

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.

UD2013/2009

against
EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.
Members: Mr. A. O'Mara
Ms M. Mulcahy

heard this claim at Dublin on 8th November 2010

Representation:

Claimant(s) : Mr. Conway O' Hara, Brendan Maloney & Co, Solicitors, Kilbride Cottage,
Killarney Road, Bray, Co Wicklow

Respondent(s) : Mr. Tom Mallon BL instructed by Ms. Sinead Casey, Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

Respondent's Case

The first witness known as (MF) gave evidence that he is employed by the respondent group as an investigations manager. He was contacted by the Managing Director of the company to carry out an investigation into irregularities concerning apparent "under the counter" payments which had occurred in the stores area of the respondent company. As part of his investigation he interviewed an employee known as (SOC), who worked in the stores area of the respondent company. (SOC) admitted that he had supplied phone watch items including inertia sensors and contact sensors to the claimant. The claimant had been employed as an engineer, installing and repairing alarm systems for the respondent company at the time. (SOC) informed the witness that he had received three separate payments for the items totalling €400 from the claimant. The witness then interviewed the claimant as part of his investigation. The claimant was accompanied by his trade union representative during the interview. The claimant denied any knowledge of receiving the items and of paying cash to (SOC) for the items concerned. Following the conclusion of his investigation which lasted a couple of months (MF) reported his findings to the respondent company. He found that while the claimant had denied that he had paid cash "under the counter" for the respondent's stock (SOC) had admitted receiving cash for three transactions. He found that

there was no direct evidence that the transactions actually occurred other than (SOC's) uncorroborated statement. He found that it was most unlikely that (SOC) would have paid €400 out of his own pocket in order to frame the claimant. His report did not contain any recommendations.

Under cross examination the witness accepted that the only evidence against the claimant was the evidence of (SOC). He accepted that (SOC) has resigned from the respondent organisation and only mentioned the claimant's name after his resignation. He accepted that he did not give the claimant the opportunity to question (SOC) as part of the investigation. He denied that he told the claimant that his (the claimant's) name was "laced in it" during the investigation.

(SOC) gave evidence that he worked as a general operative in the stores area of the respondent company for just under one year from December 2007 until late 2008. He told the Tribunal that he provided undocumented stock to two people during his time working in the stores. He provided the stock to the claimant and another outside dealer. He did so following an approach by the claimant who said to him that he would like some stock for outside work. He manipulated the recording of this stock by including it on another employee's documentation without their knowledge. He told the Tribunal that this manipulation was easily done. The claimant paid him a total of €400 on two separate occasions for this stock. He was paid the money at two different locations, one at a garage on the N11 and at a bank car park by the claimant. He accepted that he had committed theft from the respondent company and was advised by his father to admit his wrongdoing. He was suspended by the company during the investigation and eventually resigned from the respondent company. He has refunded payment in the amount of €950.00 to the company. He told the Tribunal that he is not seeking to apportion blame to the claimant and has been offered no inducement to give his evidence to the Tribunal. Under cross examination he accepted that he took advantage of a flaw in the respondent's system. He confirmed that he resigned from the company following the advice of his father.

The next witness known as (AG) gave evidence that he is a field operations manager with the respondent company and was the claimant's manager. He conducted a disciplinary meeting with the claimant on 5 February 2009. Prior to the meeting a letter was sent to the claimant in January 2009 indicating that disciplinary action may take place against him following the meeting and that he was entitled to be accompanied at that meeting. (AG) gave evidence that the claimant was accompanied by his trade union representative at that meeting on 5 February 2009 but the claimant himself did not really engage in this meeting. The witness concluded that the claimant be dismissed for gross misconduct as the company had lost trust and confidence in him. (AG) indicated that trust and confidence in employees was essential given that the respondent's engineers had access to customer's homes. The witness conveyed his decision to the claimant by way of letter dated 17 February 2009 and the claimant was given leave to appeal this decision by 26 February 2009 which he did. (AG) believed that he adhered to the disciplinary code and did not consider that there was an alternative sanction for gross misconduct under the code other than dismissal.

The next witness known as (BH) gave evidence that he is the chief operations officer of the respondent company and he heard the claimant's appeal. He did not meet with the claimant as part of the appeal process and the appeal was a paper appeal. He gave evidence that he addressed all the points of appeal raised by the claimant's union representative and that he considered the appeal independent and unbiased. Ultimately he upheld the sanction of dismissal.

Counsel for the respondent sought to rely on the case of *Looney v Looney* (UD834/1984) in support of his argument that it is not the responsibility of this Tribunal to establish the guilt or innocence of an employee but rather ascertain whether the employer, on the balance of

probabilities, acted reasonably in all of the circumstances.

Claimant's Case

The claimant gave direct evidence that he worked as a field engineer for the respondent company for four years. He installed and maintained alarm systems. Towards the end of 2008 he was requested by (MF) to attend a meeting regarding claims that he had received items of stock from the respondent's stores for which he paid cash "under the counter". He gave evidence that (MF) contacted him before their first meeting wherein (MF) informed him that his name was "laced in it". He felt bullied and intimidated by (MF). When questioned on his attitude towards the interview process the claimant indicated that he thought his views were not taken into account, that the company wanted him to admit to something he had not done and he was never given the opportunity to question (SOC). He told the Tribunal that he did not approach (SOC) in any way and could not understand where (SOC) was coming from. What (SOC) said was untrue as far as he was concerned and he refuted all the allegations put to him by the company. He told the Tribunal that he was aware that employees in the store room were up to something and there was a few bob to be made from it. He confirmed that he did not always see eye to eye with (SOC) as he was left waiting for stock by him on a number of occasions but there were no big issues between them.

Under cross examination he confirmed that he heard that some employees who worked in the stores area were making a few bob by 'dealing stock'. He did not report the matter as he did not know if it was true and it may have been just banter. He confirmed that he was aware of the garage location on the N11 and bank car park referred to by (SOC) in his evidence. He accepted that he contacted (SOC) on two occasions during the investigation as he wanted to ascertain why he (SOC) had given his name to the respondent. He could not recall if he had also sent him a text message. He felt that (MF) had been very hard on him during the investigation and also felt let down by his trade union official. He told the Tribunal that it was his view that (SOC) made the whole thing up. He has sought alternative employment since his dismissal but has been unsuccessful to date.

Determination

The members of the Tribunal have given careful consideration to the evidence tendered before it at the hearing. There was a direct conflict of evidence at the hearing but the Tribunal prefers that of the respondent. On the evidence given the Tribunal considers that the appeals procedure and grievance procedure conducted by the respondent was fair and proportionate.

For these reasons the Tribunal is satisfied that the dismissal was not unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

