

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
- *Claimant*

CASE NO.
UD2318/2009
MN2154/2009

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. D. MacCarthy S.C.
Members: Ms A. Gaule
Mr A. Butler

heard this claim at Dublin on 8th July 2011
and 28th October 2011
and 20th January 2012
and 20th March 2012

Representation:

Claimant(s) : Mr. Darach McNamara B.L. instructed by Fitzgerald & Co, Solicitors,
16 Harcourt Street, Dublin 2

Respondent(s) : Ms. Cliona Kimber B.L. instructed by John B. O'Connor & Co., Solicitors,
37 Upper Mount Street, Dublin 2

Preliminary Points

The representative for the respondent submitted that the claim under the Unfair Dismissals Acts, 1977 to 2007 was out of time and that tips should not be included in the gross weekly pay amount.

Respondents Case:

LM Operations Manager for the respondent gave evidence of being in charge of staff and the day to day operations of the business. On the night of 30 January 2009 she was contacted by a Supervisor at approximately 12:45am who told her he had witnessed something suspicious in one of the bars. She was told that the claimant was seen putting a small amount of coin into the till and taking three €10 notes and two €5 notes from the till and putting them into the tips tray. She instructed a supervisor to carry out a till read to establish the amount of money in the till at

that stage. The till was removed and a new float was authorised. The till was counted and a shortfall of €49 was established. Another Supervisor was asked to work with the claimant in the bar for the remainder of the night. The daily bar cash sheet was handed in as evidence. LM said that the x – read showed no over-rings or errors and explained the procedure when a mistake is made at the till which involves bar staff circling any over-rings or errors. The claimant was later asked to explain the shortfall with the till and she offered no reason. When the second till was checked following the bar closing it contained a handwritten note of an over-ring which now meant the shortfall was €25. LM stated she sought an explanation from the claimant about the shortfall and that the claimant offered no explanation. She advised the claimant that if she could not explain she would dismiss her. When told this at the time, the claimant responded saying I don't know. She advised the claimant that if she recalled anything which could explain the shortfall to come back to her.

LM told the Tribunal that she had recruited the claimant as she had previously worked with her and had trained her and found her a good worker and honest. She said she was shocked and surprised by the claimant's behaviour and was upset when dismissing her. LM said she was aware the claimant was pregnant and alternative areas of work were offered to her during the period October / November. She accepted that on the night in question the credit card machine was not working correctly but she only discovered this later. She also stated that she was unaware of the transaction where a customer ordered three drinks and a pack of cigarettes and due to the credit card fault was unable to pay for the items and agreed to return with cash payment. The customer did not return with payment and this transaction was not offered as an explanation by the claimant. She also accepted that two other staff were working the till in question on the night but could not confirm who as the access codes were known to all staff. She also accepted that where any shortfalls with tills are found that the shortfall is made up from the tip jar or from wages.

At the next hearing date of 20th January, 2012 an application was made to have the case postponed due to bereavement on the part of a main witness for the respondent. The application was refused by the Tribunal and the hearing continued in cross-examination of LM.

LM told the Tribunal that an alternative role had been discussed with the claimant due to her pregnancy.

LM said that a witness saw the claimant take money from the till and put money into tip jar. The read on the till showed a shortfall of €49. Copy of Ejournal showing till transactions was opened to the Tribunal. LM called the claimant to the office at 3am in order for her to explain the shortfall. She said it was normal to call a member of staff to the office to explain a shortfall. The claimant was not informed in advance of why she was being called. The witness stated it was not her intention to dismiss the claimant at the time but that if the shortfall could not be explained it would lead to a dismissal. The claimant was let go that night by LM but was told to return to the respondent if she remembered anything. The claimant did not return and LM issued her P45 a few days later.

LM confirmed that the claimant had stated that she did not steal the money. The original of the x read was not available at the hearing. €812.90 was processed during the night and the till count was €763.40. The claimant was seen taking 3 x €10 and 2 x €5 from the till. LM had looked at the Ejournal for a void transaction but there was none listed. LM stated that she felt the claimant tried to cover her tracks with an over register on the till as she probably knew she was under suspicion when another member of staff was put on the bar work with her and the

till was changed.

LM stated that she checked the Ejournal that night on the screen. She forgot to check pre-midnight records and she admitted that that was a serious error. The Ejournal was printed in April 2009 – midnight to midnight was saved. LM did not back up the file for pre midnight. The till had since fallen off the shelf and the hard drive was not available. The till went for repair in August 2009 and it was found that the memory was gone and as result there was no record of pre midnight of the night in question.

It was put to the witness that the cash could have been counted and a stock take carried out to see if the stock matched the till amount. The witness said that still would not have explained what the Manager witnessed as regards the claimant taking the money from the till. The claimant's representative stated that the claimant will say she was replacing money in the till. LM said that the till did not balance. The report of the incident dated 2nd

September 2009 was opened to the Tribunal. LM did not realise she had not given this report in with her notes. The respondent's representative said that he was not asking the claimant's representative to accept the report only being handed in on the day of the hearing.

LM was not aware of the claimant's right of appeal as their policy is instant dismissal. No explanation was given by the claimant. €25 was taken from the tips to balance the till as the over register had already gone through.

The next witness for the respondent confirmed that she worked for the respondent company while she was pregnant. She had no issues with the respondent in relation to her pregnancy.

The venue manager (hereinafter referred to as R), gave evidence on behalf of the respondent. He commenced with the respondent in 2002 and was promoted to manager in 2006. He referred to the incident report of the night of the 30th January 2009. He explained he was on duty that night and was doing a check on the VIP toilets when he saw the claimant pick up the tip tray empty the contents in to the till and take out 3 ten euro notes and two five euro notes and place them in her tip glass. He was approximately 4 to 5 metres away from the claimant when he was observing her. He telephoned LM and informed her of what he had just seen. He went to the office and LM gave him a new float. He returned to the VIP bar took an X read and replaced the float. While doing so he asked the claimant if she had any issues with the till that night the claimant replied in the negative. His suspicions had been aroused as there was only a small amount of coin on the tip tray when the claimant had emptied the contents in to the till. In his opinion it could not have been more than 6 or 7 coins.

Under cross examination he explained that it was common practice to exchange the coins in the tip jars for notes. While he is not involved in the counting of the till floats, they are normally accurate to one or two euros out. He explained that while observing the claimant, her body was at an angle and did not obscure his vision of her in any way. However he could not say how much in coin she had placed in to the till. He accepted it could have been possible that she had put more coin in to the till than he saw. However it was unusual to put coin from tip tray straight in to the till. The easier way was to empty the tip jar on the counter and count same. He had observed the claimant pick up the tip tray from the bar and not from the counter beside the till.

It is up to the bar staff if the floor staff are to receive tips from their tip jar. He could not recall serving any customer at the VIP bar that night.

He had telephoned LM straight away and about 5 to 6 minutes later he returned to change the float. He did not see the claimant's tip jar when he returned to do this. He had used the manager's code to do the X read. He has his own code for making sales on the till. "Jack" is a member of staff who was not on duty that night. While the incident occurred at approximately 00.45 the X read took place at 1.13, the witness insisted it was no later than ten minutes when he returned to the bar with the new float. The till receipts that night showed that "jack" performed a transaction at 00.48 and another at 1.12, the witness denied that he had used "jacks" code and it was not him that had done these transactions. It would have been possible for the claimant to have used "jacks" code. He did not see the claimant counting coin from her tip jar.

Claimant case

The claimant gave direct sworn evidence. She previously worked in a club as a bartender where LM was her manager. LM trained her and they had a good working relationship. This bar was sold and a new owner took over. LM came in one night to socialise and asked the claimant to telephone her as she could offer her a position with the respondent. She commenced in a bar position with the respondent in October 2006. When one of the other supervisors left she was promoted to that position.

She recalled two incidents in which she had found cash and had reported same and handed it in to the office.

She explained that while working at the bar she kept a soda glass behind the till for tips received. She would be given a float for this till with extra coin, to avoid opening the coin bags and having to count them; she would empty her tip glass and transfer the coin for notes into her till.

She recalled the night of the 30th January 2009. She commenced work at 10.00pm. The credit card machine was not working and she informed LM. LM checked this and informed her it was working again. She opened the bar at 11.00pm and started serving. Approximately twenty minutes later a customer ordered a Jameson and coke, a Heineken and cigarettes. She organised this order, rang them in to the till and the customer handed her a laser card to pay for this. The credit card machine was still not working and she informed the customer of same. She took back the order from the customer who told her she would return with cash from the ATM. The customer never came back. At this stage she forgot to enter the over reg of this order and only remember later on in the night when she sold another packet of cigarettes. At this point she wrote out the order on a piece of paper and placed it in the tip glass as per normal practice.

That night she had good customers in who knew her by name who tipped her generously. At a quiet time she started to count her tip jar, she always used the tip tray for this. She emptied the contents on to the tip tray and started to flick the coins in to the till drawer, when finished counting she took the notes out €20.00, €10.00 and a €5.00. Before she had started counting she had noticed the presence of R. At this point a customer came along and R served them while she was finishing counting the coin. R then left the bar area and another supervisor (Y) came along and worked with her for the rest of the night. Approximately 20 minutes later R returned and took an X read and the till drawer and replaced it with another. He did not explain his actions to her and it would normally be done during a shift. She continued

to work for thenight.

LM came for the till at the end of the night and asked her to come to the office with her. In the office LM asked her what was wrong with the cash in the VIP bar where she had been working.

The claimant told her she did not know. LM explained that there was a shortfall and she responded by saying that there must be a mistake. LM then informed her that it looked like she had taken money; the claimant repeated that it must be a mistake. The till contents had not been counted in her presence nor was she show the earlier X read.

She explained that normally a stocktake was taken at the beginning and end of each shift and at the end of the night this would be matched with the Z read. Hence a comparison could have been made between the Z read and stocktake to establish if there had been a mistake.

There was no one else in the office with her and LM. She agreed with LM's version of events where she had told her about the €49.00 shortfall. LM put it too her that she was trying to cover herself, the claimant told her that she did not steal and reiterated that she had probably made a mistake. LM then led her out of the building. She realised that she had left her handbag behind and return for same. When back at the bar Y told her to take her share of the tips and that she had put €25.00 in to the till to balance it. The claimant took €25.00 of the €75.00 left.

Under cross-examination she confirmed that she was rostered to work on her own in the VIP bar the night of the incident. The tip jar was for her and she could use her discretion as to what she would give the floor staff from the tips. She did not know if her first float what up or down as she was not present when it was counted. She had offered the explanation that she must have made a mistake when the float was short. She was referred to LM's statement of the meeting, which states she offered no explanation nor did she mention the over reg or problems with the credit card machine. She could offer no response to this as she did not write this statement. Later in evidence she insisted that she had offered both the over reg and credit card machine as an explanation on the night.

She was referred to the X read of the till for 23.00 to 1.13 which showed that one packet of cigarettes were sold during this period. She was further referred to a transaction at 00.47 showing this pack of cigarettes was the sole item for this sale. She accepted this as correct, and stated it was her mistake and that she must not have sold another packet of cigarettes. She accepted that she must have been wrong in respect of the sale in which she had registered a Jameson and coke, a Heineken and cigarettes. She had remembered wrongly in respect of the sale to the customer in which the credit card machine was not working. She insisted that R had made a sale on the till while she was counting the tip money in to the float. There was one sale registered under the name of "jack" anyone could have entered the wrong code that night. When the Y had joined her behind the bar, the claimant had gone to the back bar to get another credit card machine to enable them to do transactions.

Determination

The Tribunal are unable to make a finding that would explain the shortfall at the till. In the cross-examination of the claimant sufficient doubts were raised. The other main element in the case is the manner in which the claimant was dismissed. She was summoned to a meeting to explain a till short fall at the end of her shift. While it was reasonable to expect the manager to have an immediate investigation, this investigation quickly turned into a disciplinary meeting and she was dismissed therein. The manager said she had no choice but to dismiss her, but the

Tribunal does not agree. There was another choice open to the management, namely to follow the procedure that most reasonable employer's would adopt, to suspend her and have a later disciplinary meeting. For this reason the Tribunal find the dismissal unfair.

In assessing compensation the Tribunal considered the extent to which the employee contributed to the dismissal. Section 7 (2) of the Unfair Dismissals Act, 1977 refers to

“the extent (if any) to which the said financial loss was attributable to an action, omission or conduct by or on behalf of the employee”

Having regard to all the circumstances the Tribunal award the claimant €8,000 under the Unfair Dismissals Acts 1977 to 2007.

The Tribunal makes no award under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)