

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1050/2009,
MN1062/2009

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' Lehane 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:

Respondent's Case

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 this particular branch of the respondent supermarket chain 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 the 27 December 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 told the Tribunal that he found this report so usual that he initiated an investigation into 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.

The witness in the presence of the assistant store manager and another colleague met the claimant on 28 December to discuss this report. At that meeting the claimant admitted taking beer without permission from the shop and offered to either return it or to pay for its purchase. 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. 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 which matched the claimant's account.

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 situation issued him with a formal letter of dismissal citing serious misconduct for that sanction. The claimant was given the right to appeal that decision.

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 gathering. 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. 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 November 2007 as an assistant in the grocery section agreed he received some formal training around that time. He "glanced" at the honesty policy and described the purchase policy as common sense. Towards closing time on 24 December 2008 he was approached by a security man who sought his assistance in shutting down the off-licence section. That person offered him a crate of beer to take away as a gift and indicated it was being paid for by his clearing cheque. The claimant told the Tribunal that himself and another employee subsequently carried out a crate of beer each through the canteen door and into the security man's car parked nearby. By that stage the front doors of the shop were shut. He vacated the premises at 18.45.

No mention of that incident was made by him when he returned to work on 27 December. That situation changed the next day when he was invited to a meeting by the store manager who informed him of the nature of that meeting. He then exercised his right to a witness who was a work colleague. Since he did not want to get anyone into trouble this witness declined to identify or even acknowledge other involved people. He was told by the store manager at that investigation meeting that what he did amounted to gross misconduct. While suspended the claimant attended a further meeting on 30 December. On that occasion the witness gave an explanation why he took a crate of beer out the back canteen door. The witness was adamant that he had not spoken to the other two involved colleagues following his first investigation meeting and prior to another on two days later.

Determination

This hearing revealed a number of flaws in both parties' cases. It appeared that even prior to an official investigation into the alleged wrongdoing of the claimant that a senior manager concluded and indeed announced that the claimant's reported involvement in a breach of company policy amounted to gross misconduct. Such a statement at that stage could be regarded as premature and potentially prejudicial. The respondent's use and attitude towards the concept and practice of witnesses and representatives in this case left a lot to be desired. It is obvious there is a difference between those two functions and this needs to be respected and acted on. The respondent's use of the term serious misconduct as distinct from gross misconduct needs to be addressed.

It is clear from the evidence that the claimant's behaviour in this case was contrary to the respondent's policy on honesty and staff purchases. That behaviour was compounded by his inconsistency in his version of events surrounding this case which may have been overcome had the claimant produced the security guard as a witness. Perhaps his most serious error was his lack of clarity and avoidance of personal responsibility regarding his role. The Tribunal cannot endorse such behaviour in finding in his favour in this case.

The claim under the Unfair Dismissals Acts, 1997 to 2007 fails.

Since the Tribunal considers the reason for dismissal in this case as gross misconduct the appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

