

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER– *appellant*

CASE NO.
UD1384/2009

against the recommendation of the Rights Commissioner in the case of

EMPLOYEE – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. B. Kealy
Mr. F. Barry

heard this claim at Dublin on 29th July and 21st January 2011

Representation:

Appellant: Mr. Eamonn McCoy of IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Respondent: Mr. Willie Hamilton, MANDATE, O’Lehane House,
9 Cavendish Row, Dublin 1

This case came before the Tribunal as an appeal by the appellant, the employer, against the recommendation of the Rights Commissioner reference number r-071457-ud-08/JT.

Appellant’s Case

The respondent (employee) was dismissed for deliberate damage to a time in attendance (TNA) machine. The store manager gave evidence that the TNA machine replaced the punched card system for recording staff attendance. It is an online system that records in real time. The TNA system is owned and operated by a contractor. A staff member updates his time record by placing a finger on the finger pad of the machine.

The retail security officer gave evidence. On the day of the incident, 20 September 2008, the check out manager came to him because the TNA machine had frozen, she could not set an employee up on the system. When he went to look at the TNA machine there was a clear scrape on the finger pad. The retail security officer obtained a printout of the last 8 activities on the TNA machine. The TNA machine had recorded an employee clocking in at 17.59 and another employee clocking out at

18.24. He then went to the security office to look at the recording from the security camera. A security camera is in place near the TNA machine, to monitor the door used by a security company who collect the takings from the store. The primary purpose of the camera was not for monitoring staff. The CCTV footage shows the respondent employee at the TNA machine. In the footage it is not clear that he damages the machine.

About 4 hours before the damage to the TNA machine the retail security officer was in that area overseeing a cash collection. Two pins were on top of the old card-clocking machine. When he went to examine the TNA machine one of the pins had fallen into a slot on the old machine and the other was not there. The retail security officer did not talk to any of the people he had seen in the CCTV pictures using the TNA machine. The check out manager gave evidence. On the day of the incident the TNA machine was only about two weeks in use. Not all members of staff were on the TNA system; there was some resistance to using the system. At the time of the incident it was not compulsory for staff to use the TNA machine but now the policy is no clock, no pay. When a member of staff came to work he would report to his duty manager. When the check out manager went to the TNA machine to set an employee up on it, she entered the code, then she entered the code for the employee but the machine did not read the employee's finger. The machine beeps when it reads a finger. The machine did not read her finger either. She noticed that there was a scrape on the sensor. She reported the matter to the duty manager.

The duty manager and the check out manager met with the respondent and his witness at about 7.30pm on the day of the incident. When the respondent was asked about the damage to the machine he said that he put his finger on it and he may have damaged it. There was a 5-minute break in the meeting. The respondent was not shown the CCTV footage at that meeting. When the meeting resumed the respondent said he had a pin in his hand when he touched the machine and he may have damaged it. He did not realise the machine was so sensitive. The respondent was suspended with pay and told he would be informed of the next meeting.

The store manager gave evidence. On the day of the incident the store manager was not at work. The duty manager informed him of the damage. The store manager reviewed the information collected by the duty manager. He mulled over the notes. The duty manager arranged a meeting between themselves and the respondent and his representative. The respondent arrived 35 minutes late to the meeting. They went to look at the CCTV footage in the security room. The respondent's representative said the footage was irrelevant but the store manager did not agree. The pictures showed the respondent going to the machine. He picked up a pin and with the pin in his hand he put his finger on the machine. The respondent had said, that he might have damaged the machine. The store manager did not ask the respondent why he had a pin in his hand when he touched the machine. It was an oversight that he did not give the respondent's representative a copy of the statement from the last employee who had used the machine successfully before it ceased working. The store manager was satisfied that the respondent had maliciously damaged the machine from what he saw on the CCTV footage. After the meeting he contacted HR to review his procedures. Then he phoned the duty manager and requested him to issue the letter of dismissal to the respondent.

An engineering manager from the company who is contracted with the installation and maintenance of the TNA machines at the appellant's stores gave evidence that the appellant had reported a fault on the TNA machine. Upon investigation it was discovered that the sensor on the machine had been scratched. He told the Tribunal that it required a certain level of physical force to scratch the sensor and it could not have been damaged by gently rubbing something on it.

Respondent's Case

The respondent worked for the appellant since 2003. He had a good record and there were no issues in relation to his work performance. He never received any warnings and was always on time for work. On 20 September 2008 he was working on a shift from 4pm until 10pm. At 9.30pm he was called into his manager's office and told that he could bring a work colleague with him as his representative. (RK), his manager alleged that he had damaged the TNA machine with a drawing pin at approximately 6.30pm earlier that evening. The respondent told the Tribunal that he did not damage the machine nor did he say to (RK) that he could have damaged the machine when placing his finger on it. He told (RK) that he did not damage the machine.

Under cross examination he agreed that CCTV footage shows him alone at the TNA machine for a short period as he was going for his break. He agreed that he put his hand on the old machine and then moved his hand to the new TNA machine. He denied that he ever told (RK) that he had a pin in his hand. It was suggested by (RK) at the meeting on 20 September 2008 that he had a pin in his hand while at the machines but he told (RK) at that meeting that he did not have a pin in his hand. He did not agree that that the decision to dismiss him was the correct decision.

In response to questions from the Tribunal he replied that he did not remove any object from the old machine. He was simply playing with the door of the old machine on the CCTV footage and he did not see or pick up a pin from the old machine. He accepted that the old machine had not been operational for a long time and in any event it required a card to operate. He agreed that he did not have such a card in his hand at the time he was present at the machine.

Determination

The Tribunal carefully considered the evidence adduced. This matter comes before the Tribunal on an appeal of a Rights Commissioner's recommendation dated 10 June 2009 at which time the respondent was ordered to be reinstated. The appellant was not present at the Rights Commissioner hearing and appealed the order made.

The appellant alleges that the respondent intentionally damaged the sensor pad on a clocking machine installed in the employer's premises. The appellant proposes that the respondent picked up a thumbtack or drawing pin that had been left on a nearby machine and scratched this with some force along the sensor pad. The machine was rendered obsolete and up to €2,000.00 of damage was caused. It is accepted by the Tribunal that such an allegation if found to be true, accurate and well founded would be grounds for a finding of gross misconduct warranting dismissal.

The appellant relies on the available CCTV footage of the comings and goings around the clocking machine on the afternoon in question. The Tribunal recognizes that the appellant made an assumption that the machine was working when a Mr. (N) used the machine in the ordinary course of his work. The evidence demonstrates that the checkout manager (GD) approached the machine in the course of her employment, and after a number of attempts determined that the machine was not working. (GD) gave evidence that her examination of the machine revealed a noticeable scratch on the sensor pad which could be seen as well as felt. It is worth noting that the respondent was never shown the scratched sensor pad and that the appellant relied on the evidence of (GD) and Mr. (KH) of security. Further the appellant relied on the evidence of the clocking systems manufacturer/installer whose report clearly states that a "scratch" was on a finger sensor

Returning again to the CCTV footage being relied upon by the appellant, it is the appellant's case that the only person to touch the machine between Mr. (N) and (GD) was in fact the respondent who was clearly seen to linger beside the clocking machine and appeared to be handling or touching something on the older clocking machine situated beside the newer sensor operated clocking machine. Using the same hand, the respondent moved his hand to the sensor pad on the new machine.

The appellant claimed that the respondent had picked up a pin which had been on top of the older machine and used it to draw a long scratch across the sensor pad. The respondent accepts that he was at the machines but that he was simply playing with the door on the older machine before testing the finger pad to see if it was registering him. The Tribunal has had the benefit of viewing the CCTV footage several times.

The Tribunal makes a finding on the facts that the respondent damaged the sensor pad in the manner alleged. The Tribunal in reaching its conclusion accepts that the respondent admitted picking up a pin and having it in his hand at the first interview conducted in the investigation.

The Tribunal upsets the recommendation of the Rights Commissioner and finds that the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)