

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE- **Claimant**

UD694/2010

RP964/2010

MN665/2010

WT302/2010

against

EMPLOYER

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 D Herlihy

Members: Mr B. O'Carroll
Mr F. Dorgan

heard these claims at Castleconnell on 21 November 2011
and 13 March 2012

Representation:

Claimant:

Mr John Kane, SIPTU, 4 Church Street,
St. John's Square, Limerick

Respondent:

Ms Fiona Higgins, IBEC, Confederation House,
84-86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

At the outset the claims under both the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn.

The claimant was employed as a night worker in the respondent's Hostel for homeless men from September 2007. The hostel can accommodate up to 47 residents and has a staff of eighteen. Two members of staff are employed on each night shift. The claimant worked two nights on and two nights off. The claimant's position is that he received a verbal warning for smoking some nine months before the incident that led to his dismissal.

The residents pay a fee to stay in the hostel and the hostel provides full board. In addition the hostel has a vending machine (the machine) for hot drinks for which the residents are required to pay a nominal fee. From February to October 2009 the machine was out of order on some eight occasions. The arrangement in the hostel when the machine was out of order was that the staff would provide hot drinks from the kitchen and no charge would be made for this alternative service.

In mid-October 2009 a project worker (PW) was made aware by a night worker (NW) through the report book that the claimant was charging residents for the provision of hot drinks when the machine was out of order. PW informed the project manager (PM) of this allegation against the claimant and on 20 October 2009 the claimant was suspended with pay by the project leader (PL), the claimant's report, pending an investigation into the matter.

This suspension was confirmed in a letter from PL on 22 October 2009, by which time statements had been made by PW, NW and a second night worker. This letter set out the allegation against the claimant that he was in breach of the respondent's policies and procedures in that he had charged residents for providing hot drinks and desserts and had used the monies for his own use. The claimant was warned that this would be considered as gross misconduct which could lead to disciplinary action up to and including dismissal.

The claimant then went on certified sick leave resulting in the disciplinary hearing being delayed until 27 November 2009. The hearing was attended by PM, the respondent's conference president (CP), a conference committee member (CM), a note-taker, the claimant and his union representative (TU). Copies of the three statements made during the investigation had been furnished to the claimant but the identity of the authors was not revealed. TU took issue with both PM and CM about the omission of the identities.

The claimant told the disciplinary hearing that he was taking money from the residents for the hot drinks in order to collect money to purchase a replacement DVD player as the one in the hostel was broken. Whilst accepting that he should have got management approval for this course of action the claimant position was that it was common knowledge that he was collecting the money for this purpose and he was requesting the residents to make a donation towards the DVD player. The claimant denied having charged for desserts or using the money collected for his own use.

During a recess in the hearing the parties went to the claimant's locker in the office and found an envelope containing €10-00 marked "DVD money do not steal" there was also a box on top of the computer desk containing some €5-00 in change. After the recess it was agreed to provide signed statements to the claimant and the hearing was adjourned.

The disciplinary hearing was reconvened, with the absence of CM, on 15 December 2009 by which time the claimant had been provided with signed statements concerning the allegations against him. He had also had the opportunity to view CCTV footage of the purchase of a pizza in which it was suggested that the claimant had used the "DVD fund" to go towards the purchase of the pizza. The claimant told the reconvened hearing that one of the motivations behind his charging for hot drinks had been to prevent damage to the vending machine as he had believed certain named residents had been responsible for its breaking down in order to get hot drinks without charge.

On 16 December 2009 PM wrote to the claimant to confirm the decision to dismiss the claimant effective 17 December 2009 for breach of the respondent's policies and procedures in that he had charged residents for providing hot drinks and had used the money gained for his own use. He was

advised of his right to appeal by writing to the respondent's regional president. The respondent's position at the Tribunal was that the actions of the claimant amounted to gross misconduct.

The appeal hearing took place on 3 February 2010 and was attended by the president of a different region of the respondent (RP), a human resource specialist, a note-taker, the claimant and TU. On 11 February 2010 RP wrote to the claimant to confirm that the sanction of dismissal was upheld.

Determination:

It is common case that the claimant was charging for hot drinks at times when the vending machine was out of order. While the Tribunal is satisfied that management was not aware of this practice it is clear that the claimant made no secret of what he was doing and, as several of his colleagues were aware,

it is easy to see why the claimant might have thought that the practice was condoned or even approved. The Tribunal is not satisfied that the claimant had any intention to benefit personally from the practice; rather his actions were somewhat misguided. The sanction of dismissal represents a disproportionate response to the conduct of the claimant where a written warning or a final written warning would have been more appropriate. Accordingly, the Tribunal finds that the claimant was unfairly dismissed. The evidence having shown that the claimant has been unavailable for work since the dismissal the Tribunal is constrained in the amount of compensation available to it and awards €2,360-00, being four weeks' pay under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal further awards €1,180-00, being two weeks' pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)