

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD786/2009,
MN808/2009

against

EMPLOYER

Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Mr C. McHugh
Mr A. Butler

heard this claim at Wicklow on 7th April 2010

Representation:

Claimant : Mr. Joe Donnelly, Divisional Organiser, Mandate Trade Union,
O' Lehan House, 9 Cavendish Row, Dublin 1

Respondent : Mr. Eamonn McCoy, IBEC, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Among the respondent's documents presented to staff were its honesty and staff purchases policies. Included in its honesty policy was the following condition that applied to all employees:

Converting or attempting convert to his/her own use or the use of another, any cash good, supplies or equipment regardless of monetary value, the property of the company (or in the company's care) without authority, such authority to be granted only by store managers or employees more senior than store managers, if found guilty will be subject to dismissal and/or prosecution.

Its policy on staff purchases contained six clauses. Among those clauses was the requirement for employees that all receipts for purchased goods had to be attached to those purchases and then they had to be deposited in a specific area approved by the relevant manager. That policy document concluded with the warning that breaches of this practice might lead to disciplinary action up to and including dismissal.

The store manager (BT) of the particular branch of the respondent supermarket chain told the Tribunal he discharged himself from further duties at approximately 18.15 on 24 December 2008

following a busy day at work. When he reported back for duty at 08.00 three days later on 27 December 2008 he was informed by a security man that company close circuit television cameras had recorded the claimant along with two other identifiable employees vacating the premises through the canteen exit at approximately 18.30 on Christmas Eve carrying what appeared to be stock from the shop. That exit was located at the rear of the premises close to a car park. BT found this report so unusual that he initiated an investigation to its contents. At least two of the departing staff appeared to be carrying cans of beer. It was not normal for staff to leave the shop in that manner and under those conditions especially when the front doors were still open and in use for employees at that time.

BT in the presence of the assistant store manager and another colleague met the claimant on 28 December to discuss this report. That other colleague was there at the request of the claimant to be a witness. At that meeting the claimant admitted taking beer without paying for it and apologised for that omission. According to one version of the submitted notes of that meeting the store manager told the claimant that his action amounted to gross misconduct. He suspended him pending the outcome of an investigation. An investigatory meeting took place two days later whereby the claimant changed his story on the incident in question. On that occasion the claimant in referring to cheques and bar codes said that it was his belief that the beer had been paid for and was given to him by a third party as a gift. When it was pointed out to the claimant that his version was different to his original account he replied that he was in shock and confused while attending the first meeting. The store manager told the Tribunal that he did not believe the second explanation of the claimant.

In and around the same time the store manager had interviewed the two other relevant employees one of whom had changed their version of events that matched the claimant's account. The claimant also stated he had not spoken to anyone about this incident and investigation between these two meetings.

The store manager met the claimant again on 16 January 2009 in the presence of representatives and witnesses when a disciplinary hearing meeting was convened. That meeting took the form of a question and answer format between the manager and the claimant. The store manager could not find any evidence to support the claimant's version of events and having deliberated on the issue issued with a formal letter of dismissal citing serious misconduct by reason of his actions on 24 December 2008.

A trade manager at the time of these events who was also a member of the local senior management team placed himself in the company of a security person at the front doors of this shop at 17 35 on 24 December 2008. Their purpose there was to control both customer flow and to close off one of the two entrances by 18 00 when the shop was closing. During the time he was there this witness did not observe the claimant exiting the store through the front doors. By 18.45 the front doors were shut and the remaining staff were leaving through the canteen exit. This witness attended a meeting on 28 December with the claimant, the store manager and another colleague as part of an investigation into the claimant's involvement in a possible disciplinary issue. He said his notes of that meeting were an accurate reflection of that meeting. As part of that investigation the witness was interviewed by the store manager. He told him that at no time had he given permission to another security person to purchase goods using a cheque. That person had earlier approached him about cashing a cheque and he referred him to the store manager.

The regional development manager who heard the claimant's appeal against dismissal acknowledged that witness and representatives at investigation and disciplinary meetings were not

interchangeable. Prior to hearing this appeal this witness reviewed all the notes of earlier related meetings and viewed the relevant video footage. She asked the claimant to explain his role in this affair and he repeated that it was his belief that the beer was a gift from a security man. In upholding the decision to dismiss the witness noted that the claimant's version of events had changed from one meeting to the next. She further concluded that the claimant had not followed proper procedure for staff purchase of product but did accept that where there was no purchase then no receipts were required. Besides, the security person involved was neither a supervisor nor a senior manager and had no authority to allegedly distribute gifts.

Claimant's Case

The claimant who commenced employment with the respondent in March 2007 as an assistant in the grocery section acknowledged he received some formal training for this job. He was aware of the receipt requirement in the event of staff purchases. Towards closing time on 24 December 2008 he helped a security man with his tasks and in return for that assistance the claimant accepted an offer from him to take away a crate of beer. He also took away some flowers and compact discs as a gift from the respondent. All those products were taken out through the canteen door at the rear of the shop.

This witness was called to a meeting with the store manager and his assistant on 28 December. He initially refused the offer of a witness but soon changed his mind and did not object having a named work colleague to be his witness there. The claimant told the Tribunal he was in shock at that meeting and did not know initially what the store manager was talking about. He was placed on suspension and "had time to think it over" before the next meeting on 30 December. On that occasion the witness acting on advice told the truth about the Christmas Eve departure from the store. He had been under the impression that the beer had been paid for but accepted he had not seen the receipts for it. The witness insisted he had not spoken to the other two involved colleagues following his first investigation meeting and prior to another one two days later.

Determination

The Tribunal finds it hard to accept that the claimant had no communication with other relevant colleagues involved in this case during the course of its investigation and disciplinary process. The Tribunal are also of the view that had the claimant produced the security guard who allegedly gave him the beer on Christmas Eve as a witness then perhaps such evidence could have been tested and may have assisted the claimant greatly with his case. However, such corroborative evidence was not available to the Tribunal. As regards the incident itself the claimant at best behaved naively and was perhaps swayed and influenced by others. Even allowing for this miscalculation and indeed inexperience the claimant nevertheless greatly contributed to his own dismissal. Ultimately the claimant accepts that he was aware of the procedures to follow when purchasing stock from the shop.

The respondent's approach and application of this case was not without fault. Its casual use of witnesses and representatives was less than expected from such a large employer. The store manager's hasty conclusion that the claimant's alleged role in this incident left an impression on the Tribunal for all the wrong reasons. Natural justice and fair procedures were compromised as a result. Notwithstanding those flaws the Tribunal finds on balance that this dismissal was not unfair. The claimant was the author of his own misdeeds. The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fail, as this was a case of gross misconduct.

Sealed with the Seal of the

Employment Appeals Tribunal

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(CHAIRMAN)

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Employment Appeals Tribunal

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(CHAIRMAN)

