

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER – *appellant*

UD2114/2010

appeal of the recommendation of the Rights Commissioner in the case of

EMPLOYEE – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr G Hanlon

Members: Mr T. O’Sullivan
Mr Al Butler

heard this appeal at Dublin on 12th March 2012

Representation:

Appellant: Mr Michael McGrath of IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent: Mr David Miskell of MANDATE,
O’Lehane House, 9 Cavendish Row, Dublin 1

This case came before the Tribunal as an appeal by the employer, appellant, of the recommendation of the Rights Commissioner reference number r-090846-ud-10/TB.

The determination of the Tribunal is as follows:

Appellant’s Case

The store HR manager gave evidence. In the particular store where the respondent worked, shrink or stock loss was a big issue. It was discussed at meetings and raised with employees every day. She was confident that all staff members were aware of the need to keep an eye on shrink. The respondent did have a contract of employment, which referred to a staff handbook that was given to all members of staff.

The incident that led to the respondent's dismissal happened on the evening of 9 November 2009. The store HR manager was made aware of it by the security officer the following morning. The respondent had failed to scan 4 items while serving a customer. The store HR manager called the respondent, accompanied by her shop steward, to an investigative meeting. The check-out manager also attended. The store HR manager asked the respondent if she remembered anything. The respondent did not remember anything. The store HR manager suspended the respondent on full pay and referred the matter to the store manager. The CCTV footage of the incident was shown to the store HR manager and to the Tribunal.

On the CCTV footage the respondent was serving a customer's groceries. Four items did not scan when the respondent passed them across the scanner. As each item scans a small green light flashes and there is an audible beep.

The store HR manager accepted that the respondent did make an attempt to scan 2 of the four items. However stock loss was an issue in the store. In her view it was serious misconduct on the part of the respondent to fail to observe till procedure. The incident occurred on a Monday evening when the store was not particularly busy. The respondent did not complain about the functioning of the till she was using. In the opinion of the store HR manager it is not feasible to employ someone who cannot be trusted. The customer was not charged for 30% of the value of goods he bought.

The store HR manager believed the respondent had received a copy of the Staff Handbook but did not have a receipt with the respondent's signature to show that she had received it. It was common for staff not to sign these documents. The store HR manager agreed that the disciplinary procedure was intended to correct behaviour in particular where there is incompetence. The store HR manager did not think that the respondent was incompetent she thought that she was dishonest. The respondent could not have thought that it was ok not to scan items. Demotion/relocation were not options. Employees whose main role is stocking shelves are all trained to use the tills and are called upon to do so when a store is busy.

The store HR manager suspended the respondent on full pay and referred the matter to the store manager.

The store manager gave evidence. While he was manager of that store shrink was the biggest issue. He tried to get to the core of the issue and stop shrink. He was satisfied that the respondent was aware that shrink was an issue for the store.

The issue with the respondent was brought to his attention on the Wednesday by the store HR manager. The respondent worked evenings. The disciplinary meeting was held on 13 November 2009. The respondent did not remember anything but said that she probably had not been paying attention. On the CCTV the respondent is shown making no attempt to scan certain items. When an item did not scan the respondent had the options of entering the barcode directly or of calling the supervisor. The customer was not contacted as part of the investigation. The respondent was given a copy of the staff handbook. The store manager accepted that she had not signed for it. The respondent was aware that CCTV cameras covered the till area of the store. He did not accept the respondent's view that she thought the items scanned because she heard the beep from the till behind her.

The store manager made the decision to dismiss. He did not feel that the decision was disproportionate. The bond of trust was broken. She breached till procedure and it was reasonable

of the company to expect her to charge customers for goods. The store manager did not consider retraining or redeployment as alternative sanctions to dismissal.

The employee relations manager gave evidence. The respondent appealed her dismissal on the grounds that the sanction was excessive. The respondent also said that her failure to scan goods was not deliberate but she accepted that it had happened. The respondent did accept that her failure to scan the items warranted a sanction.

After her meeting with the respondent the employee relations manager looked at the CCTV footage. There was a further meeting with the respondent because the employee relations manager felt that it was important to hear her explanation. The employee relations manager did not accept that because she had not signed for the respondent did not receive the staff handbook. Staff members in that particular store often did not sign for documents.

The employee relations manager thought that the respondent was competent and that the incident was not due to lack of training. Not charging a customer for goods was serious misconduct. It is a fundamental issue, all staff members would know to scan all items. The employee relations manager did not know why the respondent failed to scan items. She thought that the respondent could have decided to do it to get at the company.

The employee relations manager decided to uphold the decision to dismiss the respondent.

Respondent's Case

The respondent gave evidence. She had worked for the appellant for 8 years. She had a good working record and no issues had arisen prior to the incident that led to her dismissal. She had not received a copy of the staff handbook and neither had she received a copy of the honesty policy. She had not been asked to sign receipts for the documents and refused. The respondent accepted that she had been trained in till procedures. She was aware of her responsibility to scan all items.

On the evening in question the customer came in. She served him. He said good bye to her. She had a bad day and apologised for it. She does not know the customer and did not benefit from her failure to scan. She thought that the items had scanned and that she heard the beep. She made a mistake and apologised. The respondent did not feel that she deserved to lose her job.

Determination

The Tribunal carefully considered the evidence adduced. The details of the incident that led to the dismissal of the respondent were accepted by both parties. Also there was no evidence that the respondent acted dishonestly or in bad faith.

In considering the proportionality of the sanction imposed by the appellant, the Tribunal took into account the 8 year unblemished employment record of the respondent and the availability of alternative sanctions to the appellant. The Tribunal accepts that the appellant needed to take action to contain the serious problem of shrinkage in the store.

The Tribunal finds that in the circumstances the sanction of dismissal was not warranted by the

action of the respondent. She had accepted that her actions fell short of the standard required and apologised for the lapse. The dismissal of the respondent was unfair. The appeal under the Unfair Dismissals Acts 1977 to 2007 fails. The recommendation of the Rights Commissioner is varied and the respondent is awarded the sum of €13,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)