

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1675/2009
MN1637/2009

against

EMPLOYER – *respondent*

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

The determination of the Tribunal was as follows:

The claimant's 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. This claim was heard in conjunction with two other claims 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 claimant was dismissed. She took notes at all the investigatory and disciplinary meetings. She was present at the initial meeting with the claimant on January 16th 2009. There was a short break followed by a disciplinary meeting when the claimant was suspended. There was a final disciplinary meeting on January 20th 2009 when the claimant was dismissed for consuming food without paying for it and allowing others to pass the till she operated without paying for their food. The witness processed the claimant's P45 and holiday pay.

The witness contended that the staff purchasing policy was noted in the staff handbook and on display in the staff areas. The claimant had received a copy of the handbook.

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 claimant contended she had with the Restaurant Manager whereby she could pay for meals after consuming them.

The witness considered that the company was at a loss of €20 to €30 because of the claimant. The company considered the claimant's 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. All options were considered between the first and second meetings on January 16th 2009. It didn't always happen that staff members got a manager to sign the voucher but they were not disciplined for this. The claimant was not dismissed for not having the receipt signed. She was dismissed for not paying. On January 12th 2009 the claimant said she had a salad and a portion of batch bread which should have cost €5 or €5.50, but there was no receipt or voucher for that amount in the till.

The claimant seemed upset when the witness went to collect her for the second meeting on January 16th 2009. She asked the claimant if she was alright, but she could not recall anything else. The claimant was asked at the meeting if she understood the seriousness of the situation. There was no detailed explanation of the disciplinary procedure. Six members of staff in total were dismissed at the same time for similar offences.

The Security Manager who initiated the investigation gave evidence that he came to the conclusion from observing CCTV footage of the in-store restaurant that some members of staff were taking

food without paying for it. He informed the Store Manager and the Regional Security Manager. He was present at the investigatory meeting with the claimant on January 16th 2009. The Regional Security Manager led the questioning. He showed the claimant a still from the CCTV. He was present for the third meeting, but not the second. The Store Manager was the decision maker.

During cross-examination the witness stated that the CCTV was not played for the claimant, as she 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 over 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. This was not put to the claimant. The witness checked receipts from the day to see if she had paid for her meal later but he could not find any evidence of it. The claimant admitted at the meeting that she had not charged other staff members for meals and that she had taken items without paying for them.

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

At the meeting of January 16th 2009 the RSM asked the claimant to explain the staff purchase policy. She put the incident of January 12th 2009 to the claimant. The claimant accepted that she turned a blind eye for certain people that didn't pay for goods. Tea was not an issue as it was established that the employees paid for a box of tea bags, which they shared. She had not heard prior to the Tribunal hearing that there was any policy of paying for food afterwards. The RSM was not part of the decision making process.

During cross-examination the RSM stated that the claimant did not appear confused at the meetings. She was unaware that the claimant suffered from depression. The claimant initially denied that she hadn't paid for the goods, but later when the witness put to her that there was no evidence of her paying she accepted that she must not have paid. She didn't feel it was necessary to show the claimant the CCTV picture. She agreed that on January 11th 2009 the claimant had purchased goods with a voucher and paid the difference. She spoke to the Restaurant Manager after the meetings and she was unaware of staff paying for meals after consuming them. This was not put to the claimant. The claimant did not raise at the meeting that there was any agreed system of paying afterwards. The meeting lasted fifteen to twenty minutes. The claimant was asked 41 questions.

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 was not at the first meeting with the claimant. He read through the minutes of the first meeting and attended the second.

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. There was no coupon for the meal the claimant had and there were incidents when she did not charge other staff.

The claimant was a bit upset but not so much that she was unable to continue with the meeting. He explained that it was a dismissible offence and suspended the claimant. He spoke to the Restaurant

Manager and she was adamant that procedures were being followed. The claimant was dismissed on January 20th 2009.

During cross-examination the Manager stated that the Restaurant Manager was not at the meetings as he did not consider it necessary. He considered that the claimant was guilty of collusion as she did not charge others. Prior to meeting the claimant he viewed the CCTV of the 12th January 2009. He made up his mind after viewing the footage that the claimant was to be dismissed. There was no need to view any more footage as he was satisfied that company policy had been broken and it was therefore irrelevant. The claimant was not offered to view the footage.

The claimant was not advised in the letter of dismissal that she had an opportunity to appeal the decision. 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 process which is contained in the staff handbook. He wasn't aware that the claimant suffered from depression. 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 her evidence after the claimant's evidence. She commenced as restaurant manager in the summer of 2008. She stated that she could only recall one occasion when the claimant had come to her to pay for her food after having eaten it. She had no recollection of the claimant paying her for her food on January 12th 2009. She was not aware of any till receipt reflecting the sale. 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. She knew the claimant had personal problems, but it didn't affect her work.

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. Staff 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 not paying at the till. She was busy at her work. The claimant came to her once to pay for a meal she had forgotten to pay for at the time. She did not reprimand the claimant for this as it was a once off. She considered the claimant to have been a trustworthy person. She trusted the rest of her staff as well.

Claimant's Case:

The claimant gave evidence that she worked at the respondent company's in-store café for two and a half years. She contended that the policy whereby staff could pass the queue for the till if busy and return later to pay had always been there. No one had told her about it, but the Restaurant

Manager was aware of it, as she had passed by her when she was on the till with her tray of food on occasion and showed her what was on her tray. On those occasions the claimant had returned after her meal to pay with either cash or a voucher.

The claimant contended that she always paid for food she consumed. She did not always get her receipts signed by a manager, but she had never been spoken to about it.

The notes of the investigation meeting stated that the claimant did not wish to have someone with her at the meeting. The claimant contended that she had asked for the Restaurant Manager and she was refused. She then asked for a colleague from the restaurant and was again refused. They said she could invite an employee from the cash office or from the shop floor, but as she did not know anyone from those areas she refused. This was not recorded in the notes. Neither was the question RSM asked her about having brown bread for her lunch on January 12th 2009. The claimant had corrected her and said she had batch bread.

At the meeting she explained the staff purchase policy as 'whatever you take you pay for'. If she didn't have a coupon she paid with cash. If she forgot to pay she went to the Restaurant Manager to pay when she remembered. She contended that she had paid for two batch bread and small salad on January 12th 2009. She used a voucher and put the sale through the till herself or someone else put it through. When it was put to her that there was no evidence that she had paid she replied that she must not have. They showed her a large printout of the till. She was shown one picture of her sitting at the till and a colleague passing with a tray of food. She contended throughout all the meetings that she had paid for the goods she had consumed on January 12th 2009.

She agreed that she let others pass without paying, but understood that they would return later to pay. She didn't charge for butter or jam as they came with a scone. Butter came with bread. Staff had their own teabags in the kitchen which they purchased themselves. She did not know why she had agreed in the meeting that she had turned a blind eye to staff not paying. She contended that when she said staff didn't pay she meant that they didn't pay immediately but always came back up to pay later and that she charged everyone. She was very nervous at the meeting.

She suffered from depression and anxiety and is on prescribed medication for the condition. She did not inform the company of this at the time. She found the meeting very distressing. The RSM questioned her in a very aggressive manner.

She was suspended at the next meeting held after a short break. The notes of the meeting didn't reflect that she expressed to the HRM on their way back to the meeting room for the second meeting that she was very upset and didn't understand what was going on. The claimant gave evidence of her loss.

During cross-examination the claimant agreed that it was serious if food was taken without being paid for. She agreed that there was no queue in the picture shown to her at the meeting. The colleague in question was only on a thirty-minute break and would have paid later. If she paid by coupon she would have had to clock out, go upstairs to the cash office to get the voucher, and come back to get her food. She contended that on January 12th 2009 she paid the Restaurant Manager for her food.

She understood that her evidence was at odds with what was recorded in the notes of the meetings but she contended that it was not clear on the day and that she got confused. She said several times during the meeting that she was confused. She contended that the Restaurant Manager was aware

of her depression. She did not give further explanations at the second meeting or the dismissal meeting. She disputed where it stated in the minutes that she said her reason for not paying was just laziness. She contended that she was not a lazy person and that she would not have said that.

A practice had developed whereby whichever staff member was buying the restaurant ingredients in the supermarket would collect vouchers for the staff on that day and leave them in a pouch beside the roster.

She agreed that she was given a company handbook, but she was not aware of the right to appeal.

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.

The Tribunal does not believe that the claimant intentionally took food without paying for it. She understood that employees paid for their food after consuming it.

The Tribunal finds that the sanction of dismissal was excessive in this circumstance. Accordingly, the claim under the Unfair Dismissal Acts succeeds and the Tribunal awards the claimant €8,500 (eight 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 €660.00 (six hundred and sixty euro) in respect of two weeks' notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)