

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
EMPLOYEE – *claimant*

CASE NOS.  
UD661/2010  
MN617/2010

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 P. Hurley

Members: Mr J. Hennessy  
Ms S. Kelly

heard this claim at Abbeyleix on 1st September 2011 and at  
Portlaoise on 29th and 30th November 2011

Representation:

Claimant: Mr. John Curran BL instructed by Tom O'Grady, Solicitors, Market Square,  
Mountrath, Co Laois

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House,  
Victoria Place, Galway

#### **Respondent's Case**

The area manager for the respondent company gave evidence. He is based in the Limerick region and has responsibility for 12 stores including the Portlaoise store where the claimant was employed. On 8 July 2009 he received a phone call from the financial controller informing him that two cash lodgements were missing from the Portlaoise store. The financial controller asked him to conduct an investigation into the missing lodgements. The missing lodgements were from Wednesday, 1 July 2009 and were part of a number of lodgements made by the local general manager on 6 July 2009 at the Post Office.

The area manager travelled from his Limerick base to the Portlaoise store on 8 July 2009 to commence his investigation. He told the Tribunal that the cash from the store is held in a drop safe in the upstairs office on the premises and only three employees had access to the safe combination numbers. The witness spoke to these employees but they could not provide him with any

information in relation to the missing lodgements.

He then checked the rosters from 1 July 2009 to ascertain the names of the employees on duty that day. The upstairs office has 24 hour video surveillance and the video tapes are held in the office. They are numbered 1 to 31 representing each day per month. All staff are aware of the CCTV system. When he searched for the videotape for 1 July 2009 he could not find it and the tape for 30 June 2009 was also missing. He viewed videotape from other days circa 1 July 2009 but these tapes did not reveal anything untoward. He returned to the Portlaoise store on the following day and spoke again to the employees who access to the safe combination. He also spoke with an employee with whom the respondent had some previous difficulties. All of these employees denied that they had any knowledge of the missing lodgements.

As the missing lodgements were from part of a lodgement made on 6 July 2009 he commenced viewing more videotape footage from dates prior to 6 July 2009. On viewing footage from 2 July 2009 he noticed an object left on top of the safe. At circa 5.30pm on the videotape the claimant, who was employed as a supervisor enters the upstairs office to make a lodgement in the safe. He makes the lodgement and as he leaves the office the object which had been on top of the safe is now in the claimant's hand. This videotape footage is shown to the Tribunal. The witness gave further evidence that he re-enacted what he had seen on the videotape by placing a sum of money in a lodgement envelope which is used by the respondent to make lodgements. He placed this envelope containing the money on top of the safe and viewed the object on the videotape as part of the re-enactment. Upon viewing this videotape footage he formed the view that it corresponded to the object which he had seen on the videotape footage from 2 July 2009.

On 10 July 2009 he contacted the financial controller and showed him the videotape footage of 2 July 2009. He also showed him the videotape footage of his re-enactment. The financial controller reported the matter to the Gardaí at circa 4pm on that day. On Wednesday 22 July 2009 the claimant was working on the premises. The Gardaí arrived in the store and removed the claimant from the premises. The claimant reported for work on 24 July 2009 and was sent home. The area manager then contacted the claimant and a meeting was arranged for Saturday, 25 July 2009. He told the claimant that the meeting concerned a disciplinary matter and he could bring representation with him to the meeting if he wished. The claimant attended this meeting and informed the respondent that he did not wish to be represented at the meeting. The witness and the local general manager attended the meeting on the respondent's behalf. The meeting proceeded and the claimant was asked for his recollection of events. The claimant informed them that, on 2 July 2009 he did the evening lodgement and put the money in the drop safe. He noticed a box containing knives and forks which were used in another of the respondent's restaurants. This restaurant was located downstairs from the respondent's store and he removed the knives and forks and took them down to the restaurant. He denied that he had any knowledge of the missing lodgements.

The area manager gave further evidence that he formed the view that the object taken from the top of the safe was the missing lodgements in question. He informed the claimant that he was terminating his contract with immediate effect due to gross misconduct and gave the claimant the opportunity to appeal the decision within 5 days. In concluding his direct evidence he told the Tribunal that knives and forks are not stored on the respondent's premises. If knives and forks are required they are ordered and delivered directly to the downstairs restaurant. He visits the Portlaoise store at least 2 days each week and visits the upstairs office each time. He has never seen knives and forks in the upstairs office.

The area manager spoke to the shift manager. The missing lodgements were from his shift. At first

the shift manager was clear that he had dropped the lodgements into the safe. Later he was less clear. The shift manager remembered that €50 was missing from the lodgements and that he left them on top of the safe intending to re-count the money later. As a result, the area manager accepted, the lodgements were left unnoticed for approximately 18 hours. Five people had access to the upstairs office.

Initially the claimant was not on the radar. The CCTV was the evidence against the claimant. The area manager and the financial controller did a re-enactment to see if empty lodgement envelopes looked like the objects seen in the claimant's hands. They did not keep the recording of the re-enactments or ask anyone else to witness them.

The area manager did not question the claimant instead he reported the matter to the Gardaí. The Gardaí looked at the CCTV. The claimant was arrested. After his release the claimant was called to a meeting. He was not given written notice of the meeting but the area manager did tell the claimant in advance that it was a disciplinary meeting. The area manager said that it was the claimant's choice not to bring a representative or witness to the meeting. The area manager did not show the claimant the CCTV or the re-enactment at the meeting.

The area manager made the decision to dismiss the claimant at the meeting. He did not suspend the claimant with pay while he investigated further. The claimant was not paid after that. The local general manager was a party to the decision to dismiss the claimant. The area general manager accepted that the local general manager had lodged the money without the missing lodgements and had initially been looked at as a suspect.

The financial controller gave evidence. He received a phone call on 7 July 2009 to inform him that 2 lodgements from the Portlaoise store had not been credited. On Friday he went to Portlaoise to meet the area manager. The area manager showed him the evidence on the tapes. There were 2 packets on the safe. The claimant came in and took the bags off the safe. The financial controller took the view that the claimant was taking the money and the area manager shared his view. The financial controller reported the matter to the Gardaí. When he returned to the store the claimant was pointed out to him. At first everyone in the store was a suspect until the area manager looked at the tapes they did not know who was involved.

It is not in the notes of the investigation but the financial controller and the area manager re-enacted the events. They folded up some lodgement envelopes and came to the view that they were similar to what was on the safe. The re-enactment was done without money in the envelopes as the financial controller had no access to money then.

The local general manager gave evidence. He has experience running a restaurant before he came to work for the respondent. He outlined the procedure for handling lodgements. An end of shift deposit is done for the fast food outlet at 5pm. Then at the end of the evening a deposit is done for the fast food outlet and for the restaurant. For each deposit the cash control sheet and the store control sheet is filled in. This is done in the upstairs office. During working hours the upstairs office has video surveillance.

If the deposit does not balance following a thorough check and recounting a note is left for the opening manager the next day. The note could be by text message, on a piece of paper or an entry in the diary. The claimant sent a text message to the manager who was due to be on duty the next day. However that manager was out sick the next day.

The local general manager worked the 8am to 5pm shift on Monday 6<sup>th</sup> July 2009. It was a very busy day. All the paperwork for HQ had to be done. Also that day there was a problem opening the safe. At about a quarter to 5 he pulled the deposits from the safe and ran to the post office before 5. Then he drove to a hotel as he was on an early flight to France for a holiday the next morning. It was not company policy to count the number of bags being lodged but he would have been wise to count the bags.

A member of his team contacted the local general manager on the Wednesday and told him that 2 lodgements were missing. He suspected that it was not human error and felt that the lodgements would not turn up. He phoned the area manager and asked him to seize the CCTV tapes.

When the local general manager returned from holidays the area manager phoned him and requested that he go to head office for an interview. He met with the managing director and the HR manager. The meeting lasted a couple of hours. The meeting was nerve wracking. At that time the local general manager was the only suspect. It was suggested that the local general manager had taken the money. He was also in trouble because in his hurry to get to the post office he did not notice that 2 lodgement bags were missing. The local general manager was given the opportunity to put his side and he came out of the meeting with his integrity intact.

On Monday 20<sup>th</sup> July 2009 there was a managers meeting in the Portlaoise store. The area manager led the meeting. The usual business was attended to and then the area manager said that evidence relating to the missing lodgements was found and handed to the Gardaí and that action was likely shortly.

On Wednesday the Gardaí arrested the claimant. The next day the claimant phoned in sick. On Friday the claimant was at work. The local general manager spoke to the claimant on the phone and told him to go home but to return the next day at 5pm, bringing a witness, for a meeting.

The local general manager greeted the claimant downstairs and went upstairs with him to meet with the area manager. The area manager asked the claimant if he wanted a witness, to which the claimant replied no.

The claimant said to the local general manager that the packets he was seen in the CCTV tape, removing from the safe top were knives and forks for the restaurant. The local general manager did not accept this explanation. Knives and forks are stored in a drawer under the coffee machine, near the dishwasher in the restaurant and never in the office. There is never a back up store of cutlery. The claimant did not suggest any other explanation. The local general manager, having seen the CCTV tape, agreed with the decision to dismiss the claimant.

The claimant appealed his dismissal to the HR manager. She got statements from employees in the store. One colleague of the claimant's submitted two statements. The HR manager asked him for clarification so the local general manager helped the claimant's colleague the shift manager to type his statement.

The shift manager gave evidence. He started working for the respondent in September 2006. He was promoted to supervisor and later to shift manager. The area manager asked him about the missing lodgements. Three lodgements were prepared for 1 July 2009, one for the morning shift and two for the evening shift. The lodgements were down by €50. €10 was missing from the shift manager's shift and €40 was missing from the claimant's shift. He sent a text message to the shift manager due to be on duty the following morning, asking her to check the lodgements. She was the

only one with access to the safe. She was sick the following day. Five people, all managers, had access to the upstairs office.

The Gardaí asked the shift manager about the lodgements. They also asked him if he knew who took the money. The shift manager said that his colleague had been working the day of the shortfall. The Gardaí showed him the CCTV tape. He could not believe his eyes. He saw the claimant take his 2 lodgement envelopes.

The shift manager accepted that the 2 envelopes remained on top of the safe. He was under pressure, it was the end of the shift and it was twenty past one in the morning and his colleagues were waiting for him so that they could all take a taxi home. He had intended checking the envelopes again. He knew the respondent's policy on handling lodgements. He had gone to the safe to drop the envelopes, which he had already folded, but stopped himself and left them on top so that the shift manager due in the next morning could check the lodgements. If the shortfall was a single €50 note it could be found easily.

He made three separate statements relating to the events. In his first statement (1<sup>st</sup> August 2009), he was unsure whether he had dropped the lodgement envelopes into the safe or left them on top. In his second statement (13<sup>th</sup> August 2009), he accepted that he had left the lodgement envelopes on top of the safe. When he was shown the CCTV of the claimant leaving the upstairs office he was satisfied that the claimant was carrying them. The shift manager did not accept that it suited him to do this.

The shift supervisor said that knives and forks are never stored in the upstairs office. When the delivery is made on Friday knives and forks together with loyalty cards go directly to the floor. The cutlery is sanitised before use.

The HR manager asked the shift manager for clarification of his second statement. The shift manager asked the local general manager for help. The local general manager typed his statement and read it to him. The shift manager then sent it to the HR manager.

The HR manager gave evidence. She heard the claimant's appeal against dismissal. The claimant came to the meeting with a representative. She showed the CCTV to the claimant. He identified the objects on top of the safe as boxes of knives and forks. The claimant was seen in the CCTV to stand for 10 seconds in front of the safe. The HR manager asked him what he had been doing. He replied that he counted the contents of a box of knives and a box of forks. She asked him how many. He replied 10. She said that when the boxes left head office they contained 12. The HR manager was surprised because he counted them and he replied quickly to her question incorrectly.

She did not believe that the items on the safe were 2 boxes of knives and 2 boxes of forks. She checked the statements she had received from other staff members and the delivery documents from head office. The next delivery was on the day of the incident. She found no evidence to support the claimant's explanation.

The HR manager felt that dismissal was the right decision because even though the CCTV is open to question she could not find that there were knives and forks on top of the safe. Also at the meeting with the claimant she did not get the conviction from him of someone being blamed in the wrong. He was not emphatic enough in denying his guilt. She also expected more of a statement from him.

The HR manager did not know the claimant before the appeal meeting. There had been no issues with the store. There was no relevant history at all. It was a difficult decision but because of so many things that did not add up she was led to the decision to uphold the decision to dismiss.

The area manager had asked her for the appeals procedure before the claimant was dismissed. The HR manager did not go through the procedure step by step with him. She did not tell him to suspend the claimant with pay. The HR manager told the Tribunal that it is the respondent's policy to inform the Gardaí before talking to an employee under suspicion.

### **Claimant's Case**

The claimant gave evidence. He started working part-time for the respondent in November 2001 while he was still at school. After school he worked full-time. At the time of his dismissal he was a shift supervisor. Before he was given this role he underwent an induction. He was informed of procedures and given a booklet. Meetings were held 2 or 3 times a year in the store at which he was given feedback about his performance. He was working well. The claimant was ambitious and set his sights on a site manager role or even of an area manager role. As shift supervisor he ensured that staff did their jobs.

The claimant also made orders to Head Office every week. A document was provided for counting stock items every week. When the stock count was completed he used this information to fill in the order form that was then sent to Head Office. When the order was delivered he took it in. Ordering stock was important for the running of the store. He felt that he was a valued member of staff and was part of the management team. He was sent to Northern Ireland for a period of weeks to assist at two stores there.

On an average day the claimant started at midday. He served customers and did cash procedures. Cash procedures involved taking a reading from each till at the start of the shift. When the shift ended he took a final reading from each till. He counted the cash and filled in the cash reports in the downstairs office. Once the cash was counted he put it in a white envelope and on the front of the envelope he wrote the amount and the date and signed it. He then folded the envelope in half and took it upstairs and dropped it into the safe.

If the money for a particular shift is short the procedure was to check and double check. Then put the money in the envelope and drop it in the safe. A note of the shortfall would be left for the manager of the next shift. If the shortfall was large the shift supervisor would phone or text the next shift supervisor.

The claimant found it hard to believe that his colleague would leave his shift takings on top of the safe. All managers received the same training that takings were to be dropped into the safe and not left on top. The claimant never saw lodgement envelopes left on top of the safe.

On the day in question the claimant counted the cash, documented it and dropped it into the safe. He took four off white boxes of cutlery from the top of the safe. He went to the computer and then placed the spare float in the filing cabinet. He left the upstairs office with the boxes of cutlery in his hands. He proceeded downstairs and continued with his shift. When shown the CCTV footage of his actions the claimant said that it was very noticeable that the items he took with him did not look like lodgement envelopes.

When shown CCTV of two of his colleagues on separate occasions in the upstairs office the claimant noted that they could see the items on top of the safe and he said that neither would have left cash lodgements

A week later the area manager asked the claimant about missing CCTV tapes. The claimant had not seen them. When the area manager asked the claimant about missing lodgements, he thought it was a joke because lodgements do not go missing. At a managers meeting he learned that 2 lodgements and 2 CCTV tapes were missing. This information was not particularly directed at him.

On the morning of Wednesday 22<sup>nd</sup> July 2010 the claimant arrived for work and worked on a stock check. At 12.30pm when he was on the shop floor he was approached by two Gardaí who asked his name. The claimant went upstairs with the Gardaí and was asked about the missing money and the missing tapes. The claimant was arrested. He was in a state of shock. He handed his paperwork to another manager and was taken away in an unmarked car to the Garda station.

The Gardaí were convinced that he had taken the money and the tapes. He was questioned in the cells and for a taped interview without a representative. When his solicitor arrived the claimant was brought for another interview. The claimant lived with his parents and a search warrant was issued for their house. He asked to phone his father and was then left for a considerable time.

The claimant's father had to leave work and accompany the Gardaí to the house. The claimant was released at 10.30pm. He drove home and was shaking when he got there. The atmosphere at home was dead quiet. On Thursday he phoned in sick.

On Friday morning when the claimant arrived at work his colleague told him that he had to stay in the lobby while he phoned the local general manager. His colleague handed the claimant the phone. Over the phone the local general manager told the claimant that he was to go home and to come back at 5.00pm the following day for a meeting with himself and the area manager. Nothing else was said to the claimant. The claimant did not receive notice of the meeting in writing.

The claimant came to the meeting with the local general manager and the area manager. No reference was made to his not being accompanied. The claimant was not informed that it was a disciplinary meeting and therefore did not feel that he needed to bring a witness or a representative. The area manager told the claimant that he was dismissed. He was given 5 days to appeal. He was only paid for the days he had worked.

The claimant appealed the decision to dismiss him. The HR director met with him on 13 August 2009. She told him that a factor in her decision was that he did not make more of a statement when he was asked the question 'did you take the money'. The claimant received a letter of dismissal towards the end of October. Social Welfare was informed that his dismissal resulted from money gone missing. This is now on his employment record. It also prevented him from claiming Social Welfare for a time.

The week before Christmas the Gardaí informed him that the DPP had decided not to prosecute him over the missing tapes and money. The matter was dropped.

The claimant's father gave evidence. A Garda phoned him at work to say that his son had been arrested for stealing money from his employer. He had a warrant to search the house and wanted the claimant's father to be present. The claimant's father had to arrange cover at work. On the way home he called in to his solicitor but nobody there was free to accompany him to his

house. When he got home 5 Gardaí in total were there; one was talking to a neighbour, two were in front of the house and two were in a car. The Gardaí used the claimant's key to get into the house. One of the Gardaí read the warrant to the claimant's father. He asked to read the document for himself and was not allowed.

The claimant's father was asked if his son had a credit union book and he gave it to the Gardaí. The claimant had a sum of money in his bedroom. The house phone rang and he was able to talk to his son in the Garda station. The Gardaí were looking for the CCTV tapes and for the money. The claimant had never been in trouble. He worked long hours and rarely went out. A family member is involved with the local credit union and having the Gardaí search the house put them in a predicament. The claimant's mother was involved with the local Vincent de Paul and felt that having the Gardaí in the house detracted from their standing.

## **Submissions**

The respondent's representative reminded the Tribunal that they did not have to establish the guilt or otherwise of the claimant. The question arises, what did the claimant take out of the upstairs office, the lodgements or boxes of cutlery. There was no hard evidence against other staff. The CCTV put the claimant in the frame.

The Tribunal must not assume the mantle of the employer but must judge by objective standards and test its decision against a civil standard of proof. There was a significant loss of money and the dismissal was fair.

The claimant's representative told the Tribunal that the claimant had an impeccable record before the event. The claimant was aware of the CCTV camera. If he was the person who took the 2 missing tapes he would have been stupid not to take the tape that incriminated him.

The employer had acted unreasonably. They did not follow their own procedure. A reasonable employer would investigate and interview potential witnesses before a disciplinary meeting. The claimant was not told in advance of the allegations against him. The employer went to the Gardaí instead of interviewing the claimant. The onus is on the employer to show that they used fair procedure and not just show that the procedure exists. The area manager jumped to conclusions and did not take time to consider but went ahead and dismissed the claimant.

## **Determination**

The Tribunal carefully considered the evidence adduced. The respondent was faced with a situation where a significant sum of money was unaccounted for. The area manager was sent to investigate. On the basis of CCTV the area manager believed the claimant was responsible for the loss. However the area manager was aware that 2 CCTV tapes relevant to his investigation were missing and that 4 people other than the claimant had access to the upstairs office from where the money went missing.

The Tribunal finds that the area manager was too hasty in arriving at his conclusion that the claimant was responsible for the loss of the money. A thorough investigation would have included all 5 people who had access to the upstairs office. The procedure used to dismiss the claimant was flawed in that the local general manager was a party to the decision even though he could



reasonably be under suspicion himself. The local general manager potentially influenced the outcome by assisting the shift supervisor in preparing a statement that was given to the HR manager.

The Tribunal finds that the claimant was unfairly dismissed. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The claimant is awarded €32,000.00.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also succeeds and the claimant is awarded €1,700.00 being four weeks wages.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)