

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD321/2009 MN322/2009  
WT136/2009

against

Employer

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 N O 'Carroll-Kelly B L

Members: Mr L. Tobin  
Mr G. Lamon

heard this claim at Wicklow on 20th October 2009

### **Representation:**

Claimant : Mr Daniel Keleher B L instructed by  
Maguire McNeice & Company, Solicitors, Bray House,  
2 MainStreet, Bray, Co Wicklow

Respondent : XXXX

The determination of the Tribunal was as follows:

### **Respondent's Case**

Among the various business activities of the respondent is the issuing of slimming tablets and the time rental of digital versatile discs or digital video discs (dvds) to its customers. The respondent has over forty branches in the jurisdiction and employs in excess of three hundred people. Its management includes an operations director and an area manager. The area manager for the Braybranch where the claimant worked outlined her involvement in the claimant's termination of employment. She explained how the respondent operated the issuing and return of rental dvds. This was done through the means of a scanning system as every dvd had its own bar code.

In fulfilling her functions in that role the witness who was visiting and working as a sales assistant in the Bray branch on 15 July 2008 took possession of three dvds from a customer who was returning them following a seventy-two hour rental. While scanning in those devices she noticed there was no record of them having been scanned out. Following preliminary enquiries the witness concluded that the claimant was the staff member who issued those dvds to that customer. This manager reported that incident to the company's head office and the next day she approached the claimant about this issue. As part of that approach the witness scanned the relevant dvds into the system in front of the claimant, and satisfied herself there was nothing wrong with them or with the scanning process. Apart from that check those dvds were subsequently subjected to similar scrutiny and always correctly scanned in and out.

The witness referred to a previous incident involving the claimant when he wrongly gave some slimming pills from the respondent's stock to unauthorised persons. While such action was contrary to company policy and subject to disciplinary action no sanctions were imposed on him. She also stated that the respondent honoured the claimant's call-out payments and complied with his statutory entitlements regarding breaks. The area manager had no knowledge of the claimant being forced back to work while he was still out on certified sick leave. She further stated that the claimant's dismissal was not only related to his involvement in the scanning issue but was also linked to his involvement in other incidents. Despite claiming that the till for the night in question was down €1.60 when it should have been up €5.00 the witness was not asserting the claimant took the €5.00 charge for himself.

In his letter of dismissal to the claimant dated 1 August 2008 the operations' director wrote, *inter alia*,:

*We must therefore conclude that money was taken from a customer and not put into the till and that the items were not scanned on to the system. This is considered Gross Misconduct and therefore your position with the company must end as of today 1/8/08.*

That manager told the Tribunal that not only did he not accuse the claimant of taking that money but that the till issue did not form part of the disciplinary process. He maintained the the decision to dismiss the claimant was solely based on the issue of the non-scanning of the dvds by the claimant. That incident and its consequences stood on its own merits. Due to the scanning incident the respondent lost trust and confidence in the claimant as an employee.

The letter writer reminded and indeed invited the claimant to appeal the dismissal decision to an uninvolved senior manager. The claimant ignored that option.

In writing to the claimant on 24 July 2008 the witness outlined the respondent's contention that he had been issuing non-scanned dvds to customers and particularly referred to an incident on 12 July. That letter also requested the claimant to attend a disciplinary hearing on 28 July and added that he could be either represented or accompanied at that hearing. During the course of that hearing the claimant said he had no memory of this incident. He also added that such scanning scenarios happen from time to time and that this was another instance of one.

Both this witness and a general office employe who attended the disciplinary hearing had no recall of the claimant mentioning a diary entry or comment about that mal functioning scanning process.

## **Claimant's Case**

The claimant commenced employment as a sales assistant with the respondent in April 2007. In acknowledging he was furnished with a contract of employment and a company handbook the claimant admitted he never read those documents. Following his training and short spells at several outlets the claimant found himself working in the Bray branch. Prior to the incident that led to his dismissal in July 2008 that branch did not have a manager. At times the claimant undertook tasks such as call-outs, and opening and closing the premises. He maintained that the respondent owed him outstanding payments for such duties and deprived him of holiday pay and forced him to return to work while still out sick.

While performing his role as a sales assistant there were a number of occasions when outgoing DVDs did not scan out. That scenario not only happened to him but to at least another colleague. The witness said he brought this situation to the attention of management and recorded it to his diary. He also gave some background to the slimming tablets issue and while accepting some responsibility and regret for it the claimant indicated his behaviour was due to lack of communication and clarity from the respondent.

According to the claimant the first he heard of a situation regarding an incident on 12 July was when he received a letter from the operations' director dated 24 July. He insisted that the account of a conversation by the area manager that she spoke to him about this matter on 16 July did not happen. The only discussion he had with that manager about that particular scanning issue was at the disciplinary hearing on 29 July. The claimant told his listeners at that meeting that he had no memory of dealing with the relevant particular customer. He suggested that in this instance an error occurred in the scanning process. The witness was also adamant that he did not charge that customer and then "pocket" the money.

References were made to the use of CCTV during this hearing. The claimant expected to view some recordings from them at the disciplinary hearing. None were shown and it emerged that the cameras behind the till were malfunctioning on 12 July.

Following the disciplinary hearing the claimant continued working until he received a letter from the operations' director in early August informing him of his dismissal effective from 1 August. The witness told the Tribunal he was neither interested nor intended to appeal that decision due to the way the respondent had treated him. Earlier he had verbally given notice of his resignation to his branch manager as he was "sick and tired" of the treatment and accusations levied against him by his employer.

## **Determination**

The letter of dismissal suggests that the decision to terminate the claimant's employment was based at least partly on the company's conclusion that he misappropriated funds. However, in evidence the respondent seemed to suggest that the issue of the missing money was not connected to their decision to dismiss the claimant. The Tribunal are of the view that the respondent's investigation could have been more thorough.

The Tribunal also notes that the claimant did not read his contract of employment, his employee

handbook, or the letters he received from the respondent. He did not know about his right of appeal because he neglected to read the letters he received from the respondent. The claimant had a responsibility to exhaust all appeals procedures before bringing a claim to the Employment Appeals Tribunal. His failure to exhaust the appeals process is a fundamental flaw in his claim and the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The appeals under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

