

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE

- *claimant*

CASE NO.

UD346/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr. J. Reid
Mr G. Whyte

heard this claim at Dublin on 17th May 2011
and 2nd September 2011

Representation:

Claimant: Ms Grainne Fahey BL instructed by O'Connor & Bergin, Solicitors, Suites 234-236,
The Capel Building, Mary's Abbey, Dublin 7

Respondent: Mr. David Farrell, IBEC, Confederation House, 84-86 Lower Baggot Street, Dublin

The determination of the Tribunal was as follows:

Preliminary issue

At the commencement of the hearing the respondent's representative explained that the claimant was advised of his termination by telephone which was confirmed by letter on the 13th July 2009. The claimant lodged his T1A form on the 15th January 2010; the claim was lodged outside of the six month time limit from the date of termination of employment imposed by the Unfair Dismissals Acts, 1977 to 2007.

The claimant's representative outlined that the claimant had appealed this decision and the final appeals decision issued on 25th August 2009 confirming the claimant's termination.

The Tribunal considered the matter and decided that the claimant's date of dismissal was 25th August 2009; therefore the claim was in time under the Under Dismissals Acts, 1977 to 2007.

The claimant was employed as a security officer in a large 24 hour supermarket and was dismissed for non-payment for goods that he consumed while on duty.

Respondents Case

The security manager of the supermarket at the time of the claimant's dismissal gave direct sworn evidence on behalf of the respondent. Part of his role as security manager is to monitor theft, stock losses and to protect the company's assets. The claimant was employed as the night security officer and part of his role was to ensure nobody left the store without paying for goods.

He explained that the shrinkage of stock in this store costs about €30,000.00 per annum, this includes staff thefts which accounts for about 25% of this loss. Examples of staff thefts are letting friends go through checkouts without paying, staff consuming goods without paying and theft. In trying to combat this shrinkage they retained security officers to prevent goods leaving the store without being paid for. They also have designation areas for the consumption of goods and wallets or personal items should not be carried by staff when they are on duty.

He referred the Tribunal to the company's "Honesty Policy" which states:
"Assisting or attempting to assist others in the theft of staffs' property or of company assets of any types, (or in the company care), regardless of value, if found guilty will be subject to dismissal and /or prosecution."

He further referred the Tribunal to their "Staff Purchases" policy which states:
"All purchases must be produced and paid for at the time of purchasing. No credit or I.O.U.s are permitted."
"Stock cannot be held for staff to purchase at a later date. The only exception to this is where the store manager authorises it."

All purchases made by staff within the store should be kept in designated areas and the receipt for purchase must be kept with the goods.

The claimant commenced in this store in January 2009 to cover for this witness holidays. The claimant was returning from a career break. The claimant was an experienced officer and was fully aware of the respondent's policies and procedures.

The incident involving the claimant occurred on the night of 11th June 2009 and he was informed of it the following morning by a member of staff of the petrol station (hereinafter referred to as L). The claimant had consumed two items and had not paid for them. The witness viewed the CCTV footage where he saw the claimant taking a mineral and a bag of crisps and then he walked towards the till and consumed the goods. The claimant told the staff in the petrol station he had forgotten his wallet and would return later to pay. The claimant did not return to pay for these items.

The witness copied the CCTV footage and aided the store manager in watching same and gave the store manager the copy. After this he was not involved in the claimant's disciplinary process as it was a serious incident.

Under cross examination he explained that he used to work nights in the store also in late 2008, it was customary to have two night security officers on at this time. However due to cutbacks this was cut to one security officer. The night security officers work a ten hour shift with one hour fifteen minutes for breaks. Their duties are to assist and monitor with the cash run, also check in deliveries of bread and milk etc., monitor the store and petrol station. The officer would generally not have to visit the petrol station as there are 12 cameras located here.

He was told that the claimant was fully competent and had previously received training, he was not

aware that the claimant had not been given a staff manual or honesty policy. He was not aware that the claimant found it difficult to take his breaks while working nights and recalled when the witness worked nights he would liaise with the store manager who would cover him. He explained if a delivery arrived while the security officer was on break, they could delegate this to the night store manager. There was a canteen on the premises for use by staff.

The claimant's representative outlined to him that it was the claimant's practice that every night he would go to the petrol station have a can and a bag of crisps and take his 20 minute break there. He would also pay for the goods he consumed. Witness said there was no issue made of this as he was not aware that this was the claimant's normal routine. The security officer that morning informed him of the incident; L told him directly about it at a later stage.

On the second day of the hearing the store manager since January 2009 gave evidence. He is with the parent company for 12 years.

One of the staff of the petrol station approached him and told him that he felt aggrieved that he had to pay for goods he consumed from the station while the claimant had eaten goods the night 11th June 2009 before and had not paid for them. He informed this member of staff he would look in to this. He asked the security manager to check the CCTV, who confirmed that the claimant had taken a drink and a packet of snacks, ate them and had left the station without paying for them.

On Saturday at about 7.15am he approached the claimant and informed him that he needed him to come to the office to talk to him about a serious situation and that he might want to bring a representative with him. Present at this "Pre investigatory meeting" were witness, claimant, the in store trade manager who took notes and the stock controller who was the representative for the claimant. Minutes of this meeting were produced in to evidence. He outlined the incident to the claimant whose initial response was "Oh God, I forgot to pay for them" and explained that his wallet was in the main store and he had forgotten to go back and pay. He explained to the claimant that they did not operate a "post purchase policy" and that not paying for goods is gross misconduct. He suspended the claimant on full pay pending an investigation into the incident.

The investigation meeting with the claimant took place on the 26th June 2009, present at this were this witness also the personnel manager, and the claimant's union representative (CB). Notes of this meeting were produced in to evidence. They firstly revisited the notes of the first meeting 13th June 2009. He asked the claimant if he had anything further to add, the claimant reiterated that he had forgotten to pay. He explained to the claimant that they would take the factor that the claimant had not denied it into account. There had been gossip in the store surrounding the incident which he addressed. This witness explained he had commented on the claimant's health at this meeting as he suspected the claimant had taken the whole situation badly. The next meeting was set for the 30th June 2009.

He referred to the statement provided by the staff member (L) in the station who had brought the incident to his attention. He could not recall if this statement was presented or provided to the claimant. This statement is dated 29th June 2009 L was on annual leave and he had to wait until he came back to obtain same. This statement outlines that the claimant called over to the station as usual, he took the crisps and drink and after that found out that he had no money with him. The claimant told him he would pay later and left the empty packets beside the till.

Present at this next "investigation" meeting were witness, claimant, personnel manager, CB union representative and JP union official. He explained that the notes of this meeting should have been

titled “disciplinary” not “investigation”. This was the last meeting with the claimant before he made the decision to dismiss him. The union official on the claimant’s behalf explained that the claimant’s role was pressurised and that there was a vacancy for a second night security officer. Witness explained that previously there had been two night security officers but the company had decided to cut back to one officer due to a drop of sales within the store, hence there was no vacancy. This meeting ends with an arrangement for another meeting on the 3rd July. There was no other meeting.

The final role of this witness in the process was to make the decision to dismiss the claimant. He considered all the facts in this case and outlined his reasoning. The claimant’s main role is to protect the store’s assets and as part of his role it is his duty to enforce their honesty policy but through his actions he had broken this policy himself. He had consumed goods before purchasing them which is against company policy. The claimant realising that he had no money to pay should have returned to pay for the goods immediately. At no time during the course of the disciplinary process had the claimant said he was under pressure and could not do his job properly.

The CCTV footage was offered to the claimant and his union representative but as the claimant had admitted the offence as far as he could recall the claimant did not want to see it.

Under cross-examination he explained that the claimant had been a security officer for a number of years, he had received training around the honesty policy while some procedures may have changed while he was on his career break on his return the security manager would have spoken to him about changes. The claimant never raised any queries regarding procedures. The fact there is no record on file to show the claimant received the honesty policy did not mean he did not receive it. The union had made representation to the company about providing two night security officers.

He had no issue with the claimant taking his break in the petrol station however they do provide canteen facilities for this purpose. It is only against company policy to carry your wallet while on duty if you are working with cash. L informing him of the incident initiated the investigation subject to the viewing of the CCTV. He did not record or take note of his first conversation with L. The claimant’s representative raised the fact that when L first told him about the incident it was because L felt aggrieved that he had to pay for goods consumed while the claimant did not. However the written statement provided by L makes no mention of this issue and states “I think he might forget to come back to pay for that”. The claimant was told that one staff member in the petrol station had reported him to the manager for eating goods and not paying for them.

The claimant’s representative asked him to explain the dishonesty in the claimant’s actions. The claimant consumed products without paying for them, nor did he return to pay for the goods. The claimant had offered to return to the process of getting his receipts signed; however this was not helpful as the claimant had already broken the bond of trust. He had considered if the claimant had genuinely forgotten but he concluded the claimant had not forgotten. He did not accept the reason that the claimant had forgotten his wallet as a plausible excuse for a security officer. He would be shocked if the claimant had never received a copy of the respondent’s honesty policy.

He did have another meeting with the claimant to inform him of his decision to dismiss him; however he had no note of this meeting. He telephoned the claimant’s union official about his decision but the union official refused to inform the claimant that he was dismissed.

Next to give evidence on behalf of the respondent was the then regional development manager who was covering for maternity leave in this role. The claimant appealed the decision to dismiss him to

her. The claimant's union official sought the CCTV footage at this stage and as far as she was aware he got to view same. The appeal meeting was held on the 17th August 2009 present at this meeting was witness, claimant, his union official, shop steward and CB the union representative. Witness original notes of this meeting were produced in to evidence. She explained to the Tribunal that at the time of the claimants appeal the company was going through restructuring and there were other notes of staff she had spoken to during the course of her investigation however these notes are missing.

At the meeting the union official explained that the claimant had been brought to the first meeting under false pretences that the store manager had told him it was about a transfer. There had been gossip around the store during the course of the investigation and disciplinary meetings mainly that the claimant would be coming back to work on the store managers terms, the union official put forward this as an argument that the claimant had not realised the seriousness of his actions. The claimant also stated he did not speak to anyone in store regarding the events. They took a break at this stage as she had noticed that the claimant was visibly upset.

During this break outside the meeting the claimant's union official raised the issue of the claimant's illness with her, and she queried the relevance of this with him.

The meeting resumed and the union official raised the following issues, the meeting scheduled for the 3rd of July was cancelled the store manager had telephoned and informed them of this. The store manager informed the union at this stage of his decision to dismiss the claimant and requested them to tell the claimant of his dismissal. There were no training records in place for the claimant in some aspects of the respondent's policy. At no point did the claimant try to defraud the company, he had not tried to conceal the items and furthermore he was doing the work of two people that night. The claimant could not recall his lunch break that night. The claimant had given eight year's service to the company and the punishment meted out to him was so severe. The witness assured the union official that she would address the issues raised within the appeal meeting.

After this meeting the witness commenced her investigation she had four issues to deal with.

1. Reason given for the first meeting on the 13th June 2009 was misleading
2. Hearsay/gossip within store did it influence decision to dismiss – sanction was too harsh
3. A new statement was provided by CB union representative who was the claimants representative from the beginning of the process
4. The procedures e.g. length of time and verbal dismissal

She explained there are no statements available in respect of this as they were lost while the company were transferring their administrative functions to India.

In respect of the first issue the store manager in evidence accepted that he gave the claimant another reason for the meeting when he contacted him to come to the office.

The hearsay or gossip did not influence the decision but “the severity of the actions of the *claimant* whereby he breached the bonds of trust”

The new statement provided was by CB who at the time of the incident was a trainee shop steward. Within this statement she raised the fact that she had not been comfortable attending the meetings and had raised this with the HR manager. The HR manager had informed her that the claimant would not be losing his job so on that basis she continued to attend the meetings. As part of her

investigation she could substantiate that this conversation had taken place, however it was after the meeting that the severity of the claimant's actions had come to light and after this the union official was also in attendance.

The length of the process was required to investigate all facts of the incident and to allow the company to come to the right decision.

She upheld the decision to dismiss the claimant after considering all aspects. The claimant had received training in his role of security officer; it was his role to ensure there was no theft. He should not have consumed the goods without paying for them. She explained you could see when he had forgotten his wallet that he leaves the empty packages, however he had loads of time to pay for them before the store manager approached him. She had considered a lesser penalty but the respondents operate a zero tolerance when something is consumed without being paid for or theft.

Claimants Case

The claimant gave direct sworn evidence. He has worked 10 to 15 years in security and has never been accused of dishonesty. In 2006 he was working in another of the respondents' store when he went part-time because of his illness, he had been called in to the office on several occasions because he had been out sick. He told the store manager of his condition and the HR manager was also made aware, they informed him that head office would have to be told.

He then went on a career break and his return date was 9th January 2009. He explained that he had difficulty in arranging his return to work with the respondent, and was eventually given two options one of which was to work the night shift in the store where the incident occurred. On his return he met with the security manager who told him things had changed. The security manager told him he would sit down with him regarding training but this never happened. He was never given any documentation on his return to work.

The claimant described his typical nights' work. He started at 22.00 when he would close the off licence, organise the changeover of the self scan check outs and at 23.00 he would check on the petrol station. As he was the only security officer on he would have to take his breaks when he could. Previously there used to be two night time security officers. In the petrol station he normally took his first break of about 20 minutes where he would drink and eat a snack. It would depend on what the staff member was doing in the petrol station as to when he would pay for the goods he consumed.

On the night in question he went over to the petrol station and got a drink and a packet of crisps and flick through a newspaper. When he took the drink and crisps one of the staff members was serving through the hatch while the other was doing paper returns, so he decided to wait and pay for them. When he went to pay he realised he had no wallet with him and he told the staff he would be back. He went back to the main store; he had a busy night and totally forgot to return. He went home in the morning got some sleep and returned again at 22.00.

The next morning when he was about to go home a staff member approached him and told him that the store manager wanted to talk to him. He telephoned the store manager who informed him that he wanted to speak to him about a transfer and told him it would not be nice. MMC came with him in to the office and the store manager explained to him about the incident in the petrol station. The claimant immediately knew what he was talking about and admitted it straight away. At this meeting the store manager did not tell him that L from the station had reported the incident. No

sanctions were discussed either at this meeting.

He received a telephone call to go to the next meeting and telephoned CB to accompany him. CB in turn contacted the HR manager who informed her that the claimant would not be losing his job. It was at this meeting that he received a copy of L's statement. He had received a telephone call on the 3rd July 2009 and was informed that there was no meeting that day and the store manager told him he was dismissed.

He thought the penalty for his actions was too harsh; he was firstly called to the office on false pretences. The store manager had spoken to another security officer about the case and about the claimant returning on his terms. He, the claimant never spoke to anyone in store about the case only to his union.

After he revealed his medical condition to the respondent he was called into the office about coming back full-time. LOL in head office was aware of his medical status from this time and during the course of the disciplinary process she responded to some of the letters. He was never given any additional statements regarding his appeal.

He gave evidence of loss.

Under cross examination he explained he did not accept that they were not aware of his medical condition as LOL was. He accepted that regional development manager who carried out his appeal only heard of his medical condition at the appeal meeting. He received no training on his return from his career break. While it was his job to ensure there was no theft, it was difficult when he was doing an 8-9 hour shift on his own as well as doing other stuff that was not in his role. It had got to the stage where he couldn't take a break as the security manager wanted to know why there was nothing noted in the log book. If he had known what the first meeting was about he would have brought somebody from the union with him.

In reply to questions from the Tribunal he was never told he could have a full time union official accompany him to the investigation meeting of the 26th June 2009. He had forgotten to pay and when he returned to work on the Friday he also had forgotten. If somebody had said to him you never paid at this stage he would have settled up straight away. His wallet on the night in question was in the office, and somebody must have called him when he returned to the store. He only recalled not paying when the store manager informed him at the meeting on the Saturday morning.

A union official gave direct sworn evidence on behalf of the claimant. He confirmed that the respondent was aware of the claimant's medical condition. Over the years he has been involved in cases of dishonesty and theft, but this case is different, dishonesty is proven with intent and would lead to dismissal. He had dealt with other cases where people had taken papers or not got their receipts signed where there would be disciplinary procedures but they would not be dismissed.

Determination

The Tribunal having heard the evidence of the respondent is not satisfied that the various meetings including the original meeting (26th June 2009) were carried out in a fair manner to the claimant. It would appear that the initial meeting with the store manager was based on a false premise. No indication had been given by the store manager that in fact the meeting was called as an inquiry regarding the incident on the 11th June 2009.

From the evidence furnished to the Tribunal it would appear there had been no breaches of

discipline or complaints against the complainant over the period of his employment, the Tribunal find that the dismissal was unfair.

In the circumstances it would appear that compensation is the most suitable remedy. It is also the view of the Tribunal that there was a significant element of contribution by the claimant and in considering this the Tribunal award the claimant the sum of €32,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)