

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE – *claimant*

&

EMPLOYEE – *claimant*

MN1533/2009

against

EMPLOYER – *respondent*

CASE NO.

UD1543/2009

MN1531/2009

UD1549/2009

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: Mr G Hanlon

Members: Mr P Pierce
Ms M Mulcahy

heard this claim at Dublin on 26th July 2010, 7th October 2010 and 8th October 2010

Representation:

Claimant(s): Mr Gavin McKay
Spelman Callaghan, Solicitors
Corner House, Main Street, Clondalkin, Dublin 22

Respondent(s): Ms Lorna Lynch BL, instructed by:
Ms Joanne Dignan
Byrne Wallace Solicitors
2 Grand Canal Square
Dublin 2

The determination of the Tribunal was as follows:

The claimants' representative made a preliminary application on the basis that the respondent's form T2 – notice of hearing – was not returned until July 2010 and therefore the respondent was not entitled to appear. The Tribunal decided to proceed with the hearing. These claims were heard in conjunction with another claim against the same respondent.

The respondent's representative sought that only the claimant whose case was being dealt with should be present in the room and that the other two claimants should leave. The Tribunal decided that as no application was made to have the case heard in camera it was not appropriate to ask anyone to leave the room.

Respondent's Case:

The respondent company operates a chain of grocery and clothing stores. Some of the stores have a café which is also operated by the respondent company. The claimant was employed as a till operator in the restaurant.

The Human Resources Manager (HRM) of the respondent company gave evidence that she worked at the branch of the store in question when the claimants were dismissed. She took notes at all the investigatory and disciplinary meetings. She was present at the investigatory meeting with the claimants on January 16th and 17th 2009. There was a short break between each meeting followed by a disciplinary meeting when the claimants were suspended. There were final disciplinary meetings with the claimants on January 20th 2009 when they were dismissed. The first named claimant was dismissed for consuming food without paying for it or presenting a voucher. The second named claimant was dismissed for consuming food without paying for it and for allowing others to pass the till she operated without paying for their food.

The witness contended that the purchasing policy was noted in the staff handbook and on display in the staff areas. The claimants had received a copy of the handbook. The witness processed the claimants' P45 and holiday pay.

Depending on the length of their shift staff members in the restaurant were given vouchers worth €0.89, €1.90 and €3.17 to redeem against food or their breaks. In order to claim the vouchers staff members must sign for them in the cash office. The vouchers are then produced at the till. Any excess amount is paid for in cash. The voucher should be signed and the total meal amount noted on it. No change is payable for purchases below the value of the voucher. The till receipt should be attached to the voucher and then put in the till. Employees are not allowed to carry cash and must clock out before retrieving it from their lockers.

During cross-examination the witness agreed that the purchasing policy outlined in the handbook was not written with the purchase of food for consumption on the premises in mind. The voucher should be signed by a manager before being put into the till. This policy was not outlined in the handbook, it was explained at the induction meeting. She was not aware of any agreement the claimants contended she had with the Restaurant Manager whereby she could pay for meals after consuming them. Staff did not always get their receipt signed by a manager, but they were not disciplined for this. The claimants were not dismissed for not having the receipt signed. They were dismissed for not paying.

The company considered the claimants' actions to be theft and theft is considered gross misconduct. The witness was not aware of a lesser sanction than dismissal being utilised in the case of theft. There was no detailed explanation of the disciplinary procedure at the meetings. Six members of staff in total were dismissed at the same time for similar offences.

The Security Manager gave evidence that while he was monitoring CCTV in the Store on December 31st 2008 he observed staff of the restaurant passing the till with food without paying. He checked the till printouts and staff vouchers put through the till. He informed the Regional Security

Manager (RSM) and the Store Manager. The RSM instructed he to continue his observation and to install further CCTV cameras. He monitored the restaurant for two weeks and identified six staff who had not paid for food and/or hadn't charged other staff members or members of the public.

He could not find corresponding transactions on the till for what he had observed on the staff members' trays. He did not see the staff members returning to pay for the items later.

The Security Manager conducted investigatory meetings with the staff members. The first named claimant (Claimant A) was interviewed on January 16th 2009 by the Security Manager. The HRM took notes and the Store Manager also asked some questions. The Security Manager showed Claimant A a picture of her passing the till with a tray of food. She admitted that she had eaten food and hadn't paid for it. She said that sometimes she got another employee to get her food for her. Claimant A was suspended at a meeting later that day and dismissed by the Store Manager on January 20th 2009. The letters of dismissal did not refer to the claimants' right to appeal the decision, although it is contained in the staff handbook, which the claimants had a copy of.

There was no pre-decided policy of not allowing the employees to have the Restaurant Manager or a restaurant colleague present with them at the meetings, but the Security Manager did not want anyone else who might be involved as a witness.

The Security Manager did not show either claimant any CCTV footage or any documentary evidence other than the CCTV still. She admitted taking food without paying.

The second named claimant (Claimant B) was interviewed by the Security Manager on January 17th 2009. The HRM took notes and the Store Manager asked some questions. Claimant B admitted that she sometimes forgot to pay for meals she had at the restaurant, but contended that it was by mistake.

She agreed that she had not paid for a cake and a coke on January 14th 2009. She could not explain why on January 10th 2009 she had charged a colleague for a wrap when she had a hot meal on her tray. She also could not explain why on the same date she charged the same colleague for a wrap when she had a soup and sandwich on her tray and failed to charge a customer for a sandwich. The Security Manager showed her a CCTV still. On January 3rd 2009 Claimant B had a curry but no corresponding voucher was put through the till. The claimant said that she didn't get the voucher. She said that she always had cash on her person, which was also a breach of company policy. She denied that there was a clique in the restaurant. She let staff pass by the till without charging them.

There was a disciplinary meeting held a few minutes later when Claimant B was suspended. Claimant B was dismissed by the Store Manager on January 20th 2009.

During cross-examination the witness stated that the CCTV was not played for the claimants, as they did not ask for it. Staff members were aware that CCTV was in use in the store. He was responsible for carrying out the investigation. He viewed the CCTV footage from a two and half week period from December 31st 2008. He observed from the CCTV that several staff passed the till without paying and that the checkout operators failed to make them pay. He could not find corresponding transactions on the till for what he had observed on the staff members' trays. He did not see the staff members returning to pay for the items later.

The next witness was the Regional Security Manager (RSM) with responsibility for the store at the

time of the dismissals. The Security Manager informed her of his concerns. She told him to continue his observation. When she visited the store she checked the till receipts, redeemed coupons and viewed the CCTV footage. She identified six individuals that she wanted to speak to. Extra CCTV was installed at the store.

The Store Manager gave evidence that it was brought to his attention that six staff members were not paying for food bought in the store's restaurant. After viewing the CCTV he decided to interview the staff members. He attended all the meetings with the claimants. He was satisfied that staff members were taking items without paying for them and that till operators were not charging certain people. The onus was on till operators to charge for everything on a tray. He spoke to the Restaurant Manager and she was adamant that procedures were being followed. He dismissed the claimants on January 20th 2009.

During cross-examination the Store Manager stated that the Restaurant Manager was not at the meetings as he did not consider it necessary. The claimants were not advised in the letter of dismissal that they had an opportunity to appeal the dismissals. The Store Manager was unaware of the appeals process on the first day of hearing but he corrected himself on the second day and confirmed that the company has an appeals procedure which is contained in the staff handbook. He did not think it was surprising that the Restaurant Manager was unaware of what was going on. He notified her that her department was under observation at a meeting on January 16th 2009 prior to the investigation meetings.

The Restaurant Manager gave evidence that she commenced as restaurant manager in the summer of 2008. There was no policy of staff members paying later if there was a queue. Prior to her commencing at the Store the vouchers were kept by the till. When she started she instructed staff members to collect their vouchers individually from the cash office upstairs before their breaks. It sometimes happened that a staff member would collect them for other employees but she told them they should collect them individually.

During cross-examination she agreed that it was a major investigation of her section. She only found out on the day the investigation meetings started. She was asked about the procedures in the restaurant and if she knew what was going on. She said she was unaware of staff not paying for meals. There was no variation in the policy. It was an exception that a staff member collected the vouchers from the office on behalf of other staff members. Staff members always queued up to pay for their meals in advance even if there was a queue. She was very surprised by the situation. She presumed she was under investigation as well.

Nothing had stood out to her in regard to stock loss or returns. She had not observed staff members not paying at the till. She was busy at her work.

Claimants' Case:

Claimant A gave evidence that she normally had a scone for lunch, valued at €1.80. After the vouchers were moved to the cash office she didn't go to claim them as they were upstairs and she had arthritis. Other colleagues collected them for her when they went to the cash office for the shopping for the café. She normally got her colleagues to get her food and she believed that they paid for her with a voucher. She contended that she had never knowingly taken food without paying for it. She disputed the allegation that there was a clique in the restaurant.

It was normal in the restaurant for staff to pay for their food after they ate. She contended that the

Restaurant Manager was aware of the practice. She claimed that the notes of the meeting were not accurate as they did not reflect her request to have the Restaurant Manager with her and that this request had been refused. She did not sign her vouchers. She had not been reprimanded for it. When the vouchers were moved to the cash office the Restaurant Manager told them that they had to sign for them. She did not mention it again.

She normally had her lunch with a particular colleague who got her a scone while she went for a cigarette. When she said at the interview that she hadn't paid she meant that her colleague had gotten her food and had gotten her voucher for her. If she didn't have a voucher she paid with cash which she kept in her handbag in the kitchen. She considered that they were guilty of not following procedure concerning the vouchers, but the value of the voucher they were entitled to covered their meals.

During cross-examination Claimant A contended that she hadn't said at the meeting on 16th January 2009 that she had paid cash for her scone on January 14th 2009, as they had not asked her that. They had shown her the picture, but they did not accuse her of anything. When she said she was being lazy she meant by not collecting the vouchers herself. The claimant gave evidence of her loss.

Claimant B gave evidence that she did on occasion forget to pay for her meals, but that it was by mistake. She considered that dismissal was very harsh for what had been an error on her part, which she had admitted to when asked about it. She contended that it was normal practice for staff members to pay for their meals after consuming them. She believed that the Restaurant Manager was aware of it, as she had passed her with food on her tray when the Restaurant Manager was operating the till.

She normally got her bag from the kitchen, where the restaurant staff members kept their bags, and paid for her food afterwards if she did not have a voucher. She rarely had a full meal in the restaurant. She could not explain why the till receipt showed that she had charged a colleague and a customer for items of a lower than what was on their tray as viewed from the CCTV. The claimant gave evidence of her loss.

Determination:

Based on the evidence adduced the Tribunal does not accept that there was a general conspiracy within the restaurant regarding the non-payment of food and considers that generally the procedure around the use of vouchers was lax.

In regard to the first claimant (ref: ud1543/2009) The Tribunal heard clear evidence that another member of staff got her lunch for her. The Tribunal cannot discern any intention to steal on the part of this claimant. In this case the Tribunal finds that the sanction of dismissal was excessive. Accordingly, the claim under the Unfair Dismissal Acts, 1977 to 2007, succeeds and the Tribunal awards the claimant €9,500 (nine thousand five hundred euro). Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, also succeeds and the Tribunal awards the claimant €740.00 (seven hundred and forty euro) in respect of two weeks' notice.

In the case of the second claimant (ref: ud1549/2009) the Tribunal heard evidence of five occasions when the claimant either failed to pay for food she consumed or intentionally undercharged others for their food. The Tribunal considers that the sanction of dismissal was not excessive and accordingly the claim under the Unfair Dismissals Acts 1977 to 2007 fails. Accordingly, The claim

under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)