

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1525/2008

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr P. Clarke

heard this claim at Sligo on 31st August 2009

Representation:

Claimant: McGovern Walsh & Co, Solicitors, Pearse Plaza, Pearse Road, Sligo

Respondent: BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows: -

Respondents Case

The store manager gave sworn evidence that company A of which the respondent is a large shareholder, employed the claimant, however the claimant was treated as a direct employee of the respondent. Company A supplies red meat to the respondent. The claimant's duties were to stock, sell and order the red meats for the store. The claimant and was issued with the respondent's staff handbook in 2004. This book included the grievance and disciplinary procedures.

This witness referred to the respondents "Employee Purchases Policy" which is displayed in staff areas of the store. It states that "Purchases must be placed in a bag and the receipt signed by a member of Management and retained for inspection on leaving the store" and "You must not remove any goods from the Sales Floor unless authorised by a member of management or you have paid for them and have retained a signed receipt for them".

The security manager informed him of an incident regarding the claimant on the 13th June 2008.

This manager told him that the claimant was seen removing two bags of frozen chicken from the store without any evidence of them being paid for. He reviewed the footage of the CCTV showing this incident and instructed the security manager to review any purchases made by the claimant going forward.

On the 20th June 2008 the security manager informed him that there was further evidence that the claimant had left the store with un-purchased goods. He viewed the footage of the CCTV in respect of this incident with the security manager and the deli manager. From this he could see no evidence that the claimant had purchased chips, bread, frozen fish and a toothbrush, that he was seen removing from the store. The claimant had however paid for call credit and cigarettes at the time.

A series of CCTV photos were produced in to evidence showing both incidents of the 13th June and 19th June 2008. This witness outlined the photographs in relation to the incident of the 13th June 2008. These showed the claimant with two bags of frozen chicken goujons. The second set in respect of the 19th June 2008 showed the claimant selecting a toothbrush, chips, frozen fish, bread, then making his way to the customer service desk. The claimant then places these goods on the counter. The claimant then uses the ATM, which was located to the side of this counter. The claimant then appears to speak with the employee behind the counter to order call credit and cigarettes. He then hands money over to this employee. This employee gives a bag and change to the claimant. The claimant put these goods in to the bags and proceeds to leave the store.

This witness organised a meeting on the 21st June 2008 to discuss both incidents with the claimant. Present at this meeting was himself, the deli manager, the claimant and the claimant's representative. A typewritten record of this meeting was produced in to evidence. This witness explained that this note came from handwritten notes that the deli manager made during the course of this meeting. He maintained that this record reflected what had occurred at this meeting. This record was read in to evidence.

At this meeting he questioned the claimant on the respondents employee purchasing policy and asked him if he always adhered to the policy. The claimant indicated he did but added, he did not always get his receipt signed, as sometimes there was no manager around. He continued and asked the claimant about the purchases he had made on the 19th June, and as the claimant did not remember he showed a photograph of him at the customer service desk. The claimant recalled he had got his messages, call credit and cigarettes. The store manager informed him that he had not paid for bread, frozen chips, fish and toothbrush. The claimant replied that this was not like him, as he would have paid for anything he got. An excerpt of the till roll was produced at the hearing showing that the transaction made at this time was phone credit and cigarettes. He asked the claimant if he wished to see this transaction on the CCTV, the claimant replied in the negative. He also raised the incident of the 13th June 2008 with the claimant. The claimant gave no explanation for either incident at this meeting. The meeting was postponed and he held the second meeting at about twelve noon that day.

Notes of this second meeting were read in to evidence. At this meeting he told the claimant he was being very un-cooperative. He asked the claimant if he had any further explanations in regard to the evidence, but the claimant had "nothing new to add". He described both incidents to the claimant again and according to the respondent's notes the claimant replied at one stage "if that's what you are saying I done, then I done it". He informed the claimant of the seriousness of the situation and that it might lead to his dismissal. He told the claimant that he was suspending him without pay till Monday 23rd June 2008, 12.00pm and advised the claimant to use

the time wisely to think about the incidents.

A further meeting was held on Monday 23rd June 2008 and present were this witness, the deli manager, the claimant and his witness. He revisited both incidents with the claimant; the claimant gave no further information. The claimant made no comments on the minutes of the previous meetings. He informed the claimant he had no other option but to dismiss him. The claimant asked if company A were aware of the situation and the store manager confirmed they were.

The store manager explained he had contacted company A and outlined to them the issue with the claimant. Company A informed him that they would back up any decision that he made. He as the store manager had the authority to dismiss the claimant and had done so because of his failure to comply with company policy and for removing goods from the store without paying for them. A letter from company A dated the 1st July issued to the claimant, dismissing him with immediate effect.

Under cross examination it was put to him that the claimant would say that he has purchased the chicken goujons at lunchtime and had a receipt on him when he took them from the store. This witness outlined that the claimant should have identified this to a member of management at the time. He accepted that there was no indication that the claimant had checked his change or receipt after the transaction on the 19th June 2008. When he put the allegations to the claimant, his reaction was passive. The first meeting on the 21st June had lasted about twenty minutes. He reiterated that the deli manager was taking notes through out the course of the three meetings. He had offered the claimant the opportunity to see the CCTV. He did not think it was conceivable that the claimant was not aware of what had happened on the 19th June. He used the time between the first and second meeting on the 21st to discuss the situation with the deli manager and store manager and he reviewed the CCTV footage. He was asked that when he was aware that the employee who served the claimant had not charged for the bag did he return to this employee to discuss the purchase, the witness replied in the negative. He did speak to the employee who served the claimant on the 19th June in an informal manner about why he had not charge for the bag but not about the goods. This witness was satisfied that after his investigation that he was correct to dismiss the claimant.

In reply to questions from the Tribunal, did not consider any other sanction, as the claimant's action was a serious breach of company policy. He informed Company A of his decision and Company A issued the claimant's dismissal letter. This letter refers to the claimant admission "You admitted that your actions were in breach of company procedures, but could not give any reasonable explanation for your actions". This witness was asked as to where in the notes that the claimant had made this admission, he explained that he telephoned Company A and they had drafted the letter based on the information he had given them. In his opinion the claimant had admitted that his actions were in breach of company policy. When asked if he had shown the claimant the "Employee Purchasing Policy" during the course of the meetings he replied in the negative but the policy is displayed in the staff areas. He did not inform the claimant he was specifically in breach of point number one or two, etc of this policy. He was unsure whether the claimant had returned to work during the intermission of the first two meetings on the 21st June. It was pointed out that the first meeting was noted as a disciplinary meeting and was asked to explain the purpose of this meeting. The witness explained it was a disciplinary meeting and its purpose was to establish the facts of the incidents.

Next to give evidence was the deli manager on behalf of the respondent. The claimant reported to him and up to this time he had only ever to speak to the claimant in respect of their absenteeism policy. In May 2008 he spoke to all his staff including the claimant reminding them to adhere to

the respondent purchasing policy. This policy was posted on the staff notice board and is included in their staff handbook. He attended all three meetings and took notes at same. After each meeting he and the store manager went through the notes taken and drafted the formal record of each meeting. He had reviewed the formal notes and agreed with the contents. The claimant had offered no reason to explain his actions during the course of the meetings.

The respondent's legal representative interjected at this time explaining that the notes of the meeting were contemporaneous, as after each meeting both the store manager and the deli manager sat down and agreed what was said and drew up the formal notes. The handwritten notes taken at these meetings have now been destroyed.

Under cross-examination he was asked to describe the claimant's reaction when he heard the allegations. He said the claimant was very quiet, but he did not come across as shocked. He usually spoke to his staff twice a year around stock take concerning the respondent's policies and procedures.

The Tribunal suggested to this witness that showing the CCTV footage to the claimant might have jogged his memory. This witness replied that they had offered to show him the CCTV footage but the claimant had declined. When asked if all the photographs were shown to the claimant, he could only recall the photograph of the claimant at the customer desk on 19th June. The investigation was not completed until they spoke to the claimant at the meetings on the 21st June to see what he would say. The Tribunal asked him if the employee who had served the claimant at the customer desk was spoken to as part of the investigation. This witness could not reply to this question.

Claimant's case

The claimant gave direct sworn evidence. He had worked with the respondent for about fourteen years. Over this he had attended one or two meetings in respect of his time keeping but had never any other issues during the course of his employment.

In respect of the incident of the 13th June 2008 he explained that for about the last eight years he would normally do his shopping on a Friday during his lunch hour. On some occasions he would leave his shopping in the backup areas of the store e.g. fridges and others he would put his shopping in the car. Several people were aware of him leaving his shopping in the back up area and nothing was ever said to him about this practise. On Friday 13th June 2008 he did his shop as normal during lunchtime after which he put his frozen products in to the back up fridge. He finished work at 16.30 and went to the freezer to get his chicken goujons. They were not there; they must have been put back on the shop floor. He picked them up from the shop floor on his way out of the store. He maintained he had a receipt in his pocket at this time for about €120.00 nobody asked to see the receipt then or any time afterwards.

On the 19th June 2008 he had picked up a selection of items, but as he had no cash he left these items on the customer service counter while he went to the ATM. While there, he asked the employee behind the counter for cigarettes, call credit and a bag. He took €40.00 out of the ATM and handed it over to the employee. He received change and a receipt. He did not check his change at this stage but maintained that he stopped for petrol on the way home and only had €10.00 left. He bagged his items and left the store. The claimant explained that he did not knowingly leave the store without paying for these items.

On the morning of the 21st June 2008 sometime after 10.30 am, he was on the shop floor when the deli manager told him he was wanted in the office. He was also informed to bring PMcC with him. He was not told previously that it was a disciplinary meeting as was noted in the respondent's records. He was informed that there were allegations against him that he had left the store with goods he had not paid for. He was surprised and disappointed that they thought he was capable of doing this. At no stage during the course of this meeting did he admit that he had taken goods without paying for them. At no time was the opportunity given to him to view the CCTV footage, but he was shown about three photographs of the 13th June and the 19th June. Up to the time he arrived in the office he had no idea what the meeting was about. After this meeting he was told to return to work on the shop floor.

He was called back up for the second meeting at about 12.00pm. The claimant explained he was still in shock and was being asked to explain something that he did not think had happened. He could not take on board what he was being accused of and felt that all they wanted was for him to admit it. PMcC was asked if he had anything to say. PMcC said he was surprised at the allegations and the reason the claimant could not give any explanations was because he was in shock. The store manager informed him that he may call the Gardai in and asked him to consider the consequences of his actions. The claimant was suspended with out pay till the following Monday.

He went to the disciplinary meeting on the 23rd June 2008 and PMcC accompanied him. The claimant knew that the purpose of this meeting was to make a decision whether he was going to be dismissed or not. At this meeting he did not proffer any further explanations as he thought it was just going one way now and it would lead to his dismissal. He did not recall receiving the respondent's staff handbook, however he was aware of their purchasing policy. In his mind he did not think that the matter was investigated completely.

Under cross examination it was put to him that during the course of the three meetings he gave no explanation to the allegations put to him. The claimant accepted this but explained he could not focus or take on what was being implied. He agreed it was the time to give his explanations and not now, today at this hearing. At this time he did not discuss his situation with PMcC who is the shop steward for the union members. The claimant is not a member of the union.

He did not think it was important at the time when he took the chicken goujons from the shop floor on 13th June 2008 to bring it to somebody's attention, as he had already paid for them and had the receipt in his pocket. The deli manager could verify that he did his shopping on a Friday. He normally got his receipts signed at lunchtime. On the 19th June he took the goods up to the counter to pay for them, he did not get his receipt signed as there was no one about. He had presented these goods for payment. He was referred to a photograph of the 19th June 2008 where the respondent maintained that a trainee manager was beside him at the counter. The claimant did not know who it was beside him. He confirmed that the first meeting of the 21st June started at 10.30am after his teabreak. He did not agree that the respondent had offered to show him the CCTV. The claimant did not accept that he had said, "no, if you said I didn't pay for it, I didn't pay for it". If he did not pay for the goods on the 19th June, why did he take the money out of the ATM to pay for them.

He was referred to the notes of the first meeting where the store manager described to him both incidents, to the first incident it is noted that the claimant said "if that's what your saying I have done, then I done it". To the second incident the claimant replied, "If you said that's what happened, it must have happened". He denied he would have ever said this. He gave evidence of loss.

In reply to questions from the Tribunal, he did not get an opportunity to discuss his situation with PMcC before or during the times between the meetings. The claimant maintained that the break between the two meetings of the 21st July was from 10.50 to 12.00. He was never told of any conversation between the store manager, the security manager and the employee who had served him on the 19th June.

The claimant's witness (PMcC) gave direct sworn evidence. He has been employed by the respondent to work in the deli department, has worked with the claimant and he reports to the deli manager. He is working there for about 22 years. He is a member of the trade union, however he is not the shop steward. There is no shop steward, so management ask him to go to the disciplinary meetings as a witness. The claimant asked him to go to the meeting on the 21st June, the claimant told him he thought it was about his time keeping. Neither he nor the claimant knew what the meeting was about till they attended. When the allegations were made, the claimant went white and was shocked. The claimant gave no explanation at the first meeting, but this witness maintained the meeting was going round in circles; the store manager was trying to get the claimant to admit it. This witness intervened and said the claimant was not that type of person. He also suggested that maybe there was a misunderstanding between the claimant and the employee who had served him on the 19th June in relation to paying for the goods. He did not recall anything being said to the claimant about the availability of the CCTV.

Under cross-examination he explained that he took no notes during the meeting and neither did the store manager or deli manager. He accepted that during the course of the meetings it was apparent that the claimant's job was on the line, however at the time he did not discuss the situation with the claimant. The explanations of the claimant's actions he had only heard in recent times. He would agree in a certain amount to the notes of these meetings, he became aware that it was a disciplinary meeting as the meeting went on. He accepted that the claimant had not offered any explanation to his actions. He confirmed that the claimant was not offered the CCTV to view. He gave no instructions to the claimant between the first, second and third meeting.

Determination

The Tribunal carefully considered the evidence presented and the submissions made by the parties.

The Tribunal was unhappy with the way that notes of the disciplinary meetings were represented to the Tribunal by the respondent. The notes were described as contemporaneous notes taken by the deli manager but after the Tribunal asked for a copy of the original notes it was told they had been destroyed and the typed notes were an amalgam of recollections of the store manager and the deli manager. This was information that should have been volunteered to the Tribunal from the start of the hearing. The Tribunal further noted and accepted the evidence of the claimant's witness that no notes were taken during the meetings. Best practise would have been to seek to agree the notes of the meetings at the time with the claimant and his witness.

The respondent's procedures were not ideal and the witness who accompanied the claimant to the disciplinary meetings was not made aware of his function at these meetings, nor initially of the seriousness of the matter. We make no criticism of the claimant's witness, and he in fact assisted the claimant and spoke up for him at the meetings. While best practise was not followed, the Tribunal notes that the claimant was given every opportunity to explain his actions, The respondent gave the claimant opportunities to explain his actions but his explanation was only adduced at this hearing.

Deficiencies in procedures followed need not necessarily lead to a dismissal being deemed to be unfair.

Barrington J. in the Supreme Court in *Mooney v An Post* [1998] 4 I.R 288 at p. 298 stated:

“Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.”

Laffoy J. in the High Court in *Maher v Irish Permanent plc* [1998] 4 I.R 302 at p. 298 interpreting Barrington J. in *Mooney v An Post* stated:

“It was pointed out by Barrington J. in Mooney v An Post [1998] 4 I.R 288 that what the justice of a particular case will require will vary with the circumstances of the case, for example, in a case involving a contract of employment, whether it stipulates the procedure to be followed when dismissing an employee for misconduct or not. If no procedure is stipulated the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. The minimum an employee is entitled to is to be informed of the charge against him and to be afforded an adequate opportunity to rebut or attempt to rebut them.”

While best practise was not followed that did not of itself render the dismissal unfair.

The claimant by his silence when questioned by his employer, and at his disciplinary meetings, did not avail himself of the reasonable opportunities given to him to rebut the charge against him. The Tribunal was given an explanation by the claimant at the hearing, and had such an explanation been given by the claimant to his employer ab initio, matters might well have progressed differently. However what the Tribunal has to consider is whether the employer was justified, based on the information available at the date of dismissal, in dismissing the claimant.

The Tribunal determines that the employer was justified in all the circumstances in dismissing the claimant. Accordingly the Tribunal is satisfied that the claimant was not unfairly dismissed and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)