

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD1374/2008

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. B. Glynn

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 23rd March 2009
and 14th May 2009

Representation:

Claimant(s): Mr. Gerard Reidy, Wallace Reidy & Co., Solicitors, 24 Glentworth Street,
Limerick

Respondent(s): Mr. Duncan Inverarity, BCM Hanby Wallace, Solicitors, 88 Harcourt Street,
Dublin 2

The determination of the Tribunal was as follows:-

Opening statements:

The respondent's representative stated that the claimant had been a deli manager, which was a position of seniority and responsibility. On 22 May 2008, he as the deli manager had reduced the price of fresh chickens from €3.79 to €1.00. In accordance with the respondent's policy, reduced priced goods should be offered for sale to customers before staff. On this day, the goods in question should have been classed as waste and not items for sale. On that day, the claimant had purchased fifteen of those chickens and transferred others to the hot food bar. The claimant had not followed the respondent's waste products policy or the employee purchase policy.

The incident of 22 May was witnessed by the security assistant (*hereinafter referred to as AZ*) on CCTV. AZ reported the incident to the store's security manager who in turn reported the incident to the store manager (*hereinafter referred to as EK*).

The claimant was on leave for a number of weeks after the incident. Following his return from leave, the incident was brought to his attention and same was investigated. At the conclusion of the

investigation, the claimant was dismissed by EK. The claimant was allowed to appeal against the dismissal decision and the appeal was heard by JK.

Previously, in February 2008, the claimant had been involved in a disciplinary incident, which had resulted in the issue of a written warning, but this incident had not formed part of the claimant's ultimate dismissal.

The claimant's representative confirmed that the claimant had been employed by the respondent in one of its Limerick stores as a fresh food manager. The incident, which happened on 22 May 2008, was only brought to the claimant's attention a month after the incident happened. He had fully co-operated with the investigation and had admitted to some failures on his part. However, the sanction that had been imposed was disproportionate to the offence and had not warranted dismissal.

The claimant had secured alternative employment but at a rate of pay, which is less than when he was employed by the respondent.

(At the commencement of the hearing, the respondent's representative opened a number of documents to the Tribunal).

Respondent's case:

In sworn evidence, EK said that she had been employed with the respondent for over nine years and had been the store manager in the respondent's Limerick store for two years. All managers in the Limerick store reported to her.

The claimant had been the deli manager in the Limerick store. He had been responsible for the deli area, the staff employed there, for ordering stock, for accounting for stock wastage, etc. The claimant had been given a contract of employment at the commencement of his employment. He had also received the respondent's handbook.

In relation to the previous disciplinary incident, in late December 2007 the claimant had physically pulled the security manager from a fridge in the deli. The incident led to disciplinary procedures and the issuing of a written warning to the claimant by way of letter dated 20 February 2008.

The incident of 22 May 2008 was reported to EK on the following Thursday 29 May 2008. This incident was brought to the attention of EK following another incident involving two other employees who were disciplined for involvement in the reduction of the price of a product. AZ informed his security manager about the incident involving the claimant who in turn had informed EK.

Recounting the incident from viewing CCTV footage, EK said that the claimant was seen getting a shopping trolley in the deli department. He selected chickens and put, what the respondent presumed to be a "reduced to clear" sticker on them and then put the chickens in a shopping trolley. After finishing this, the claimant took the trolley of chickens through the fruit and vegetable department to the deli department where he gave the trolley to a member of staff who put the chickens in the fridge. Three or four minutes later, the claimant took one chicken to a checkout till for an operator to process a sale. This till role recorded a sale processed at €1.00 multiplied by fifteen chickens. The claimant then returned directly to the deli department and put that one chicken into the cold room. A half hour later, a staff member

took the trolley from the fridge to the deli counter. Subsequently, the claimant recovered the trolley, took it through the fruit and vegetable department and left the store through the nearest door. At that stage, the trolley locked because it had not been presented at a pay-point. Security approached the claimant and unlocked the wheels of the trolley. The claimant then left the store, went to his car and put the chickens in it.

EK confirmed that the claimant had purchased fifteen chickens at €1.00 each, this amounting to a loss for the respondent of €15.00.

EK described the respondent's "Reduce To Clear" policy – "RTC". The policy was designed to reduce wastage and is about getting as much for a product before it goes to waste. The policy is found in the respondent's policy folder, is on display in stores and is clearly available to all staff including managers. The use-by-date for the chickens was that date. – 22 May 2008. The "Reduced To Clear" policy states "Stock with a "use by date" can only be RTC one day prior to use". The example provided in the policy states "product to be removed from sale at close of business [*on the day before*] and entered as wastage". EK stated that the chickens in question had already been reduced from €6.79 to €3.79. By 22 May, they should have been removed to wastage because of health and safety issues. Such reduced stock is offered to customers before being offered to staff and stock that cannot be sold goes into wastage.

The "Employee Purchase Policy" was also highlighted. EK confirmed that this policy is available in the respondent's handbook and is on the notice board in the store since the store opened. The policy defines what an employee does in relation to purchases. Point three of same states "Purchases must be placed in a bag and receipt signed by a member of Management and retained for inspection on leaving the store".

The first opportunity to speak to the claimant about the incident of 22 May had been 16 June 2008. The delay in speaking to the claimant had been as a result of him being off on Friday 23 May and being on holidays on the following two weeks. The first meeting had been an investigatory meeting where the claimant got the opportunity to explain what had happened on 22 May. AE, the regional security officer had attended the meeting and EK had taken notes of same. She described the notes as an accurate reflection. The next meeting with the claimant had been on 19 June and was also an investigatory meeting because EK had not been happy to make a final decision. A number of subsequent investigatory meetings had been held with other relevant staff and managers. They were asked if they had signed the claimant's receipt for the purchase of the chickens. From the investigation, EK was satisfied that no one had signed the receipt.

Two disciplinary meetings were held on 23 June and 24 June and the contents of those meetings were noted by EK. AE attended the meetings, as did MH, the fruit and vegetable manager who acted as the claimant's representative. The notes of the meeting of 24 June 2008 state in part "[AE] told [*the claimant*] that both himself and [EK] had thought long and hard in regard to the decision that had to be made and it has been decided to terminate his contract. [AE] told [*the claimant*] that this was as a result of the actions of [*the claimant*] himself and that because of those actions the bond of trust between employer and employee had been destroyed. [AE] said that unfortunately as a result his contract would be terminated with immediate effect".

EK, as store manager, confirmed that she made the decision to dismiss the claimant and she communicated the termination of his employment to him by way of letter dated 24 June 2008. The claimant appealed against this decision and his appeal was heard by JK, the regional manager.

In cross-examination, EK confirmed that the incident occurred on 22 May 2008 and agreed that it would have been good H.R. practice to put the allegations to the claimant sooner than four weeks later. She had been cognisant that a month had passed by the time the investigation was conducted.

The claimant could not remember who had signed the receipt for the chickens and this had been hard for EK to believe. It was not reasonable that the claimant could not remember all of the incidents involved. It was not unreasonable that the claimant had not retained the receipt but he should remember who had signed it.

At the time of the incident, slightly more than fifteen people had worked in the claimant's department. The previous year, twenty-five people had probably worked there. EK confirmed that the store is very busy and profitable and agreed that everyone was busier with the reduced staff numbers. However, the reduced staff numbers were still working the same hours.

When asked if the claimant had been guilty of misconduct in what he did in relation to the purchasing procedure and the wastage procedure, EK replied that he had been dismissed because he had not followed many of the procedures. The claimant had been responsible for four sections within his department and also the hot food bar. Chickens could be sold to customers or transferred to the hot food bar. If they were transferred to the hot food bar, their transfer was entered in a book. This had been done on this day by another employee – CMc – on the instructions of the claimant. The respondent had no issue with this. An instruction had been given and had been carried out.

The manager in each department had responsibility for the wastage book and this responsibility could be delegated to others. EK agreed that in this instance, the claimant had told MMc to record an entry in the wastage book and that three other colleagues confirmed that this instruction had been given. EK accepted that the claimant had given this instruction but he had not followed up on it to ensure that it had been done, and he should have done this. She maintained that the chickens had been his purchases.

EK agreed that assessments/performance reviews are done on employees and are graded. The claimant's last performance review had been done in 2008 but was relevant for 2007. It was done in February/March subsequent to the claimant's previous warning. (*A copy of the claimant's performance review was opened to the Tribunal*). The performance review form is broken into a number of sections such as sales, variation/wastage, stock holding/control, overheads, store standards, customer care, team leadership, legal compliance, etc., and EK confirmed that she had signed off on the claimant's review form. Her comment on same had stated, "*(the claimant) is a very good deli manager*". At point 8 of the form under the title "legal compliance" in the areas of price, dates, hygiene, the claimant had received an "AA" rating. EK agreed that the contents of the form were a fair comment of the claimant's position.

The claimant was dismissed by letter dated 24 June 2008. In same were stated the reasons for the dismissal, as follows...

Breaches of purchasing procedure:

Not presenting all items for sale to the Sales Assistant.

Purchasing items whilst not on break.

Receipt not signed.

Policy re stock

Purchasing and removing stock from the store before confirming a record of the reduction.

Breach of the policy regarding selling dates.

Failure to offer purchases to security for inspection prior to leaving the store.”

EK confirmed that she was satisfied that this letter represented the reasons why the claimant was dismissed and she stood over same. She accepted that though all fifteen items had not been presented at the cash register for purchase, all fifteen items had been paid for at a price of €1.00 per chicken, so there had been no financial loss to the respondent at this price.

EK explained that contrary to the respondent’s purchase policy, the claimant had purchased the chickens while not on a break. Employment purchase policy 4.9.1 states “Purchases will be permitted at times authorised by Store management and will ordinarily be during lunch/break time or after the employee has finished work and clocked out.” Though the claimant had purchased the chickens for his own consumption, EK agreed that the policy did not state, “when on break” but ““ordinarily” be during ...break”.

It was put to EK that the claimant had been adamant that his receipt for the chickens had been signed though he could not remember who had signed it. EK confirmed that a check had been made but the respondent had not been able to find the person who signed the receipt.

EK stated that all employees must go to security when leaving the store with personal purchases but the claimant had not done this. Point 4.9.3. of the Employees Purchase Policy states, “Purchases must be placed in a bag and the receipt signed by a member of Management and retained for inspection on leaving the store”. Point 4.10 titled “security” states “all employees and independent contractors must offer for inspection all parcels, packages, handbags or motor vehicles while leaving or entering the premises.” This included personal items and items that had been purchased.

The claimant had been suspended with pay, which was one of the options available to the respondent when dealing with employees. Other options included suspension, forfeiture of pay, demotion and transfer to another store. A demotion could have implications on a person’s salary. When put to EK if any of these other options had been considered for the claimant, she stated that if these other options had been considered, the claimant would have been able to continue his employment as a manager. These other options were considered but not chosen because it would have meant that the claimant would have continued as a manager, even as a junior manager and she had not considered this to be appropriate. He had breached trust and had shown no regard for his breaches so how could he have continued. Despite his apology, he had been in a role of responsibility. EK agreed that if the disciplinary incident that occurred in February 2008 involving the claimant had not existed, it was possible that she might have acted differently. He had been involved in an altercation at that time. EK agreed that the claimant had subsequently received a good performance review but had been warned at that time that any further breaches could result in dismissal.

The security officer had been looking at the claimant when the claimant called him over to release the trolley. The security officer had reported the incident during the second half of the following week. EK agreed that the financial loss to the respondent had been €41.85. The chickens had been transferred on a date when they should have been in the waste bin. As EK believed, this had never happened before. She agreed that all managers are under pressure to keep wastage down but not to hide products when doing so.

Replying to the Tribunal, EK said that the claimant had not been given the opportunity to view the CCTV footage.

In relation to the price stickers on the chickens, the price was originally €6.79 and had been reduced

to €3.79. The claimant had reduced the price further to €1.00. The claimant had the authority to reduce the price of items but it was not normal to reduce the price of an item to €1.00. When presented for sale at the cash register, the item would scan at the original price but the reduced pricesticker would flag that the item had been reduced in price. The problem was that the chickens should not have been sold at all because by the 22 May, they were out of date. The claimant's offence had not been the putting of the reduced price sticker on the chickens but of purchasing the items when they were out of date. At that stage, they should have been binned as waste.

Employees can purchase reduced price items but such items are taken off the shelf. When managers purchase an item, it is preferable that security or EK sign the receipt but other managers can sign receipts. It is within the role of security to sign receipts and they would have caught any wrongdoing.

EK confirmed that she had taken the notes of the investigatory and disciplinary meetings. AE was the regional security manager. He was employed by the respondent in the role of internal security. He was called to conduct the investigation of the incident in EK's store and would have been called to several stores to conduct investigatory meetings. EK agreed that AE had chaired and conducted the disciplinary meetings but pointed out that she had also been present at the meetings. He was the regional security manager and she was the store manager. His terms of reference had been a security role and in this case, he had also been in a H.R. role.

EK confirmed that she had discussed the issue with AE and a person in H.R. before making the decision to dismiss the claimant. Solely, she had made the decision after she had spoken to the other people. The claimant had been allowed to appeal against the dismissal decision to EK's direct manager, JK.

In re-direct, EK confirmed again that she had made the decision to dismiss the claimant. She had been at the disciplinary meetings but her decision to dismiss may have been communicated to the claimant by AE.

In re-examine, EK denied that only managers could sign the receipts of other managers. Signing receipts was a delegated role and in the store, security could also sign the receipts.

In his affirmed evidence, AZ said that he was employed by the respondent as a security assistant. His job is to keep an eye on the store, people who enters and leaves it and on all employees.

On 22 May 2008 while watching someone else in the store, AZ saw the claimant going out with a trolley full of chickens. This observation had been by eye contact and not by way of CCTV. The claimant had looked at AZ and called him over. The claimant's trolley had locked. Security had keys to unlock trolleys and AZ had unlocked the claimant's trolley. AZ had thought that the claimant was involved in the movement of chickens for work purposes. Having unlocked the claimant's trolley, AZ went back into the store and went to the CCTV. From his observation on the CCTV, he saw a box on top of the trolley of chickens. The claimant went to his car and put the chickens into the boot and then drove off. AZ had not seen a receipt for the chickens or been asked to sign a receipt for same before the items had left the store.

AZ had not reported the incident that day. The security manager on that day had been on lunch break at the time and when he returned, he and AZ had become involved in other work. AZ had finished work at 6.00pm and had been on leave the next day. When he did return to work, the

security manager had been off. The incident would be stored on CCTV for a month. It was the following week when AZ informed the head of security about the incident and this was because of a similar incident involving two other staff members.

In cross-examination, AZ confirmed that the respondent had employed him for almost two years. He knew the claimant and the claimant had been courteous to him.

On the day in question, the store had been busy. AZ had seen the claimant leaving the store when his trolley locked. They had looked at each other eye to eye and the claimant had called AZ over. AZ had thought that the claimant was involved in an inter-store transfer of goods. AZ had unlocked the trolley and the claimant had moved on. AZ had no issue with the claimant, as he was a senior manager. It was put to AZ that the claimant had put the chickens in the boot of the car and then returned to the store. AZ replied that as a security assistant, he could not make any decisions in regard to a senior manager.

AZ informed the security manager about the incident involving the claimant four to five days later. When put to AZ that he could have made the complaint sooner if he had thought that it was serious matter, AZ replied that he knew that the incident was serious from body language. He was not in a position to make a decision or to talk to the claimant who was a senior manager and he was unable to immediately report the incident to his own manager as he was on leave. He had not telephoned his own manager or contacted EK – the store manager –, nor had he said it to the manager on duty on the day of the incident, as both he and this manager had been busy with other work from afternoon to evening on that day. He reported to his own manager within the security department, and he had reported this incident within his own department. AZ had also made a record of it in the incident book.

When put to AZ that the claimant had never before shown him a signed receipt for a purchased item, AZ had replied that the claimant had.

Replying to Tribunal questions, AZ said that when managers normally purchase items, the receipt for the items are signed by another manager and this signed receipt is shown to security when the purchaser is leaving the store. On this occasion, AZ had not asked to see the signed receipt for the chickens because the claimant was a senior manager.

After the claimant had left the store with the trolley of chickens, AZ had gone to view the CCTV because of the trolley locking. He had suspicions from the claimant's body language. AZ confirmed that he had made a record of the incident in the incident book and he had reported it a few days later because of the incident involving two other staff members.

All employees including managers and security staff have to show receipts when leaving the store with purchased items. The claimant had produced signed receipts in the past because when leaving the store, he would have had to pass security.

On the second day of the hearing, EK – the store manager – was recalled to talk through the still photographs of the CCTV. The photographs commenced with the claimant entering the poultry lane and finished with the claimant placing the chickens in his car.

AZ – the security assistant – was also recalled to explain the incident book of which the original was produced. On the day of the incident, he had noted within this MH C14:34. He explained that this was the claimant's initials and referred to camera one and the time that the claimant had left the store with the chickens. He noted this for his own records so he could inform the head of security

about the incident. He did not ask the claimant to see his receipt as he originally thought the claimant was helping the two people behind him. When he realised that this was not the case, he also thought that the claimant might have shown the receipt to another employee. He had signed receipts for the claimant on two or three occasions before. Receipts must be shown to a security guard or a manager.

The operational regional manager – JK – next gave evidence on behalf of the respondent. He received a letter from the claimant seeking to appeal on foot of his dismissal. He contacted the store manager to obtain the facts and written notes in respect of the claimant's dismissal. He reviewed the minutes of the three investigatory meetings and both disciplinary meetings. He also reviewed the statements of the three staff members that the claimant submitted in support of his appeal. Resulting from this, he interviewed these employees. He issued his decision on the 8 July 2008 by letter upholding the claimant's dismissal. He had no option but to uphold the dismissal decision as the claimant was a very senior manager working in one of their busiest stores in Limerick and there was a huge element of trust placed on him. He had breached a number of the respondent's policies as a result of his actions and this was his second warning.

Under cross-examination, JK outlined his experience in respect of H.R. He has been an operational manager for twenty years and receives ongoing training with the respondent. He was au fait with H.R. that applies to the day-to-day running of the stores. He had responsibility for two thousand employees and was competent in holding disciplinary meetings and conducting appeals. The store managers are solely responsible within their units for disciplinary issues. The regional security manager (AE) would not be involved on a day-to-day basis with H.R. but would provide support in an investigatory role. AE would have no decision-making role in respect of disciplinary issues; the decision would be the sole responsibility of the store manager.

It was suggested that AE had been present at all the investigatory and disciplinary meetings of the claimant and from reading the minutes of these meetings; AE had conducted and directed the meetings. The note of the meeting of 24 June 2008 had stated therein "[AE] told [*the claimant*] that both himself and [EK] had thought long and hard in regard to the decision that had to be made and it has been decided to terminate his contract." JK denied that it had been AE calling the shots. EK was the senior store manager and no decision could be made without her. The final decision to dismiss the claimants rested solely with EK.

The appeal JK conducted was written in line with the respondent's procedures. He did not request to meet with the claimant as he had all the facts available to him. He had known the claimant ten years but explained that personal feelings cannot come in to the appeal process. He had met with the three employees who had provided statements as he felt it was necessary to talk through their statements with them. He accepted that the claimant had presented and paid a cashier for the chickens. However, the claimant had not followed the respondent's purchasing procedures.

JK would expect the claimant to be able to recall the person who had signed his receipt for the purchase of the chickens. The onus was on the employee to present the receipt for signature before exiting the store. He accepted that the claimant had asked MMc to record the chickens in the wastage book. However, it was the claimant's responsibility as the manager to ensure that this was done. He explained that a person does not purchase fourteen chickens for €1.00 and not ensure sure that they were recorded in the wastage book. The chickens should have been removed from sale the previous day.

JK could have varied EK decision to dismiss the claimant, but as a result of the appeal process, he

was satisfied that the bond of trust between the respondent and the claimant had been broken. He had breached their written appeal procedures by interviewing the three staff that submitted the statements in support of the claimant; he wanted to ensure he gave the claimant a fair hearing. Through this interview process, he received no further information from them. He had previously been involved in appeal hearings but could not recall any for a number of years. He reiterated that it was the store manager's (EK) ultimate responsibility to dismiss the claimant and that the regional security manger role was investigatory.

Claimant's case:

The claimant gave evidence that he commenced employment with the respondent as a fresh food manager in January 2001. In July 2004, he moved to the Limerick store. His responsibilities included staff rosters, ordering stock, sales, meeting targets and hygiene. In 2007, he had 25 to 30 staff reporting to him. However, in May 2008 his staff had been reduced to 15 or 16 and covered 24 hours seven days a week.

On the day of the incident, he commenced work at 7.00am. There were a lot of reductions to be done on the chickens. There were about thirty-five chickens on the use by date; these chickens should have been removed from sale the previous day. His wastage at that time was very high so he decided to reduce them further from €3.79 to €1.00 to help his wastage. After he reduced the price of the items, he asked the deli staff if they wanted any. CMc said she would take about twenty chickens for the hot counter and he decided to purchase five chickens for himself and ten for his parents. The wastage book records what they lose monetary wise in the company. He toldMMc to record the chickens in the book. The only reason he had done the wastage that day wasbecause he had no staff to do it.

The claimant then went to the tills, handed the checkout girl one chicken and asked her to put it through 15 times. He put these chickens in the prep room. He was 99% sure that he got his receipt signed but could not recall who had signed it. He did not proffer the receipt to the security guard. The trolley locked on the way to the car so he called AZ to come out to him to unlock it. The chickens were in full view at this time. With the benefit of hindsight, his mistakes were in not getting his receipt signed and the chickens should have been disposed of the night before. He had been trying to limit his wastage as this was reflected on his staff review.

The incident was not raised with the claimant until about a month later. His daughter was sick at the time and was admitted to hospital on the Sunday. The following Wednesday and Thursday, he was in work for a few hours but EK had not mentioned it to him. It was when he returned from annual leave that it was raised with him.

In relation to the grounds of dismissal, the claimant had paid for all the chickens, purchasing them while not on break. All managers had done this before and he was sure he had got his receipt signed. In respect of "purchasing and removing stock from the store before confirming a record of the reduction" the claimant had asked MMc to do this. He accepted he had breached the respondent's policy regarding selling dates by not removing the chickens from sale the previous night. He explained that offering purchases to security for inspection before leaving the store never happens.

At all the investigatory and disciplinary meetings, the regional security manager (AE) was present. The store manager (EK) sat in the corner and took the minutes. At these meetings, he sat face to face with AE and all decisions taken involved AE. He had always received very good performance

reviews and had never received complaints about the quality of the stock. He was very surprised that he had been dismissed; he would have been prepared to accept another disciplinary penalty, eg demotion or a move to another store.

The claimant gave evidence of his loss to the Tribunal.

Under cross-examination, the claimant accepted that he was ultimately responsible for his department and there was a large amount of trust placed on him in respect of this. He had received a written warning the previous February but had not taken it up with anyone. The chickens dated 22 May should not have been on sale and should have been removed the previous night. It was put to the claimant that he had sent twenty-one chickens to the hot food counter in the full knowledge that it was wrong. He accepted this but had hesitated before giving the chickens to the hot food counter. He agreed that he had done this because his wastage figures were high and it may have affected his salary at performance review time. He could give no reason as to why he had not instructed the chickens be removed from sale the previous night. He did not accept that it was unusual to sell chickens at €1.00, that sometimes he would have higher value stock and reduce it down by €5.00. The chickens were available to customers to purchase when they were in the trolley on the shop floor.

The claimant was not clocked out at the time he purchased the chickens. However, other managers have purchased goods before while not on break. He knew it was his responsibility to fill in the wastage book but he had asked another staff member to do this. He could not recall who had signed his receipt for him. He did not show the receipt and normally did not do so. However, the chickens were in full view.

The claimant accepted that he had breached the respondents purchasing policy and the “Reduce To Clear” policy. He disagreed that he had reduce the chickens for his own benefit. He had reduced stock previously to €1.00 and thought he might have reduced steak to this price.

Closing statements:

The respondent’s representative stated this case was not about the €41.85. The claimant was a very senior manager in one of the respondent’s busiest stores. He had accepted that he had breached a number of the respondent’s policies. There were health and safety implications for the store as the claimant had allowed the sale of out of date chickens to customers through the hot food counter. He had also reduced and purchased fifteen chickens for €1.00 for his personal gain. He had left the store through an inappropriate exit and had not got his receipt signed. Trust had clearly been broken. No complaint had ever been made by the claimant during the course of investigatory and disciplinary procedures about the involvement of the regional security manager. The ultimate decision to dismiss the claimant was made and communicated by the store manager. The regional manager had gone further than the respondent’s appeal process by interviewing the three staff to clarify their statements and he could not be criticised for this.

The claimant’s representative outlined the pressure on the claimant at the time of the incident. The claimant’s staff numbers had been reduced and this had an affect on his performance. The claimant was conscious of his responsibility and he was anxious to reduce his wastage. Not presenting purchases for inspection in the store was common case. The claimant accepted that the chickens should not have been for sale on the day of the incident. The disciplinary procedure was flawed and no one from H.R. had been involved. There was very little weight given to the statements made by the three staff members in support of the claimant. The decision to dismiss the claimant

was partly made by the regional security manager. No consideration was given to any penalty other than dismissal. The only breach was in relation to selling dates and the penalty of dismissal was too severe. Reference was made to section 6 of the Unfair Dismissals Act 1993 in respect of the reasonableness and conduct of the employer in relation to the dismissal.

Determination:

The definition of “conduct” isn’t provided in the Unfair Dismissals Act. It is worth noting, however that in choosing to refer to “conduct” as opposed to misconduct, the legislation adopts a neutral position on question of justification and fairness. It is not possible to write a list of the types of “conduct” which will be adjudged by the Tribunals as being so serious as to justify dismissal without prior warnings. Much will depend on such factors as the nature of the work involved and the level of responsibility of the employee in question.

In this case the claimant was a manager in the respondents’ with a high level of responsibility. The facts are not in dispute that on the day in question he purchased chickens in addition to allowing another staff member put up same on the hot food counter which latter action could have had serious implications for the respondent from a Health and Safety perspective. In addition, he breached some of the check out conditions of his contract which included showing his receipt to a manager to have it signed and leaving through an inappropriate exit. There is also the fact that the purchase had taken place while he was on duty. The claimant was a very senior manager in one of the respondent’s busiest stores. It matters not that the loss to the respondent was minimal. The issue here is that of trust and responsibility and the claimant had by his actions breached same detrimentally and irreversibly given his position in the company. Evidence was given that the claimant was under severe pressure at the time as his department was under staffed.

Dishonesty violates the contract of employment because it serves to undermine the trust and confidence, which is essential to the relationship of the employer and the employee. It matters not that the loss to the company is minimal. It is a loss of trust and confidence, which must be measured, and, obviously, such measurement becomes incalculable if the claimant holds a position of high responsibility which the claimant did in this case.

The Tribunal is confident from the evidence that a full investigation was carried out by the respondent prior to determining to dismiss the claimant. Evidence was also given of an earlier incident involving the claimant, which had led to him being issued with a written warning. This appears to have formed part of the respondent’s decision to dismiss the claimant but the Tribunal is of the view that even without this prior incident, the incident in question would have justified them in doing so. Evidence was given of the claimant’s appeal to the regional manager. Two disciplinary meetings were held on the 23rd and 24th of June 2008. The decision to dismiss was communicated to the claimant by letter dated the 24th of June 2008 after which the claimant appealed the decision to the regional manager. The regional manager contacted the store manager and received all notes and facts in respect of the matter in addition to reviewing the notes of three investigatory meetings and both disciplinary meetings. He further reviewed the statement of three staff members that the claimant submitted in support of his appeal in addition to re-interviewing these employees. He upheld the decision to dismiss the claimant on the basis that he was a very senior manager working in one of their busiest stores and the incident involved had diminished almost entirely the huge element of trust they had placed in him.

The Tribunal is unhappy with the regional securities manager's role in the disciplinary process in that the store manager seemed to have played a servient role. However, it was her ultimate decision to dismiss the claimant. Having considered all the evidence produced the Tribunal reached a unanimous decision that the claimant was fairly dismissed by the respondent and therefore his claim under the Unfair Dismissals Acts 1977- 2007 must fail

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)