

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NOS.

EMPLOYEE – *claimant*

UD881/2008

MN809/2008

WT362/2008

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. P. McGrath BL

Members: Ms. J. Winters
Mr. J. Moore

heard this claim at Dundalk on 3 February and 23 April 2009

Representation:

Claimant: Mr. Stephen O’Sullivan BL, instructed by Mr. Kevin Phelan, of
Traynor & Co. Solicitors, 86 Clanbrassil Street, Dundalk, Co. Louth

Respondent: Ms. Eileen Barrington BL, instructed by Mr. John Carlin of
Vincent & Beatty Solicitors, 67 – 68 Fitzwilliam Square, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal is not in dispute.

Respondent’s Case

The store operations director gave evidence. He was the area manager in 2005 and he recruited the claimant. The claimant received a contract of employment, the grievance and disciplinary procedures and the handbook. The company’s alcohol policy is on p.12 of the handbook. The policy simply stated has two important points; no sales of alcohol to minors, and no sales of alcohol out of hours. To minimize the chances of alcohol being sold to an underage person, the company

has in place a policy called Challenge 21. If a sales assistant considers that a customer buying alcohol is under-21 the customer must be asked for proof of age. In this way there is a buffer zone from 18 to 21. If the store were prosecuted for illegal alcohol sales the consequences could be serious.

The claimant was dismissed for breaches of the store's alcohol sales policy. To test its business procedures the store engaged an outside company to send a mystery shopper to each store twice a month. There is no advance warning of the visits by the mystery shoppers. In September 06, a mystery shopper visited the store where the claimant worked. The under-age mystery shopper succeeded in purchasing alcohol at the till operated by the claimant. The claimant was called to a disciplinary meeting and issued with a final written warning. The claimant appealed the final written warning, on the basis that the sale had not happened, to the operations director. He showed her the till receipt for the sale and a picture of the mystery shopper. He was satisfied with the way the area manager had handled the incident. However in view of the delay in finalizing the matter he backdated the final written warning to the date of the incident. The final written warning lapsed after 6 months, in March 07.

On Good Friday (21 March 08) the claimant made 3 alcohol sales to 3 different customers. The store where the claimant worked did not have an alcohol aisle so the section was not closed off. There were signs to indicate alcohol could not be purchased on Good Friday. At that time they did not have the technology to program the tills not to accept a purchase of alcohol. The claimant said she had not been told not to sell alcohol on Good Friday. The store manager issued a final written warning on 11 April 08. The final written warning was not appealed. The operations director considered it appropriate to issue a final written warning.

On Sunday 25 May 08, the claimant sold alcohol to a customer at 11.21am. Sunday comes every week unlike Good Friday. Sales of alcohol are only allowed after 12.30pm on Sundays. The claimant was suspended. He has never known the till receipts to show an incorrect time. A disciplinary meeting was held on 11 June 08. A letter of dismissal issued. The dismissal was appealed to the operations director. He had a conversation with the claimant and did not feel that she 'was getting it'. There is no great pleasure in letting someone go from the business. The question was at what time do you say enough is enough. There were many opportunities to dismiss the claimant. He felt they were lenient in not dismissing her sooner.

The store manager gave evidence. He was responsible for induction and training. Health and safety matters are covered before shop floor training. He explains the alcohol policy. No sales to a Garda in uniform, to a minor or to an intoxicated person. He informs staff of the hours during which sales of alcohol can be made.

On Sundays till operators are reminded not to sell alcohol before 12.30 when they are given their floats. Signs showing the times when sales of alcohol can be made are up all the time. On Good Friday he screens the alcohol shelves as much as possible with plants in trolleys. The claimant was reminded by him not to sell alcohol on Good Friday. She knew about Good Friday because she had worked the previous Good Friday.

The area manager gave evidence. After the Good Friday incident he met the claimant on 11 April 08 and issued a final written warning. It was his decision and it was not appealed.

The area manager was in the store on 25 May 08. When he checked sales on the computer he saw that alcohol was sold that day before 12.30. Alcohol appears at the top of the page, so he saw it

immediately. This was the first occasion he saw a sale of alcohol before time. When he discovered the problem the store was very busy so he waited until it was quieter and then suspended the claimant. The claimant said 'I just forgot and there was no reminder.' He made the decision to dismiss her. When he made the decision he did not know of the incident of a sale of alcohol to a minor. Neither was he aware of her work history.

A store assistant gave evidence. The alcohol regulations are drummed into staff. The store opens at 11.00 on Sundays. When given their floats staff are told no alcohol sales before 12.30pm. On Good Friday manager and security staff said watch out for alcohol.

Claimant's Case

The claimant gave evidence. She started working for the respondent in October 05. There were no incidents before she had an accident at work. A pallet truck drove over her foot. She was still on medication when the selling alcohol to a minor happened. She did not remember selling alcohol to the minor.

On Good Friday she started work at 2.30pm. The area manager did not remind her not to sell alcohol. She was on the first till by the entrance and could not see the signs. She did work on Good Friday 06. Good Friday is not part of her culture. She started with the store before the store assistant, there was less training when she started. There was no reminder. She did not notice the rhododendrons in trolleys in front of the shelves with alcohol. It was not unusual to put sale items into trolleys.

She knew about Sunday. She cannot recall selling the alcohol that morning. She was shown the receipt and is not in a position to challenge it. She asked to see the CCTV footage to see what was sold. She accepted that the store was concerned about alcohol sales and abiding by the law.

The claimant made efforts to mitigate her loss.

The claimant's representative said it was for the respondent to show that the dismissal was not unfair. The incident of the sale to the minor was expired and should not be considered. Neither the Good Friday sale nor the early sale was deliberate. The claimant made mistakes. Dismissal was disproportionate. The claimant said if she had been reminded she would not have sold alcohol on Good Friday. There was no willful disobedience.

The respondent's representative said the claimant had repeatedly broken store policy and the licensing laws. The disciplinary procedures are set out and rigorously followed. The decision to dismiss was made by the area manager on the basis only of the Good Friday and Sunday incidents. The operations manager at the appeal upheld the decision to dismiss. The decision was proportionate; it was not just a breach of policy but also a breach of the law.

Determination

The Tribunal has carefully considered the evidence adduced. The Tribunal is mindful that the respondent company has to abide by very strict rules and regulations by reason of the fact that it is licensed to sell alcohol.

Of some concern to the Tribunal is the fact that an incident which occurred in late 2006 when the claimant sold alcohol to a minor was raised as an issue in the course of the proceedings before the

Tribunal, and also in the respondent's overall assessment of the claimant's performance when deciding to terminate the claimant's employment. The respondent declared that this was not a decisive factor, but there can be no doubt that the operations director took it into account. The Tribunal finds that when the final written warning for the 2006 sales incident had lapsed in March 2007 that should have been an end to the matter. The person hearing the appeal should only have known about the Good Friday 2008 and the May 2008 incident when making the decision to dismiss. To the extent that the person hearing the appeal had knowledge of the 2006 incident in making his decision, must cast doubt on the fairness of the process.

Ultimately the claimant's employment became precarious as she had inadvertently sold alcohol on Good Friday 2008 and then some six weeks later sold alcohol before the Sunday 12.30 pm cut-off. There can be no doubt that the claimant's conduct was in no way willful, but it was certainly careless. The question the Tribunal must decide is whether the behaviour in question was such that a reasonable employer could terminate the employment?

The claimant offered in her defence a lack of understanding of the Good Friday rules and just an oversight in relation to the Sunday purchase.

The Tribunal acknowledges that the respondent company is entitled to take suitable disciplinary measures in response to the carelessness exhibited. However, any such measures would have to be proportionate in all the circumstances. The Tribunal finds that the dismissal is not proportionate. The respondent company should have considered other disciplinary steps including, for example, the suspension without pay for a short period of time.

Additional to the above, the Tribunal notes that the respondent leaves itself open to human error in circumstances where it fails to cordon off the alcohol aisle during those periods when, by law, they are not entitled to sell alcohol.

The Tribunal finds that the dismissal was unfair in all the circumstances and awards €8,000.00 in compensation for loss of earnings. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds.

Evidence was not adduced in relation to the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and under the Organisation of Working Time Act, 1997 and the Tribunal makes no finding.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)