness were involved in scratching lottery tickets. The meeting took two/three minutes and the claimant was suspended for misconduct. She was not given the option to take home the CCTV to view. The claimant told the manager the first witness had told her she had paid for the tickets and she had taken her word. She did not expect to be suspended/dismissed. A week later she asked for the CCTV but was not given a copy. On Friday 2nd May 2008 she was again asked to come in to the office and she was handed letter of the same date, headed irregularities in relation to scratch cards on 11th April 2008. On being asked what she thought of the letter she outlined as at the first meeting, what the first witness had told her and she did not see a lot of the CCTV. The meeting lasted five minutes and the claimant was told she was being dismissed for her conduct. The claimant had worked for the respondent for six years and there had never been any trouble with her work during this time. Prior to being manager she worked behind the counter and there had never been any problems with her work.

She had never been told that lottery tickets were different from other purchases therefore it was not unusual for the first witness to purchase the tickets. The first witness had given her scratch cards on a few occasions however she was not in collusion with her. Had she known she was stealing the tickets she would have reported her. She and the first witness did not get on well. The first witness thought she was the boss and she would not do what the claimant asked of her. The claimant did the list of jobs she was supposed to do. She was paid a flat weekly wage and often did overtime. No extra wages were paid for security. She bought lottery tickets on the odd occasion.

In cross-examination the claimant stated while she was aware that the first witness had her employment terminated and that the dismissal related to lottery tickets/scratch cards however she did not know that she, the claimant was going to be involved. At the meeting on 2nd May 2008 she was shocked when she was told of her dismissal. She was not told she could have a witness present at the second meeting, it was only at the first meeting that she was told of her right to representation. She did not know that the first witness was taking scratch cards without paying for them. Witness stated that in relation to the rule that receipts for purchases must be signed by a manager, was not always followed through. The first witness liked scratching lottery cards and she often bought a lot of them and gave them to other staff as well as the claimant.

Determination:

The Tribunal is of the view that the dismissal was extreme and would have to be unfair. There was an onus on the claimant in her supervision of other staff members to be more vigilant in her capacity as trainee manager. In the circumstances having regard to Section 7(1) (c) of the UnfairDismissals Act, 1977 the Tribunal feels it would be just and equitable to make an award of €2,053 under the Unfair Dismissals Acts, 1977 to 2007. An award of €1,538.48 is being made

under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. No award is being made under the Organisation of Working Time Act, 1997

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)