

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-Claimant

CASE NO.
UD353/2010
RP526/2010
MN323/2010
WT156/2010

against

EMPLOYER

-Respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne
Ms S. Kelly

heard this claim at Kilkenny on 23rd June 2011 and 29th September 2011

Representation:

Claimant: Mr. Padhraic Lyons B.L. instructed by Noel Smyth & Partners, Solicitors,
22 Fitzwilliam Square, Dublin 2

Respondent: Mr. Stephen Barry, Eversheds O'Donnell Sweeney, Solicitors, One Earlsfort
Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case:

KS gave evidence that he is a management and human resources consultant with many years experience. He has provided consultancy services to the respondent company for a number of years and has advised the company in areas of productivity, contracts, handbooks and other issues.

In early August 2009 he received a telephone call from the Managing Director who stated that he was very concerned about what he had viewed on the CCTV. Following an alarm being triggered at the company's premises, the Managing Director reviewed the CCTV footage. It appeared from the footage that the claimant removed product from the respondent's premises on a number of occasions. KS told the Managing Director that the matter would have to be investigated and the individual concerned provided with an opportunity to be heard.

On August 2009 a preliminary investigation meeting was held between the claimant and the Managing Director. The minutes of this meeting were opened to the Tribunal. KS was present at

this meeting as a note-taker. The claimant had an issue with KS being present at the meeting. The claimant said at the meeting that he wanted to sort the matter between himself and the Managing Director.

The terms of reference document for the disciplinary investigation was opened to the Tribunal. KS stated that this document was prepared along with a letter to the claimant regarding a period of suspension. He explained that the outcome of the meeting would either be a reasonable explanation from the claimant with which the Managing Director would be satisfied, or an investigation would have to be undertaken. A letter to the claimant dated 17 August 2009 informed him of what would happen if an unsatisfactory explanation was provided. A copy of the company's policy and procedures for disciplinary investigations was given to the claimant. At the meeting on 17 August 2009, the claimant said that he took three or four items and put them in a Range Rover. The claimant said that he told the Managing Director that he needed a couple of doors. KS asked were these doors that the claimant had got already and asked if they were for the trade or for personal use. The claimant said they were for personal use and gave the value of them. The claimant said that he had not left a record of taking the product. He said if there were anything else it would all be on the CCTV. KS told him that he was looking for the facts and the claimant said that no one else had knowledge of what he had done and that he was embarrassed. KS told the claimant that he would get a report of the investigation. The claimant was suspended while the investigation was conducted.

KS undertook a full investigation. On the 18 August 2009 he asked Ms. K to prepare all of the CCTV footage. From the footage it appeared that the claimant usually put the products into his Range Rover but other times he used his car. There was no doubt that it was the claimant on the CCTV footage. KS also spoke to the Managing Director to check if any of the claimant's actions on the CCTV footage were permitted and it was confirmed to him that they were not permitted actions.

KS met with the claimant on 19 August 2009, as part of the investigation. KS provided details to the claimant of his visits to the company premises on five occasions between 12 July and 3 August, in addition to the visit on 15 August 2009. The claimant accepted that all the activities had occurred and that he had removed the products from the premises. The claimant provided a figure of about 20 items in total (the actual figure was 24 boxes of main products plus one small box). The claimant said that he knew he had done wrong but that he had "...not been man enough to stand up and tell him." At the meeting the claimant accepted the information supplied by KS.

KS prepared his report on 20 August 2009. The recommendation contained within his report was that the claimant had acted wrongly and that the company's disciplinary procedures should be invoked. It was difficult to consider the claimant's actions as anything other than theft. The directors sign the company accounts and the claimant, as a director, was therefore signing accounts that he knew to be incorrect. KS thought that the explanation offered by the claimant on 19 August 2009 did not stand up to scrutiny. He had stated that the products were to complete orders for a friend. He accepted that the boxes he had removed had not been invoiced.

Subsequently, the claimant was invited to attend a disciplinary meeting on 31 August 2009 in relation to an issue of gross misconduct. KS referred the Tribunal to the company's disciplinary procedures, which state that the company may terminate the employment summarily...if,

"the Executive has in the Company's reasonable opinion committed or been engaged in or party to dishonesty..." A letter dated 3 September 2009 subsequently issued to the claimant.

KS confirmed that he attended the disciplinary meeting as the Managing Director's adviser. The claimant did not attend for one of the scheduled meetings and for the other he attended but would not participate. When there was no appearance by the claimant at the re-scheduled meeting the Managing Director wrote a letter of dismissal to the claimant dated 14 September 2009, informing him that the company had made a finding of gross misconduct. The claimant had been given the opportunity to challenge what was being put to him or to appeal the decision but he did not.

During cross-examination it was put to KS that as a director and shareholder there were certain circumstances when stock could be removed. KS stated that there was no explanation forthcoming from the claimant except to say that he knew he had done wrong. If the claimant knew of a rule or procedure allowing him to remove stock he could have outlined it.

It was put to KS that the claimant had informed the Managing Director the day after he had taken the stock. It was KS' understanding that the claimant had said he needed to get stock rather than stating he had already taken stock.

It was put to KS that it was common practice to make cash sales and this was supported by the fact that the salespeople had cash accounts. KS stated that the claimant did not make this case to him. The claimant was given every opportunity to put forward a reasonable explanation but he did not provide it during the process. To date the company still does not know what stock was contained in the boxes that the claimant removed from the premises.

The Tribunal heard evidence from a director /owner (JK) of the respondent company. He was appointed general manager in 1990. The claimant had joined the company as sales manager. He explained that he and the claimant bought the company in 2006. They manufacture shower doors. He explained that the previous witness was to assist and carry out an investigation for him. The investigation was carried out accurately, honestly and fairly.

His suspicion was aroused when the alarm code was changed and the claimant entered the building and set-off the alarm. He asked KS to investigate. He got legal advice as to how things should be done, which was fairly and properly. He needed evidence as to what was happening.

He obtained evidence on 17 October 2009. If the claimant had an explanation then there would be no problem. All that he wanted was an explanation; the last thing he wanted was the sales director taking stock.

He and KS met the claimant and asked him about the removal of stock. The claimant wanted to meet him alone and not have a third party present. They ascertained the names of the people who received the stock. He realised that they were not going to get answers. KS left the room. The claimant told him of his financial situation. KS returned to the room. The meeting ended. He wanted an investigation; he wanted to "step back." He drafted a document with legal advice; it was in terms of reference for a disciplinary investigation. The investigation was left to KS. He told KS to be thorough and fair.

At no stage did the claimant give a reasonable explanation. The claimant never requested video evidence. He did not want the Gardaí involved. He wanted it low key and to be fair to the claimant.

He got the report from KS and was totally disappointed that it had happened every weekend for six weeks. This was with the exception of one weekend when the claimant was in Kilkenny.

The claimant did not have the authority to treat stock that way. The claimant was the sales director and reported to him. He himself was the person who signed off on stock and if he was not there the financial director signed off on stock.

He had asked the claimant why he was on the premises on Saturday and why he removed stock. The claimant never told him that he had the authority to remove stock because he knew that he had not the authority to remove stock

The claimant did not participate in meetings that had been arranged and he did not participate in an appeals process. It was an impossible situation ... the claimant did not participate. Dismissal was proposed. The claimant was provided with an appeal and he did not avail of an appeal.

During cross-examination it was put to the witness that the claimant was allowed to take stock and the witness replied that he was not without documentation.

The witness was asked for clarification by the Tribunal as to whether the claimant admitted he took the stock. The witness replied that the claimant admitted he took the stock and sold the stock and got paid for it. The claimant accepted the fact that he did wrong at one meeting.

The decision to dismiss the claimant was taken on 7 December when the claimant did not turn up for the meeting. He was allowed up to 14 December to appeal and he did not appeal. If he had sought an appeal after 14 December he would have allowed it.

The Tribunal asked the witness what explanation he was hoping that the claimant might give. He answered that the claimant "to come in and sit down and say what he had done to the company and talk about how we could go forward and had he an understanding and why he did it and to move on."

Claimant's case:

The Tribunal heard evidence from the claimant. He explained his work and his position. The claimant explained that he brought samples with him in his jeep, that he was the sales director and that he gave stock to people for spot prizes and for charity draws. He further explained that to say he had not got the authority to take stock "doesn't compute with reality."

The products that he removed in August were for a customer and he got reimbursed for them. He had taken stock and he spoke to JK on the phone about this, he told JK that he had been in the warehouse and had taken a couple of doors. The following day he got a phone call from JK to ask to meet him in a hotel to speak face to face. He met JK at the hotel and JK brought him to a meeting room where KS was present. JK addressed him and he did not understand what was going on. JK told him that KS was present as a witness and to take notes. He had no idea from the previous phone conversation of what was going to happen. KS seemed impartial and he did not feel comfortable. He asked to speak to JK alone. Things became aggressive and there was bullying. He was confused and two people were being aggressive towards him.

The claimant explained that he had already given a response to JK about the situation the day before. It was not unusual for him to take product; he was a key holder and he knew that the cameras were there.

He did speak to JK alone and asked him what it was all about, that it did not make sense. JK told him that he was going to fire him. JK was very angry, very uptight. He did not deny taking the doors, everything was above board, and he was shocked. JK would not talk to him without KS being present. He asked JK what he should do and JK told him he should get advice. The meeting ended and they shook hands. JK told him that he was going on holidays and that he would sort it out afterwards.

JK did not phone him so he phoned JK. He had the phone on speaker and his wife was present. JK was shouting and told him that he would never work for him again.

He himself called a board management meeting. He met with JK and the financial controller (PH). PH said that he would go to get a Dictaphone but he told him that he would take notes. He wanted to appoint someone to mediate but JK would not agree. He said to JK that he was a 30% shareholder and he presumed that he was still sales manager and JK mentioned something about a legal (matter).

After the meeting JK told him that he could buy him out if he wished and to make him a reasonable offer for his shares. He told him that he would get a valuation on the company. JK phoned him some days later and he told JK that he was still waiting for a valuation. JK told him that he was still going ahead with the disciplinary process. He did not appeal the decision to dismiss him.

The claimant gave evidence as to his loss.

Determination:

While the claimant was a director and shareholder of the respondent company he was also a salaried employee whose position as such was governed by the terms of his contract of employment dated the 1st day of August 2006.

In his capacity as an employee of the respondent company, the claimant enjoyed the same rights as all other employees and had the same obligations to the respondent company to include a duty to act in the best interests of the company.

The Tribunal does not accept the claimant's position that, because of his position as a director of and shareholder in the company, he was effectively entitled to be treated differently and more favourably than other employees. This was a fundamental misunderstanding of his position by the claimant. The claimant maintained this position throughout and both failed and refused to engage in the disciplinary process. The claimant did not have reasonable grounds for so refusing.

The Tribunal is satisfied that the Managing Director was the appropriate person to initiate an investigation in the circumstances that pertained and the Tribunal is further satisfied that the terms of reference for the investigation and the manner in which the investigation was conducted; satisfy the onus on the respondent company to conduct itself fairly and reasonably in this regard.

The claimant did not question whether the Managing Director was the appropriate person to conduct the disciplinary process. In direct evidence before the Tribunal the claimant indicated that he was not disputing the manner in which the process itself was conducted but simply felt that the process itself was inappropriate and that the matter should have been dealt with at board level. The claimant was at all relevant times consistent in his position that he was not subject to the same disciplinary procedures as other employees.

The Managing Director gave evidence, accepted by the Tribunal, of his anxiety that the claimant engage in the disciplinary process to the extent that he offered to have an entirely independent party deal with the disciplinary hearing but this offer was not availed of by the claimant.

The Tribunal is of the view that the respondent company acted reasonably throughout the process and that the claimant had every opportunity to engage in the process. The process itself was open and fair. The claimant did not proffer any credible explanation for his actions and it was at the Tribunal hearing that for the first time the claimant disclosed the whereabouts of the items removed from the respondent company's premises. The Tribunal finds it inexplicable that the claimant did not volunteer information that might assist his case to the respondent company on 17 August 2009 or shortly thereafter.

There was considerable conflict as between the evidence given by the claimant and by the Managing Director and KS before the Tribunal. The Tribunal preferred the evidence of the witnesses for the respondent company.

The Tribunal is of the opinion that, in all of the circumstances, the decision to dismiss was a reasonable one. The claimant did not avail of his right to appeal. The claims before the Tribunal fail.

The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The claim under the Redundancy Payments Acts, 1967 to 2007, fails.

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

The claim under the Organisation of Working Time Act, 1997, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)