

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- claimant

MN1386/08

UD1440/08

Against

EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Goulding
Ms E Brezina

heard this claim at Naas on 8th May 2009 and 23rd July 2009.

Representation:

Claimant: Mr Brian H MacMahon, Arthur E MacMahon, Solicitors,
Poplar Square, Naas, County Kildare

Respondent: Mr Mark Murphy, Murphy Gibbons, Solicitors,
Main Street, Newbridge, County Kildare

The determination of the Tribunal was as follows: -

Determination

The fact of dismissal was not in dispute. It was agreed that notice of dismissal was given to the claimant on 11th November 2008 and although the claimant was allowed to work until 13th November 2008 the claimant did not do so but put in a sick certificate for the remaining days instead. The preferred remedy of both parties was compensation.

Opening Statements

An opening statement was made on behalf of the respondent. The respondent operated a convenience shop with a post office attached. The shop included a delicatessen and the respondent employed the claimant as the supervisor of the delicatessen counter. The respondent had become

concerned about irregularities at the delicatessen counter and in particular that the contents of rolls as made up did not correspond with the bar-coded prices. All members of staff had been warned about issues relating to these irregularities. Subsequent to the warning being given the respondent discovered a roll made up and left in the counter. When questioned about the matter the claimant first said that the roll had been made up by another member of staff, but later stated that he had made the roll up for a builder. However the security video did not disclose the presence of a customer at the counter at the relevant time. Then the claimant admitted that he had made up the roll for himself. The respondent estimated that the value of the roll was €10 and stated his belief that it was the intention of the claimant to take the roll home with him without paying for it. There was no label on the roll.

An opening statement was also made on behalf of the claimant. It was stated that the claimant had been a trusted and conscientious employee who had been dismissed without a warning or a proper hearing over a single mistake. The claimant stated that he had been trusted to make cash lodgements for the respondent and its proprietary directors. On the day in question the claimant had received a telephone call from a friend who had asked for a roll to be made up. The claimant had made up the roll with two pieces of chicken breast and attached a €4 price tag. The claimant admits that this was an incorrect pricing and believes that the correct price should have been €6 but this was a mere error. For the claimant it was stated that the price of the rolls changed frequently. The claimant was questioned on the Monday and Tuesday. The disciplinary hearing occurred on Tuesday morning and took approximately 25 minutes. The two directors of the company and the claimant were present. The claimant was not offered the opportunity for a colleague to attend with him at the hearing, but the claimant was allowed to see the security video. No documentation was furnished prior to the hearing.

Respondent's case:

The Tribunal heard evidence from an employee, U, who had worked in the respondent's store for six years. She stated that understood that it was instant dismissal for any staff member was stealing product. Members of staff were not permitted to make up rolls for themselves and if they did one had to pay the proper price. U felt management had seen things going on. She verified that she had received the employee handbook from S co-director/owner. U was not in the shop on the day in question.

In cross-examination U stated that a week prior to the incident a meeting was called by the co-owners and co-directors hereinafter referred to as S and D and the message at the meeting was that one would be fired for theft.

In answer to questions from Tribunal members U stated that the respondent would not accept staff making up rolls for themselves or friends and not attaching the price sticker and if they were seen taking rolls it would be instant dismissal. They were told not to make up a roll for themselves. The reason the claimant was kept on for the week was that there was nobody to replace him. In the six years U had worked in the store she never got an order by telephone and if one did come in it would have to come through the telephone in the shop. Staff members were not permitted to have their mobiles telephones on at work. There is a staff canteen on the premises. At the meeting other matters such as uniforms and the delicatessen were also discussed. U had never seen rolls made up and left there.

Another employee, P, who had worked with the respondent for four years also gave evidence. P was at the meeting referred to by U and the evidence of P corroborated that of the previous witness in relation to the meeting. P was in work on Monday 10th November 2008 when she received a

telephone call from the claimant asking P to say that she made the roll and that the claimant had put on the sticker. P stated that she would not lie for the claimant. A few days later when she was talking with S she told S she did not make the roll and she also told him that she was asked to lie.

In cross-examination P stated that on the day in question she saw the claimant making a roll but she did not see where he put it. As far as P was aware the claimant did not receive a telephone call on the day in question. When she received the telephone call from the claimant he stated that he had made a roll and had forgotten to take it with him.

In answer to questions from Tribunal members P stated that the telephone call from the claimant was received at 6pm when she was at home and had finished work that day at 3pm. The claimant finished work after her. The respondent's telephone is only used to place orders. There was one occasion when a customer asked her to make a sandwich she priced it and left it on the counter but the customer then walked away. P worked as a shop assistant and the claimant worked as delicatessen manager.

The Tribunal then heard evidence from S who is co-owner and co-director of the business. The business is a convenience shop and post office. S is also the postmaster. At the meeting referred to by U and P the main items under discussion were not to serve oneself, putting correct prices on items, mobile telephone use and uniforms. S stated that if any employees put the incorrect price on a roll for their selves, family or friends then they would be dismissed. S had noticed certain things at the counter and he did not want theft. S also talked about how customers were to be treated. S had given a statement of terms and conditions to the employees, including the claimant. The claimant was in charge of the delicatessen and his other duties included placing orders and making lodgements to the bank if the manager was not present and also to bring cash to the office. The claimant was a senior member of staff and had the keys to the premises.

On Monday 10th November 2008, D his co-owner and co-director told him that a roll had been left behind without a sticker. S knew it was worth in the region of €10. They looked at the tape as they were initially told that a builder had come and ordered it, however when they looked at the tape it showed that no one had come in at the relevant time. On the following day, Tuesday, when the claimant was asked to give his account of matters he said that a builder had come in. The claimant was also asked if he wanted to see the tape. There was a small queue in the post office at the time. The claimant then said that he made the roll for himself and that if D and S could not trust him he would leave. D stated that a business could not be run if employees were pilfering and if this was happening in the delicatessen then it could also be happening elsewhere in the store. Staff meetings were held every three or four months.

In cross-examination S stated that the claimant was called to the office where he stated that the roll was made for a builder who did not come back to collect it. When the claimant was told the tape did not show a builder coming in to order a roll the claimant said that he made it for himself. The claimant did not say he had received a telephone call. The claimant could not have received the call as it was not shown on the tape. The Gardaí were not called. The roll was left close to the hot counter and so it was being kept warm. The roll contained two/three chicken fillets and three salad fillings with a total value of €8 or €10. The claimant was delicatessen manager and he had a supervisory role.

In answer to questions from Tribunal members witness stated that on the Monday D rang the claimant and asked him to come in the next day. The claimant stated that if he was not trusted he could not work for the respondent anymore and D agreed. The claimant resigned because of lack of

trust. A sick note was sent in, as far as he could recall, covering Tuesday evening, Wednesday and Thursday. The claimant was being allowed to work to the end of the week but he had no supervisory role. There was agreement that the contract was terminated. Theft would constitute gross misconduct. The claimant was not told he had a right of appeal.

The other co-director and co-owner, D, also gave evidence. On 10th November at 4pm D saw the roll and noted that two of the delicatessen staff members had gone home. The roll was left in the hot counter and it did not have a price sticker. On opening the roll he found that it was filled with 2 or 2.5 chicken breasts and salad. When D asked one of the staff in the shop she knew nothing about the roll. D stated that he had never seen anybody order such a big roll. The first person D rang was the claimant because he was in charge of the delicatessen. The claimant said the roll was left for a builder who was to come back to collect it. Another staff member told witness the claimant had asked her to say she had made up the roll. D and S went through the CCTV footage and it did not show a builder coming in to order the roll. D rang the claimant and asked him to come in the next morning. The claimant knew this was to be a disciplinary meeting. When the claimant realised there was CCTV he said he made the roll for himself. At the meeting the respondent stated that the claimant could be sacked over the matter. The claimant was asked if he wanted to see the tape and his response was that if he was not trusted he would leave.

The claimant was delicatessen manager and was responsible for everything in the delicatessen. Neither D nor S have a background in deli. The claimant was getting paid more than the rest of the staff. The claimant was an important member of staff and was trusted to deal with all matters including cash. There were numerous times that the claimant made decisions in relation to the delicatessen and neither D nor S interfered. On Tuesday morning the claimant came to the meeting and that afternoon the claimant came back with a doctors certificate. The claimant lived very close to the respondent's premises and it was a regular thing for him to come back after he finished work. When the claimant admitted that he made the roll for himself it then looked like he forgot to take it. There was no price on the roll and its value was €8 or €10. The claimant would have been dismissed for theft had he not first resigned.

In cross-examination D stated that if the claimant had made the roll for himself and if he had taken the roll as he had intended to do, that is theft. The claimant was not allowed to use his mobile telephone for business purposes and there was a telephone on the premises for such use. A staff member was not allowed to make a roll for oneself, family or friends. The roll had three times the normal amount of filling.

In answer to questions from Tribunal members D stated that the claimant was due to leave at 3pm on the day in question and he stayed back for a while as the school rush is also at 3pm. When things quietened down D went to check the amount of leftovers and it was then that he noticed the roll on the hot counter. D opened the roll when he realised there was no label attached. When the claimant left D was in the shop and S was in the post office. Nobody showed up to collect the roll. D and S had a very good relationship with the claimant but there had to be trust. In relation to the meeting the claimant was asked if he wanted to have one of his colleagues present and he declined. D wanted an explanation and the claimant said that if he was not trusted he could not work with the respondent and then he walked out.

Claimant's case:

The claimant gave evidence that he had commenced his employment with the respondent in September 2007. The claimant had never received a statement of the terms and conditions of his

employment. Initially the claimant was paid the minimum wage and when he moved to the position of delicatessen manager his wages increased. The claimant was responsible for the orders, cleaning and stock and he made up sandwiches and rolls for customers. The claimant had all the contact telephone numbers on his mobile and if he received a call he would only answer it while on break or having a smoke. The claimant used his mobile to contact suppliers for the business. The respondent trusted him and he did what was required of him. The claimant attended one meeting in relation to the delicatessen and a new shop opening locally and there was another meeting where the opening of the new shop was also discussed.

The claimant kept his mobile phone on silent except when he was on break or having a cigarette. The claimant received a call from a truck driver to make up a roll with chicken fillets and salad and who said he would collect it later. The claimant made up the roll and attached a sticker with a price of €4 and placed it on the hot counter. The truck driver never rang the claimant back. Sometimes the claimant would be asked to assist with a lodgement. When the claimant was asked about the roll he said it was for a builder. The claimant rang his work colleague and he did not know what to do and he was stressed with his wedding coming up shortly after that. The claimant was still at work Friday and Saturday and was off on Sunday. The claimant felt he could not work with people that did not trust him and so he left the office on the Tuesday. After receiving a telephone call to say that he was sacked the claimant was under stress and did not sleep. The claimant sent a sick note in to work and was out for the rest of the week.

In cross-examination the claimant stated that the roll was made up on the Thursday of the week prior to 10th November. The claimant used the words that he made the roll for himself because these were the words the respondent wanted to hear. The claimant had never asked a work colleague to lie for him.

In answer to questions from Tribunal members the claimant stated that he knew he was not allowed to make up a roll or sandwich for a friend. On the Thursday the claimant had received the telephone call from his friend when his telephone was on silent at around 1pm or 1.30pm and he rang his friend back from outside the door and took the order. The claimant did a lodgement at 2pm, which took a considerable length of time, and he was dropped at his house on the way back. His colleague P was still working when the claimant left. The respondent rang him around 4pm and the claimant went into work the following day Friday. The builder had ordered the roll on Thursday and by Tuesday it still had not been collected. Payment is made when the roll is collected. The claimant did not ask his work colleague to say to the respondent that it was she who made the roll. When the claimant went in to work on the Monday he heard there was going to be a meeting and it was held on Tuesday. On Tuesday D told the claimant that he was finished and he was also told he could work out the week. The claimant went to the doctor and was told to rest for a few days. The medical certificate stated he was suffering from stress however this certificate was not available to the Tribunal.

Evidence was also given for the claimant by Z. Z stated that he knew the claimant as they both came from the same city in Poland. Z had known the claimant for over four years. Z works in Ireland as a driver for a building company. Z was on the road between Castledermot and Dublin and when he was near Newbridge he rang the claimant's mobile telephone and ordered a roll. After placing his order his manager rang him and told him he had to go to Dublin. Z rang the claimant and told him he could not collect the roll. Z did not collect the roll or pay for it. Two or three times prior to this Z had placed an order by telephoning the claimant and Z would then go to the shop and pay.

In cross-examination Z stated that the claimant rang him on Tuesday to say that his employer had dismissed him.

Determination:

The Tribunal prefers the evidence of the respondent's witnesses. The Tribunal finds that the claimant resigned when confronted over the disciplinary issue and that the respondent accepted the claimant's resignation. The Tribunal accepts that had the claimant not resigned he would have been dismissed. The Tribunal finds that the employment relationship was terminated by way of resignation and that there was no dismissal by the respondent of the claimant. The claims under the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 therefore fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)