

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE - claimant

CASE NO.

MN35/09
UD30/09

Against

EMPLOYER - respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr D. Moore
Mr. J. Dorney

heard this claim at Dublin on 2nd June 2009 and 2nd October 2009
and 30th November 2009

Representation:

Claimant: Mr. Ray Ryan B.L., instructed by Thomas Montgomery & Son, Solicitors, 5
Anglesea Buildings, Upper Georges Street, Dun Laoghaire, Co. Dublin

Respondent: Gillian O'Callaghan, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Opening statement by representative for respondent:

The respondent gets a list of products on special offer in advance. A special offer was incorrectly priced at zero at the till. If there is a mistake on special offer this should be reported to supervisor and items should be removed. The claimant made three checks on the till and was aware of the error. It is the contention of the company that no report of the error had been made by the claimant. The respondent maintained that procedures used were correct and fair, i.e. investigation, followed by disciplinary hearing and an appeal heard by Regional Manager.

Opening statement Counsel for the claimant:

Claimant worked in the store for 19 years. She was a very good employee and had an unblemished record. The dismissal was unfair and unjust and the honesty of the claimant was impugned. A supervisor asked claimant to check out a product Mr. Muscle. There were two types of Mr. Muscle costing €2.15. A customer bought two Mr. Muscles priced €2.15 each, total €4.30., as the special offer not working €4.30 the full amount was deducted at till. The claimant advised supervisor. She clocked off work at end of day. She returned later to do her grocery shopping. In good faith claimant purchased Mr. Muscle product. Her understanding was that the glitch in the till had been remedied.

Respondent's case:

The Personnel Manager, hereinafter referred to as PM has been employed with the respondent for thirteen years. On 17th October 2008 she called the claimant to her office for a meeting. When the claimant arrived she was advised to have a witness present and the claimant then asked a colleague to sit in at the meeting. The store manager, hereinafter referred to as (SM), was also present. The claimant was asked if she remembered purchasing Mr Muscle on 25th July 2008. SM showed the claimant the relevant till receipts. The special offer was buy one Mr Muscle and get one free. The claimant had been working on till 90 and she went into training mode on three occasions at 12.20, 12.22, 13.24 and checked the special offer. The claimant stated that she may have checked for a customer. SM explained the seriousness of what had happened and said that the claimant would be suspended on full pay. She also advised the claimant to contact her union official. The claimant denied she had bought the product.

A further meeting was held on 20th October 2008 at which the claimant's union official was present. At the first meeting the claimant said she was not aware that the special offer was not in fact working, which would mean that the products were purchased for free. When she was shown the till receipts the claimant said she had told GB, but he was off that day. The meeting concluded with the claimant continuing her suspension on full pay.

In cross-examination, witness stated that there were no previous incidents with the claimant and there was no issue in relation to honesty. The claimant was not challenged until October as there were other incidents with Mr Muscle with another staff member and when this was being fully investigated the claimant became involved. There was no allegation of the claimant being involved in a wider scam. The 25th July 2008 was the only date being questioned in relation to the claimant. The glitch on the system was not the claimant's fault but it would have been her responsibility to tell a member of management and the product could have been withdrawn from the shelf. On reviewing the video footage the respondent became aware of the system glitch. Witness was not aware of how many customers bought Mr Muscle on the day in question, 25th July.

The claimant-finished work at 2pm on 25th July went to the canteen and then did her shopping with the till receipt showing 16.30 hours. The total value of her shopping was €88.44. If the claimant had told the manager on duty the first time she went into training mode the problem would have been rectified in thirty minutes and would not have been on the system at 13.24, i.e. the third time she checked. This would mean the respondent would not be at a loss. Routine checks are generally carried out in relation to special offers, however no routine checks were done in relation to the Mr Muscle special offer. Due to human error at head office the special offer was not working properly on 25th July 2008. The claimant was told she was being suspended because there was an

investigation in relation to Mr Muscle. The investigation commenced on 17th October 2008 with the claimant being dismissed for serious misconduct on 28th October. She was given the right of appeal within five days. Staff go into the training mode on the till when checking that the scales are calibrated correctly, this was part of the claimant's duties and she was aware the respondent could access this.

The Store Manager hereinafter referred to as SM in her evidence stated that she was on holidays when she heard of the incident involving the claimant. On her return from holidays she fully investigated the matter. SM was in the store on the 25th and on holidays from the 26th July and she was not told about the glitch in relation to Mr Muscle. The claimant admitted she bought the product. She attended the meeting on 17th October 2008 and the claimant was suspended. Witness also attended the second meeting on 20th October 2008. When the claimant was asked why she went into training mode on the day in question, she said that someone from head office asked was the special offer working. The claimant did not report the matter to witness. The claimant continued on her suspension. Witness had meetings with PM in relation to the rosters, the claimant's integrity and the till receipts. In the claimant's letter of dismissal dated 28th October 2008 she was given the right of appeal to the regional development manager. The claimant was fully trained in till procedures. The training covers loss of stock and a message is sent to staff every week, which has to be signed to confirm receipt. In addition any new policy would be communicated to the staff. Any special offers are sent by head office and are transferred nightly to her computer. If an offer was not working they would have to wait until the overnight to have changed at the tills. The procedure is to tell a member of management and the product is then taken off the shelf. It would be normal to ring for a price check and head office would tell witness if a product had to be taken off the shelf. It would be usual to change to training mode, but only once.

All stores suffer stock loss and it was part of the job of witness to ensure to keep this loss to a certain percentage, however in 2008 the loss ran at double this figure. In the case of the Mr Muscle, if it were communicated it would stop the loss to the store. Stock loss is loss to the store and in this case the Mr Muscle went through at zero, therefore the respondent was at a loss of €2.15 and witness was accountable, but she did not personally have to pay.

In cross-examination witness stated that she believed the claimant intended to defraud the respondent. She believed it was pre-meditated on the part of the claimant as she went in to the training mode on three occasions. Witness did not have any evidence to substantiate this belief. The duty of the person at the till was to scan the goods through. The claimant was in breach of company procedures. At 7.30pm the Mr Muscle was taken off the shelves when another member of staff told the duty manager. Witness showed a printout to the Tribunal members in relation to the respondent's contention that GB was not at work on 25th October.

The regional development manager, hereinafter referred to as RDM, heard the claimant's appeal. Her union representative stated that the sanction was too severe. The claimant told witness she brought the matter to the attention of GB. Regarding checking the system three times, through the training mode, the claimant said she must have been asked to do so. In relation to stock loss the claimant never gave it any thought and stated that she did not do stock loss. This surprised witness as the claimant had worked with the respondent for nineteen years. Witness upheld the respondent's decision to dismiss the claimant based on the fact that when she was asked whom she reported the glitch to she stated GB, who was on the second week of his holidays at the time.

In cross-examination witness stated that she met the claimant on 18th November 2008. The bond of trust between the claimant and the respondent had been broken and she upheld the dismissal because the claimant set out to defraud the company.

The Tribunal also heard evidence from GB who confirmed that he was not in the store on 25th July 2008 as he was on the second week of his holidays.

In cross-examination witness stated that he went to the Oxygen concert from 11th to 13th July and started his holidays on the 14th July 2008. The claimant did not have a conversation with him on 25th July 2008. If a member of staff was notified the matter would be rectified straight away. It did not surprise him that the Mr Muscle was on sale all day on 25th July as no one told management. He stated that he did not know, when the question was put as to how likely was it that customers would continue to buy the product all day. He did not have evidence that the claimant knew about the glitch in the system. He had worked with the claimant for three years. He was not interviewed by the respondent, however prior to the appeal he received a telephone call and he confirmed that he was not in the store on the day in question.

In answer to questions from Tribunal members witness stated that everyone would know that if there was a glitch in the system it would not be rectified until that night. It was open season for all unless the product is taken off the shelf.

A General Assistant (hereinafter referred to as GK) gave direct sworn evidence on behalf of the respondent. She served the claimant on the 25th July 2008. The claimant had a trolley of goods at the end of the transaction the claimant asked her if the Mr Muscle special offer had discounted. She examined the claimant's receipt and informed her too much had been discounted. She then went and told a manager that the Mr Muscle discount was not working correctly.

Under cross-examination she described the claimant's trolley of goods as a weekly shop. The claimant had asked her specifically about the Mr Muscle not any other special offers she purchased. When she informed the claimant that too much had been discounted, the claimant had said okay and walked away. She confirmed there is a no quibble policy in place for customers. When asked if a customer presented a two for one offer and it went free as in the claimant's case, she replied if she noticed this she would probably change it or if she had already taken for it she would inform a manager immediately. She probably should have told the claimant to hang on but she did not, maybe she did not want to delay the claimant. She went straight to a manager afterwards but could not recall what manager. She had been disciplined over serving the claimant.

Claimant's Case:

The claimant gave direct sworn evidence that she had worked in the store for 19 years. She was a cashier on the kiosk, which sold alcohol and cigarettes. The special offers always commenced on a Wednesday. The Mr Muscle products normally cost €2.15 each under this offer you could mix and match the Mr Muscles sprays and purchase two for €2.15. Her honesty had never been questioned before this incident.

On the 25th July 2008 a staff member who she cannot recall, asked her to check if the Mr Muscle offer was working properly. She had a training code that allowed her to do this without registering a sale. The special offer was not going through correctly, to her recollection she told GB. This was not the first time she checked special offers, staff would request her to check offers and also she would received requests from Head Office to ensure offers were scanning properly. The reason she

thinks it was GB she informed, was because during the course of the investigation meeting, A told her it was not her. It was her job to inform management.

She had firstly checked the special offer in training mode at 12.20, and straight afterwards at 12.22 she checked to see if the kitchen and bathroom mix and match was working. She would have informed a manager as soon as possible. Normally in these circumstances she would inform management and they would go to the systems office and try and fix it themselves, if not they would make a phone call to Head Office to get it rectified. During the course of the investigation meeting GB had put it to her that she would have known that the Mr Muscle special offer could not have been fixed that day. The claimant explained normally if an offer could be not fixed on that day it would be removed from sale. She did not know whether GB was correct in that the offer would be not fixed that day, however the system is now managed from India and it could take over night to rectify. She rechecked the Mr Muscle at 13.24, she does not recall why or who asked her to do this. The offer was still not corrected.

She finished work at 14.00. Up to this stage no Mr Muscle had been purchased at her till. If a customer had presented the Mr Muscle to buy she would have brought it to a managers attention. However with the respondent's no quibble policy she thought she would be obliged to give the product to the customer for nothing. After finishing work, she ate lunch and then she did her weekly shop. When she saw the four-foot display of the Mr Muscle she assumed the special offer had been fixed, she selected a kitchen and a bathroom spray. She bought special offers all the time; on this day she bought three special offer products.

GK checked out her purchases, she did not specifically ask about the Mr Muscle but she did ask GK if all the special offers had been deducted. She did not check her receipt as she never did, she took her change and left. She knew nothing about GK reporting her transaction to anyone in the store on the day, if GK did, why was she not asked about the Mr Muscle till October.

PM and AC had called her in to a meeting on 17th October 2008 and asked her why she had bought the Mr Muscle in July. She had responded by asking them, if they could remember what they had bought three months ago. She told them she never checked her receipts. PM informed her that she was not been accused of anything but she felt she was. She was shocked, stunned and could not believe what was happening. She did say during the course of the meeting that if she was to defraud the company she would do it big, not for something small like Mr Muscle. She was suspended with pay.

The following Monday 20th October there was a further meeting, present were the claimant, her union rep, PM and AC. After this meeting she continued her suspension, her appeal meeting took place on the 18th November 2008. RDM decided to up hold the decision to dismiss her. The claimant was devastated, since she was dismissed, she feels her good name is gone; she has lost her confidence and is currently on medication. At no stage during the course of the meetings did anyone explain the delay in the event and the investigation meeting. The claimant gave evidence of loss.

Under cross-examination she was referred to her training record and agreed that she had received a lot of training. She explained you would be brought to the training room with about a dozen other staff and you would be told about the issue and then you would sign to say you were there. The staff handbook had been given to her and she was told to read through it at her leisure. She was responsible for the scales and tested them at every checkout on Monday. She agreed she was aware

that stock loss was an important issue but she never had to deal directly with stock loss. She would be asked by head office to check prices and she would have to go training mode. On the day of the incident it was a store manager who had asked her to check the Mr Muscle twice. She could not recall which manager had asked her to check the price. When she had seen the Mr Muscle on the shelf when doing her shopping she assumed it had been rectified. She had not checked her receipt and reiterated that she had asked GK if all the special offers had worked. It was put to her that she had purchased the Mr Muscle in the knowledge that the product was not scanning correctly and was referred to her note that she read out at the appeal meeting. She denied this at 4.00pm when she was doing her shopping she assumed it had been fixed because the product was still on the shelves. She wrote this note three months after the incident she positively bought it in the afternoon as she had reported it in the morning, so it should have been fixed by the afternoon. She had worded her note wrong where she had said, "that I purchased an item (Mr Muscle)(buy one get one free) knowing that this item was not scanning my reply is a positive yes I did. This mistake was down to the stress she under at the time.

She confirmed that she was advised to bring a witness with her to the meeting on the 17th October 2008. At this investigation meeting she felt she was being accused. While she was given the opportunity to appeal she felt it was not done fairly and the respondent had not considered her 19 years service.

In reply to questions from Tribunal, she could not recall when she had purchased her goods; GK telling her too much had come off in respect of the Mr Muscle. Members of staff came to her to check prices as she and about six others would have training code, no other employees would have access to this code.

Determination:

The Tribunal having carefully considered all of the evidence notes there was a significant conflict between the evidence given by the two parties in this case. The Tribunal also notes there was a ten-week delay before the incident of the subject matter in these proceedings was investigated.

On balance the Tribunal by majority prefer the account given by the claimant and awards the claimant the amount of €14,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal makes no order under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 as no evidence was adduced in respect of these Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)