

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

Employee

**CASE NO.**

UD1248/2008, MN1161/2008

WT513/2008

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. P. Clancy

Members: Mr. B. O'Carroll  
Mr. T. Kennelly

heard this claim at Limerick on 23rd June 5th October 2009

**Representation:**

Claimant: Ms. Deirdre Canty, SIPTU, 4 Church Street, St John's Square, Limerick

Respondent: No representative listed

The determination of the Tribunal was as follows:-

**Respondent's case:**

In his sworn evidence, the managing director confirmed that the claimant's employment details, as set out on her T1-A form (*Notice of Appeal*) were correct.

The claimant's employment was largely without incident except for two incidents, which were on her file but were not relevant to this case.

When the claimant commenced her employment with the respondent, she received her contract of employment and the respondent's handbook. Some of the elements in the respondent's handbook were relevant to this case. In same is set out the clocking procedures and abuse of same is grounds for dismissal. Also stated therein are other grounds for dismissal such as the harassment

and bullying of management and fellow workers.

Prior to the claimant's dismissal, questions arose among managers about clocking procedures. Accordingly, supervisors kept an eye on things to see how the clocking was operating. One of those supervisors noted that on a particular day when the claimant went to clock-out, she was in possession of another clock card. At a subsequent meeting in relation to this matter, the claimant became aggressive and issued threats against that supervisor. Subsequent to that meeting, the claimant was dismissed. The claimant appealed against the dismissal decision to this witness. At no point did the claimant request to be represented at the meetings by a union, or any other person. The respondent requested the claimant to bring her own witness to the meeting, which she did, and at her own request, she brought different witnesses to each meeting.

The managing director, the claimant, her witness and the relevant supervisor attended the appeal hearing. At this meeting, the supervisor acted as interpreter for the claimant. They went through the events of the incident and subsequent to the meeting, they went to the clocking machine and inspected what the claimant had done there. The managing director's conclusions were that the claimant had another clock card and was going to use it though she did not actually use it, and because of her subsequent behaviour to the supervisor, her dismissal should proceed and not be reversed.

In cross-examination, the witness agreed that it was probably correct to say that the incident happened on Wednesday 9 September and the claimant was dismissed on 10 September.

When asked to explain the supervisor's version of events of 9 September, the witness replied that same were fairly well set out on the disciplinary warning of 10 September and this was what he understood to have happened. This Disciplinary Warning Record, which was written in English and Polish, stated in English, in part that, "On the 9<sup>th</sup> Sept 2008 I caught [*the claimant*] attempting to clock out another employee. I stepped in and prevented the [*the claimant*] from clocking the other employee's card. As per the employee handbook this is a Dismissal offence." (*sic*) The witness added that unfortunately this supervisor was not in attendance at this Tribunal hearing.

The witness was asked if he interviewed the supervisor as part of the appeal. He explained that following a meeting on 10 September with that supervisor and others, and based on what they said, they felt that the dismissal of the claimant should proceed.

The managing director could not categorically say that this supervisor had not said that the claimant had wanted union representation at their meeting. The issue of union representation was not raised at the appeal meeting. The witness stated that he had not been aware that the claimant was a union member.

The managing director did not know if many people were clocking out at the same time on the 9 September. The claimant had been in possession of her husband's clock card and the information that he had received was that her husband had not been with the claimant at the clocking machine, nor was this suggested at the appeal. He did not check as to the time the claimant's husband clocked out that day. The onus was on a person to show that the clocking was not being abused. The claimant should not have had a second clock card on her possession.

It was put to the witness that the claimant did not actually use the other clock card. In reply, he said that the information was that she was going to use it. It had been in her hand. It was not

easy to police a clocking machine. On questioning the supervisor, the witness found his account of events to be credible. That supervisor was a Polish national and his introduction to the company had brought about good relationships and rapport between all of the staff. He did not come every day with complaints about staff, but in this instance, had felt that dismissal was warranted.

The witness was asked if he had interviewed the other employees who had waited in line with the claimant to use the clocking machine, or if he remembered the claimant saying that she had taken the clock card to pass it back to her husband. He replied that did not recall the claimant saying that she took her husbands clock card so as to pass it back to him as he stood in the line behind her. It was fair to say that the evidence of the supervisor – as a team manager – had been accepted on the matter. The respondent had not sought corroboration from the other employees. The claimant had been asked to produce witnesses and she did not do so. No one had been produced to support what was being alleged at the Tribunal hearing.

The claimant had a witness at the original disciplinary meeting and this witness had been very embarrassed by the claimant's attitude towards the supervisor. At that meeting, the claimant had said that she "was going to get the Poles after him". At the appeal hearing, the claimant had used a witness who she was comfortable with. This person had not witnessed the clocking incident.

Section 4 of the respondent's handbook, under the title "Employee Representatives" states in part

*The company accepts that it is in the mutual interest of both company and employees that employees be represented by a works committee comprising properly elected and accredited personnel. Taking into account the current size of the operation there will be a maximum of five members of the works committee.*

There was no particular reason why a person from the works committee had not been used by the claimant at the meetings, instead of having her select her own witness. It was an issue that had not arisen, nor had there been a request for union representation.

The claimant had been dismissed for two events – that of the clocking incident and the abuse of the supervisor – and both events had been coupled. Same had been stated in the claimant's letter of dismissal. From the respondent's perspective, the clocking incident was an abuse as also was the claimant's reaction of aggression and personal intimidation against the supervisor. Both events convinced the witness to proceed with the dismissal. A person could conclude that something was occurring in relation to the clocking but the response to the incident appeared to be an aggressive denial of it. This behaviour in itself gave credence to what the supervisor said about the incident. Both issues of the abuse of the clocking and the aggression towards a manager were the reasons why the dismissal had proceeded. The respondent could have engaged with the claimant if her reply had been reasonable but this had not been the case. There had been four witnesses to the claimant's behaviour at the disciplinary meeting so it was not an "alleged" aggression. The managing director questioned the supervisor and looked at the clocking process, which is a difficult process to witness impropriety occurring. An employee takes a clock card and puts it through the clocking machine. It is not on CCTV and the respondent considered the evidence of the supervisor in this regard as credible.

The witness did not recall asking the claimant why she had gotten aggressive when she was at the disciplinary meeting. The appeal meeting had been heard in the Polish language and the supervisor had interpreted for the English speakers in the room, and for the claimant. At this

meeting, the claimant's witness understood English. The initial meeting was conducted in English and the supervisor had interpreted for the claimant. The respondent had not provided an independent interpreter. There were no additional minutes taken at the disciplinary meeting except what appears in the Disciplinary Warning Record, which is on the claimant's file.

It was impossible to say if the claimant actually clocked someone else's clock card on the day in question. Supervisors had some suspicions that the clocking was being abused thus the observations on the clocking machine. However there was nothing concrete except suspicions. Though the respondent had been looking for patterns, there was no way of knowing if someone was clocking for someone else.

It was put to the witness that the incident had happened on 9 September and on the 10 September, the claimant had attended and worked her shift and at the end of it, she was approached by the supervisor to go to a meeting to explain the incident. In reply, the witness confirmed that he did not believe that the claimant had any opportunity to reply before the meeting.

Replying to the Tribunal, the witness could not categorically confirm the date of the appeal meeting except to say that it happened between 10.00 and noon. The incident at the clocking machine was discussed at that meeting, that the claimant had had been in possession of her husband's clock card and that she was going to use same, according to the supervisor. When asked how that supervisor knew that the claimant was going to use her husband's clock card, the witness replied that the supervisor believed that she was going to use it. Though she did not actually use the card, her behaviour was such that she was making to use it.

The witness made the decision to dismiss the claimant but she was not notified of the decision at the meeting. Her avenue of appeal against the decision was to the Employment Appeals Tribunal.

The claimant, her witness, the supervisor and the managing director attended the appeal meeting. All but the managing director could speak Polish at that meeting. Subsequent to the meeting, he had gone to see the clocking machine and had also discussed the dismissal with the production manager.

The claimant was dismissed for having someone else's clock card in her hand, coupled with her subsequent behaviour. The position could have been a mistake but for her aggressive reaction to the supervisor. It was this aggression which added credibility to the incident. Both incidents were unacceptable and so accounted for the respondent's position to uphold the dismissal decision. If the claimant response had been one of a mistake to the possession of the second clock card, the result may have been different.

The managing director did not establish where the claimant's husband was at the time when the claimant was found with his clock card. However, he believed that the claimant's husband had been at work that day though he did not know where he physically was, at the time in question. He had not been pursued in relation to the incident. The clock cards are held on a rack and for the claimant to have taken possession of her husband's card, she would have had to take it off the rack. It was the respondent's view that it had been the claimant's intention to use it. The witness believed that because of subsequent events and her reaction to the supervisor.

Having her husband's clock card in her hand coupled with her subsequent reaction was the basis of the claimant's dismissal. The respondent was not alleging a fraud and the claimant was not

dismissed because of fraud. Simply put, the claimant should not have had her husband's clock card. The assertion did not go beyond that she had the card but it was her reaction that had gone beyond. It was these two elements, together with the respondent's concern of incorrect use of the clocking that was the basis for the dismissal.

Per the respondent's handbook under the title "Summary Suspension or Dismissal" is stated:

*Certain offences may, after consideration, warrant immediate suspension or dismissal...Examples of such offences include...Interfering with or falsifying either one's own or another Employee's clock card or any other company record." Section 23 of the handbook under the title "Clocking procedures", "clock cards" is stated "An employee must not clock in or out on behalf of another employee, or interfere in any way with the clock card of another Employee. Where it is proven that an employee misuses the Clock Card to their own or any other employees advantage, then the employee will be dismissed.*

The witness contended that handling someone else's clock card could be seen as interfering with it.

It was put to the witness that if the supervisor had waited another minute or two, he would have actually seen her use the second card. He replied that it had looked as if the claimant was going to use the other clock card in her possession. The supervisor had seen the claimant with two clock cards in her hand and had gone to her. He had assumed that she was going to use both cards. She was confronted immediately about it before she moved away from the clocking machine, though the issue was not raised formally until the following day. Even if the actual breach had been allowed to occur, it would still be one person's word against another, and so a matter of credibility. The respondent's witness to the incident at the clocking machine was the supervisor so no others at the machine had been questioned.

In relation to the statement in the handbook that states "Interfering with or falsifying either one's own or another Employee's clock card", the witness confirmed that the claimant's husband had not been questioned in relation to the incident. The issue was of someone using another's clock card rather than someone who allows another use their clock card. The respondent had not considered conspiracy or collusion. They had no agenda against anyone and the claimant's husband is still in the respondent's employment.

The respondent only went so far as to physically observe the clocking machine. The incident involving the claimant happened at the end of the day. PS believed that the claimant's husband's clock card was also used that day but he did not know who used it. Her husband was at work and was paid for that day.

After the incident on 9 September, The supervisor advised the claimant that there was an issue. She had one day to decide what to do before the meeting on the next day. The decision to dismiss the claimant was made on the 10 September. The meeting with the claimant on 10 September occurred in the evening at the end of the shift. The issue had first been discussed at the managers meeting that morning.

In his sworn evidence, the production manager said that on 9 September, the supervisor reported to him that as he had been walking through the production floor, he had seen the claimant with two clock cards in her hand. The witness did not actually see this himself. He said to the supervisor that this was a serious offence and to be documented.

At the management meeting the next morning, the production manager raised the issue with the management team and a decision was made as to how to proceed. The management team included the operations manager and the managing director. The issue was also discussed during the day and at the end of the day. They also had to draft the disciplinary procedure.

When the disciplinary procedure was drafted, a meeting was held with the claimant. The claimant was allowed to choose her own representative, as outlined in the respondent's handbook. At the meeting, the claimant tried to explain herself and the supervisor translated for her. The production manager did not want to get involved and allowed the explanation to come from them, though he kept interrupting so as to be told in English what was being said in Polish. The claimant became upset and during the conversation, she threatened the supervisor in Polish. She said that she had never before attempted to clock out someone else. On the basis of what the production manager heard, they went through the dismissal procedure.

In cross-examination, the witness agreed that maybe he should have investigated the matter separately. The supervisor reported the incident to him and he had told KSz to document what he had seen.

The managing director, the operations manager and the witness were at the management meeting the next day and they made the decision to dismiss the claimant. The witness assumed that the disciplinary procedure was drafted based on the incident. It had been the supervisor who informed the claimant about the meeting on 10 September, though he did not know the time that she was informed. He would have told the claimant that it was a disciplinary meeting. The production manager was not aware that the claimant had requested to be represented by a union at this meeting.

The witness agreed that, at the meeting, which had been conducted in Polish, the claimant had become upset, irate and had threatened the supervisor. It had been the supervisor who had translated at the meeting. The claimant's witness said nothing at the meeting. The witness said that afterwards, this witness said to him that the claimant became too upset at the meeting. At the meeting, the claimant had said that she had never clocked anyone's card. The claimant was not interviewed without the presence of the supervisor. At the end of the meeting, the decision was made to dismiss the claimant. The witness stated that it was not fair to say that prior to this meeting, he, the operations manager and the managing director had made the dismissal decision but they would have known that the incident was a dismissal offence.

Replying to the Tribunal, the witness explained that he reported the incident to the management team at 8.00am on 10 September. "Dismissal" was mentioned at this meeting because, per the respondent's procedures, interference with a clock card is a dismissible offence. At the disciplinary meeting, a witness attended for the claimant, as is required. The function of the witness was to corroborate what was said at the meeting. The witness confirmed that the claimant did not have a representative at the meeting.

It had been while the supervisor was walking through the production floor that he saw the claimant at the clocking machine with two clock cards in her hand. The production manager believed that the claimant's husband had also been at the clocking machine, at the end of the queue, and that his wife – the claimant – was going to clock him out so as they both could leave work together. He believed that it was the claimant's intent to clock out her husband and this was not acceptable to the respondent.

The witness as supervisor line manager told him to document the incident and this had been done in the disciplinary procedure. This disciplinary document was done at the end of the management meeting and was the supervisor's account of what had happened. The witness believed that this document had been prepared prior to the disciplinary meeting.

### **Claimant's Case**

On 9 September 2008 as was her usual practice while queuing up to clock out at the end of her shift the claimant withdrew two clock cards from a particular slot. One of those cards bore her name, the other that of her husband. Her husband who was also an employee with the respondent was also finishing his shift work at the same time as the claimant. While attempting to differentiate between the names on the cards and by way of improving her eyesight through the use of her spectacles, the claimant was approached by a supervisor and co-patriot who almost immediately accused her of attempting to clock her husband out contrary to company policy. She denied that accusation.

That accusation was repeated the next day by the same supervisor when he informed her she was being dismissed "for trying to clock her husband out". In becoming upset at being punished for something she did not do the claimant again denied the accusation to the supervisor. She queried that supervisor as to why he did not wait to actually catch her performing that alleged misdemeanour. At no stage during that interaction did she make any form of threat against that person.

Her appeal against that decision was heard by the managing director. At one of their meetings that manager sought the assistance of the same supervisor for translation purposes. The claimant objected to his involvement at that stage, as he was the one who was accusing her of wrongdoing and was closely involved in her dismissal.

The claimant's husband stated that at the time there were approximately eighty slots available at the clock for up to one hundred and fifty staff. It was always the case that both his and the claimant's cards shared the same slot. On 9 September 2008 a supervisor was present checking clock cards presumably applying the company's policy on their use. As was his habit the witness who did not like queuing waited until the queue eased before clocking out. He acted no differently on 9 September and proceeded to clock himself out of work using his own card.

### **Determination**

Numerous references were made to the claimant's supervisor and his role in her dismissal during this hearing. Since he was not present for this hearing his potential evidence went unheard. The Tribunal has to base its determination on the evidence adduced and in accordance with the relevant legislation. Based on what it heard and following careful consideration the Tribunal unanimously finds that the respondent did not show that the claimant's dismissal was not unfair.

The company's handbook listed examples of offences attracting summary suspension or dismissals. Among that list was:

*Interfering with or falsifying either one's own or another Employee's clock card or any other company records.*

This apparently was what the supervisor accused the claimant of doing. Not only was she not doing that at the time of the incident there was no indication that this was her intent. That supervisor acted in a highly prejudicial and judgemental way towards the claimant by his accusation. It was also reported that the claimant threatened him. The Tribunal prefers the direct evidence of the claimant in that regard.

The respondent and particularly its managing director compounded this situation by supporting and indeed endorsing the supervisor's role in this affair. No meaningful investigation took place. The issues of representation and translation at subsequent meetings following the incident on 9 September 2008 reflected the respondent's attitude to proper procedures.

The claim under the Unfair Dismissals Acts, 197 to 2007 succeeds and the claimant is awarded €15,000.00 as compensation for her dismissal.

The appeals under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 are allowed and the appellant is awarded €324.37 as compensation for a week's notice and a further €324.37 for outstanding leave entitlements.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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