

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- claimant

CASE NO.
UD657/2009
MN671 /2009

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. P. O'Leary B L

Members: Mr. L. Tobin
Mr O. Nulty

heard this claim at Cavan on 2nd November 2009
and 2nd March 2010
and 3rd March 2010

Representation:

Claimant(s) : Mr Damien Glancy, George V. Maloney & Company, Solicitors,
6 Farnham Street, Cavan

Respondent(s) : Ms. Rhona Murphy, IBEC, Confederation House, 84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The HR Manager gave evidence. The claimant was employed as a Security Guard. When she joined the respondent company the claimant was on a prolonged absence. She explained that because of the location of the premises the claimant worked in and the high turnover in retail sales, security was extremely important. Over a three month period the premises had made a loss of € 1 million by theft.

All new staff were thoroughly trained and the training was signed off, including the claimant. There was a disciplinary and grievance procedure in place. When asked she explained the stages of the disciplinary procedure. The first written warning stayed on your file for 6 months. The second written warning stayed on your file for 9 months and the final written warning 12 months. If the matter was serious an investigation was conducted and the employee was allowed to have a shop steward present at a disciplinary interview. The employee would be suspended with pay and a full

investigation would be carried out.

All staff were given contracts but the claimant's appears to have gone missing from her office, which is locked in her absence. In the terms of each employee's employment the company sickness absence procedure states:

1. *An employee must contact a member of management (for stores the Store Manager or Personnel Manager, for Head Office and Distribution, the Department Manager) before 10.30 am or 2 hours prior to the start of the working day, whichever is earlier, on the first day of their absence to explain the reason and likely duration of their absence. If for any reason the employee is unable to contact his or her Manager in person, it is the responsibility of the employee to ensure a parent, guardian or spouse contacts him or her on their behalf."*

In every store there was a direct absence phone, which was held by the Duty Manager. The number did change from time to time but all staff were notified. If you could not get through to this number you rang the front desk. All calls to that phone were recorded in the absence logbook held at the front desk. On May 3rd 2008 the claimant went "AWOL" with no explanation on his return.

On May 8th 2008 he left the front door unattended and a staff member (hereafter known as P) carrying a large amount of cash, which was in complete disregard for the strict cash procedures set out. After an investigation he was dismissed for serious misconduct and given the right to appeal within 5 days.

The witness read out the 5 points in the disciplinary procedure handbook under which he was dismissed.

1. Wilful failure to comply with Company Safety and Health regulations and to comply with responsibilities as an employee under the Health, Safety and Welfare at Work Act, 1989.
2. Absence from work without leave (unless bona fide sickness supported by medical certificates).
3. Wilful and unreasonable refusal to obey a legitimate instruction given by a department Manager or other members of management.
4. Abusive, threatening or insubordinate behaviour towards management or other staff.
5. Failure to properly complete routine documentation procedures and / or falsification of such documents.

On cross-examination she stated that she had not worked directly with the claimant. The premises was open 24 hours and was manned by 3 Security Guards during the day 2 at night. Outside the premises there were 3 full-time Security Guards who were on contract from another company. She stated that the claimant's contract was the only one that was missing from her office.

The then Front End Manager gave evidence. She knew the claimant. He worked nights and she worked days but their shifts did overlap.

On May 8th 2008 at around 7.15 am she arrived for work and observed P unattended carrying out a cash procedure. Security staff were to accompany the staff member in this procedure. The claimant was some distance away talking to a colleague (and shop steward). She approached them and asked the claimant to go over to P and not to leave her unattended. He told her it was none of her business.

She told him it was and to go over to P. He told her she was being rude. The shop steward told him she was not being rude and to go and do his job. She told the claimant's Manager (Head of Security) when he arrived some minutes later.

On cross-examination she said the claimant would not have been able to see P from where he was standing. P was aware of the cash procedures and knew a Security Guard should be with her to protect her and the cash. She could not remember if another Security Guard was on duty at the time and was not aware what his other duties were.

A colleague and shop steward gave evidence. On the morning in question he had finished his shift and was purchasing some items when the claimant came over to him. He wanted to discuss union matters but the witness told him he could talk to him later as he wanted to go home. The first witness approached them and told the claimant to return to his duty. The claimant said he would go in a minute. He told the claimant to go as he was concerned for P's safety. He was annoyed at the claimant and for the third time told him to return to work.

The witness explained that the premises was located in a very volatile area and serious incidents had occurred in the past. Security was extremely important. P was left unattended with the cash for about 10 minutes. She was a good distance away. Anyone could see it. He said that he did not have a lot of confidence in the claimant as a Security Guard. He was not strong and was too relaxed.

On cross-examination he stated that he had attended meetings with the claimant in the past. He did not know the claimant's full job description. He had, in the past, seen only 1 Guard on duty at night and had brought it to the attention of management. On the day in question he did not see any other security or Security Manager around. He did not realise the claimant was involved in the money run until the first witness came over to them.

The Security Manager and claimant's line Manager gave evidence. There were 9 security staff including him. The claimant was well trained for his position and had signed off on all his training. All staff were aware that if there was a lot of cash on the shop floor there was a high risk of robbery. This had occurred in the past.

He explained to the Tribunal the procedures for taking cash out of the office and its distribution. It was a very high-risk duty. Two people were to be present, 1 being a Security Guard and both had to sign certain documentation. On the morning in question the claimant had not carried out this duty and left P unattended with cash. 3 full-time Security Guards were in the car park but he explained that in the mornings they would be located at the front door.

He arrived on the premises at 7.50 am to be told the claimant refused to carry out his duty. He looked up the video footage and observed the claimant walking up and down on his mobile phone before speaking to the shop steward. He was some distance from P. He approached the claimant and asked to speak to him about a serious incident. The claimant told him he would not speak to him without a shop steward present. He asked the claimant to speak to him but was told to f**k off and he left.

He tried to speak to the claimant that evening but to no avail. He again tried the following morning but the claimant had left early and then went out sick. He investigated the matter, took statements and the video footage and handed the facts over to Personnel. He tried to set up a meeting with the claimant but could not until the shop steward he wanted present was available.

On September 9th 2008 the investigation meeting took place. The claimant, a staff representative, the HR Manager and himself were present. Notes were taken. The allegations of him going AWOL on May 3rd, the cash incident, an incident concerning not carrying out a duty requested of him, signing off on duties he had not done and other matters were put to him. The claimant was informed that

statements were taken that he, the witness, had viewed the CCTV.

On September 19th 2008 a disciplinary meeting took place. The witness, the claimant, the HR Manager, a shop steward, the Store Manager and a union official attended. Again the issues were put to the claimant in the lengthy meeting. He replied that he could not recall or remember the issues. On October 3rd 2008 a letter of dismissal was issued to the claimant with the opportunity to appeal within 5 days.

On cross-examination he stated that the claimant had not told him he was overloaded with work. He could recall questioning any other Security Guard about the cash incident. The cash docket, the roster for that week, the CCTV footage for the time in question, the claimant's contract and job description were not to be found and therefore could not be viewed. He said it could be possible the claimant was the only Security Guard on duty and was adequately protected that day. When asked as the store was volatile and if the claimant was the only guard on duty was the adequate protection for the claimant and the premises he replied no.

When asked why he had not posted a written warning to the claimant while he was out sick he replied that it was procedure to speak to him first. He did not accept the claimant had spoken to him in the past concerning the fact that he was rostered for very few Sundays which was at a higher rate. At the time there was no clock in system but if a Security Guard did not turn up for work he was contacted and the Duty Manager was informed. There were substantial issues with the claimant in the past. He stated that he had not checked the docket the claimant was to sign with P to remove the cash from the office and therefore did not know if the claimant had signed it.

The Head of the respondent's prevention and risk assessment section gave evidence. He overseen security for all of the respondent's many premises and reviewed the policies, procedures and training. The premises the claimant was employed in was a "critical" store and was assessed 3 times a year for security purposes. He explained that sometimes there was only 1 Security Guard on duty due to others being off, sick or on leave but they were supported by management trained in security.

He stated that a Security Guard should be present on a cash run as it was a visible deterrent and leaving a person to carry out the task alone was "not on". When cash was being moved around the premises the 3 full-time guards in the car park moved to the front door.

On cross-examination he said he had not seen the docket the claimant was to sign with P nor had he seen the CCTV footage. He said he was constantly discussing matters with unions and assessing the respondent premises to make it safer. He disputed there was only 1 Security Guard on the premises, 3 were at the door and the Night Manager was present. He was unaware if the first witness told the Night Manager what had happened. He said Security Guards were responsible for cash and should maintain protection of it.

A Manager over high-risk items gave evidence. On May 22nd he asked the claimant to "safe case" some items. He explained that some items were prone to be stolen and therefore security tagged or boxed. The claimant said it was not part of his job. However he had been trained and signed off on the training of the duty. He told the Duty Manager.

On cross-examination he said that he had not seen the claimant's job description. He explained that "safer casing" was not only carried out by security personnel. When asked he said that the claimant was asked to perform the duty as the premises was quiet but if a security issue arose that would take priority. He did not ask the other guard on duty to do the duty, as he was not in the area where the duty was normally carried out.

The Employee Relations Officer gave evidence. She advised the Store and Personnel Managers what

procedures they were to follow in this situation. She was aware of previous incidents with the claimant. She dealt regularly with unions and the issue of the number of guards on duty was never raised.

On cross-examination she stated that the claimant had been dismissed for serious misconduct. When shown the log of absence calls for a certain day and the fact that the Manager had not put a reason for the employee's absence nor signed it she said that each premises had their own procedures. She agreed it was possible that the log was incomplete for that day. She was unsure if the Store Manager viewed the CCTV footage. She did not know why the CCTV footage was not kept.

Claimant's Case:

The claimant gave evidence. He stated that he had contacted the premises on the day he was sick. He had tried the designated phone but it was switched off so he rang another number on the premises. He got a medical certificate and gave it to the person he had spoken to on the phone on his return.

On May 8th at 6.55 am he performed a staff search, which took about 10 minutes. He did not go into the office with P but did do the run with her. At one point P had a problem and had to check something. He noticed the shop steward near him and went to speak to him about issues he had regarding his work roster and the lack of another guard. He was still quite close to P and could get to her in 5 seconds. The respondent's first approached him and told him to go back to his duty. He replied that he was going. His conversation with the shop steward took about 2 minutes.

On May 22nd a Manager asked him to do some "safer casing". He normally carried out the task but on this occasion he was very busy monitoring the CCTV and told the Manager. He explained that his colleague finished his shift at 4 a.m. and he was alone till 7 a.m. He would carry out spot checks and other duties but no guards would be on the door. He had informed management in the past about it.

He agreed he had refused to attend the meeting but this was because he had no shop steward to attend with him. When the shop steward was available they attended the meeting. He had no prior knowledge of the issues that would be raised at the meeting.

On cross-examination he carried out the staff searches with the Duty Manager. He was never shown the CCTV footage or the statements. When asked he said that he had given the key to the lady who worked in the cash office before 7 a.m. He refuted he had refused to the respondent's first witness to return to his duty. He did not tell her and the shop steward it was none of their business. He refuted it was not the first time he had sworn at his line Manager. He agreed "safer casing" was part of his job but not when he was busy.

The claimant gave evidence of loss.

Determination:

The Tribunal having heard the evidence in this case determine that the claimant was unfairly dismissed for the following reasons. The procedures used by the company in the dismissal were flawed and they failed to go through the process and the steps required and those that they did use were done so inadequately. The Tribunal noted that the employee who was involved in the cash procedure did not give evidence at the hearing in circumstances where her evidence would have been expected. The Tribunal also noted that the claimant was not shown the video evidence that was used in the investigation and no notes of the conversation made during the investigation which could have been recorded and given to the claimant. The Tribunal accept that the claimant rang his employment on the day he was sick and he should not have been penalised for this communication not been

forwarded to the correct authority. The Tribunal accepts that it is managements entitlement to issue instructions to the employees and those employees should obey those instructions. It appears that the claimant was slow to do so in this case. Similarly he should not have told his superior that it was “none of her business”. By reason of the forgoing the Tribunal consider that the claimant contributed to his dismissal. The Tribunal award the claimant the sum of € 15, 000 under the Unfair Dismissals Acts, 1977 to 2007.

Loss having been established the Tribunal awards the sum of € 1,600 this being two weeks gross pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)