EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE -*Claimant*

CASE NO.
UD1751/2010
MN1705/2010

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 N. Russell

Members: Mr J. Hennessy
Mr F. Dorgan

heard this claim at Kilkenny on 15th December 2011 and 21st March 2012

Representation:

Claimant: Mr Seamus Brennan, John Lanigan & Nolan, Solicitors, Abbey Bridge, Dean Street, Kilkenny

Respondent: Ms. Sandra Masterson-Power, Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

The determination of the Tribunal was as follows:

Summary:

The Tribunal heard evidence from the Security Manager of the store within which the claimant (who originates from China) was employed as a Sales Assistant. On the 15th May 2010 the Security Manager received a data mining report from head office. The report collates information pertaining to the respondent's loyalty card.

The report showed excessive transactions for a particular loyalty card number which was assigned to the claimant. The data mining report listed 200 transactions and 46 of those required further investigation. The 46 transactions had occurred when the claimant was working. The Security Manager monitored the claimant's register using CCTV and confirmed with the use of the CCTV that the claimant was typing in the number of her own loyalty card when customers did not have a loyalty card.

In or around the 22nd May 2010 he alerted the Store Manager to the situation. He also held an

investigatory meeting on the 28th May 2010 with the claimant in the presence of a colleague and the Human Resources Manager. The claimant accepted that the card number used was her own. However, at the beginning of the meeting the claimant said she had not used her own card while working. The claimant later said that she used it if a customer gave her permission to do so. The claimant accepted that she had used her own loyalty card on the particular dates shown to her by the Security Manager. The claimant said that she knew what she had done was wrong and she apologised. The investigatory meeting concluded. In reply to questions from the Tribunal, the Security Manager confirmed that he had passed on this information verbally to the Store Manager.

The Human Resources Manager gave evidence that she started work in this particular store on the 28th May 2010. Minutes of the investigatory meeting were opened to the Tribunal. The claimant had been informed that she could choose a person to accompany her to the meeting. During the meeting the claimant accepted that she had used her own loyalty card number during transactions. When the investigatory meeting concluded the claimant was told to wait in the canteen.

The Store Manager attended at the office and he was provided with the handwritten notes of the investigatory meeting. The Human Resources Manager, the Store Manager and the Security Manager examined the training records and other documentation. Some twenty minutes later the claimant was asked to attend a disciplinary meeting. The Human Resources Manager explained what was happening to the claimant. At the disciplinary meeting the claimant was informed that she was suspended with pay until Monday, 31st May 2010, pending investigation. At the meeting the claimant asked for another chance. The meeting was subsequently held with the claimant on the 31st May 2010 but the Human Resources Manager had no further role between the meetings of the 28th May and the 31st May 2010.

The Human Resources Manager outlined to the Tribunal the training the claimant had received in September 2009 on the loyalty card scheme. One version of the employee handbook contained a typographical error which stated that a staff member could accept loyalty card points with a customer's consent. The respondent company accepted that a copy of the defective policy was sent to the claimant's solicitor in error. However, the respondent maintained that the claimant herself had not received the erroneous handbook.

In reply to questions from the Tribunal, the Human Resources Manager stated that it would have been a different scenario had the claimant not admitted what was put to her at the investigatory meeting. She believed that the claimant first understood what the investigation meeting was about when the loyalty card was mentioned.

The Store Manager gave evidence that he has held the position of Textiles Store Manager since April 2009. He is updated by the security team on a weekly basis and was therefore aware that the Security Manager was monitoring and investigating a situation.

Having considered the minutes of the investigatory meeting, he felt that both the minutes and the data mining report indicated that a serious breach of company policy may have occurred. The Store Manager therefore held a disciplinary meeting with the claimant to further discuss the matter. He had the minutes from the investigatory meeting and there was an open admission from the claimant and an acknowledgement by her of wrong-doing. The Store Manager

believed the claimant understood the issues being put to her.

The meeting concluded but as the Store Manager felt it was a serious situation that needed more investigation; he made the decision to suspend the claimant with pay pending further investigation and advised her to return for a further meeting on 31st May 2010.

In the interim he considered and examined the minutes of the investigation meeting, the data report, CCTV footage as well as the electronic journal for the till and the claimant's admission. He also examined the claimant's training records and he was satisfied that the claimant understood the training as she had completed the training questionnaire.

When he met with the claimant on the 31st May 2010 he dismissed her as he felt a serious breach had occurred and the bond of trust between employer and employee was broken. The claimant expressed remorse and asked for another chance but the Store Manager felt he had no other option but to dismiss the claimant from her position. Letter dated the 2nd June 2010 informed the claimant that she was dismissed as, "the company have considered the matter in full and on your own admission that you breached company policy…"

In reply to questions from the Tribunal, the Store Manager outlined the respondent's procedures for offences relating to the loyalty card and the sanctions which could be applied up to and including dismissal but it was his understanding that at management level the agreed policy would be to dismiss in the given circumstances.

The Regional Manager gave evidence that he was appointed to hear the appeal and he received the claimant's letter of appeal dated 31st May 2010. Under the company's procedures the appeal process solely relates to the sanction applied. The Regional Manager felt that given the number of instances in question, the severity of the sanction was warranted and he felt that the dismissal of the claimant was the correct sanction in the circumstances. He was satisfied that the appeal was carried out in line with company policy and he was satisfied that the Store Manager had reached the appropriate conclusion. Although the Regional Manager considered the claimant's plea for leniency, he also considered the number of times the claimant breached the company's policy. The claimant was informed by letter dated 18th June 2010 that the decision to dismiss her was being upheld.

During cross-examination the Regional Manager accepted that the minutes of the various meetings should have been sent to the claimant or her representative and he agreed that this fact subverted the fairness of the appeal. He was unaware at the time of the appeal that they had not been sent, despite requests from the claimant's solicitor, but felt this did not undermine the appeal. He was aware that the claimant's solicitor had received the version of the handbook containing the typographical error but he was satisfied that the claimant had received training on the loyalty card. He confirmed that at the appeal stage of the process the person hearing the appeal usually will know the person in management who made the decision. Usually the appeal is heard by a member of management in an opposite department.

It was the claimant's evidence that she was informed on the 28th May 2010 by a member of staff that she was to attend at the office. When she arrived at the office the Human Resources Manager told the claimant she could have someone accompany her to the meeting. The claimant was unsure who to choose. The Human Resources Manager saw another employee

passing and told this employee to accompany the claimant to the meeting. The Security Manager was present and asked the claimant if she understood about the loyalty card. The claimant said she knew about the card and how to use it, "swipe card, if no card, no points." The Human Resources Manager asked did the claimant understand and the clamant replied she did not as she was nervous and had never before been called to a meeting in the office. At the meeting the claimant also said that she was unsure what was being said to her due to her level of English. It was put to her that she had used her own card to collect points and the claimant said that sometimes she did this if the customer did not want the points and agreed that the claimant could have them. The claimant recalled that the word "investigatory" was used by the Human Resources Manager but the claimant did not really understand.

The claimant recalled that the Security Manager had documents in front of him at the meeting. He mentioned dates, times and a card number to her but the claimant was not provided with a copy of what he was reading from. The claimant did not believe her position was in any jeopardy at the time of this meeting.

After a break of a few minutes the claimant was called to a second meeting. The Store Manager was present and the claimant became upset and began to think that she had lost her job. She asked for another chance but was told it could not be given to her, as then everyone would want one more chance. The Human Resources Manager told the claimant she was not to work her remaining hours that week but would receive payment for them. The claimant then understood that she had lost job. The Store Manager told the claimant she was to finish that day but was to see him again on Monday, 31st May 2010.

On Monday, 31st May 2010 the claimant was told the same thing on Monday as she had been on Friday, even though she already knew she had lost her job.

During cross-examination it was put to the clamant that she had completed a questionnaire as part of the loyalty card training and that she had written in the negative to the question, "can I accept customer's points?" The claimant replied that another employee had provided her with the answers as she was unable to understand the questions.

In reply to questions from the Tribunal, the claimant said she thought it was allowable to put the customer's points on her own card if it was with a customer's consent. The claimant had started doing this from the time that her hours were reduced to 15 hours per week. She did not think of it before her hours were reduced. The claimant gave evidence pertaining to loss and efforts to mitigate.

Determination:

The Tribunal would like to deal with the internal appeals procedure first. Under her contract of employment, the claimant was entitled to avail of a written appeals procedure which she sought to do through her own solicitor.

The fact of the matter, and accepted before the Tribunal by the relevant witness for the company, is that documents requested to enable the claimant to set forth her appeal were not provided when requested and, indeed, a totally misleading document regarding the current loyalty card policy was provided.

The Regional Manager for the company advised in evidence that, at the time of reaching his decision on the appeal, he was unaware of this omission and error and accepted that the appeals process was unfair. It is the Tribunal's view that the claimant was essentially deprived of herright of appeal.

Employers need to recognise that they are dealing with a multi-cultural and changing workforce and cannot simply assume that all employees are capable of understanding what can be quite complex documentation to include contracts of employment, handbooks, training manual etcetera. The uniqueness of employees in this respect must be recognised. There is simply no excuse for a large well-resourced company failing to recognise this reality and implementing the appropriate practices.

In this instance we are dealing with an employee who faces clear language obstacles. Yet, the respondent company appears before the Tribunal seeking to rely on a number of documents signed for and confirmed as read and understood by the claimant in circumstances where any reasonable employer would be doubtful. How hard would it be for a large employer to provide the appropriate translated versions of such documents and give the employee time to consider and digest? Such documents must be provided in a manner accessible to and in a language that an employee can understand.

In the course of the investigation into the claimant's conduct a reasonable employer would have elicited the responses provided to the Tribunal by the claimant and not challenged to any extent namely:-

- that she did not read or understand the documents.
- that it was a case of no signature, no job.
- that the completion of the loyalty card validation exercise on the 19th of September 2009 may well have been in circumstances that warranted further investigation.

It then falls to the Tribunal to look at the investigation itself and the subsequent disciplinary process. The Tribunal is satisfied that, in a number of respects, the system governing such matters within the respondent company failed the claimant.

The Tribunal believes that the roles of those involved in the investigative process were blurred and that the decision maker was actively involved in the investigation of the matter itself which is best avoided, certainly in the case of a well-resourced company that can appoint a completely independent decision-maker from anywhere in its large organisation.

The matter was presented to the Store Manager on the basis that the claimant had already admitted guilt to loyalty card fraud in the preceding minutes when first confronted. This led to an escalation to a disciplinary meeting within 30 minutes of that first meeting with her.

A careful consideration of the minutes of that earlier meeting as presented to the Store Manager would have indicated to him that no such admission had been made. The Human Resources Manager gave evidence that she read over the notes of the investigation to the Store Manager, the deciding officer, and then told him the claimant had admitted loyalty card fraud - yet this is not noted in the minutes. In fact, at no point during that interview do the minutes indicate that such an accusation was levelled at the claimant. It would have been abundantly clear to a reasonable decision-maker from the nature and tenor of the minutes that the claimant was very

open and co-operative and, indeed, quite unaware of what precisely the issue was. In evidence to the Tribunal, the claimant stated that she wanted to know what the problem was but that all she seemed to be hearing from the Human Resources Manager who was totally new to her was, "blah, blah, blah....." She was simply not thinking that her position was in jeopardy.

The Tribunal has to be cognisant of the fact that a company handbook document was in all likelihood still in circulation at the time which indicated that use of customers' points with their permission was acceptable. The company's position was that this had been overridden by subsequent training, however, the possibility for confusion was there and the company could only confirm that the error was rectified by way of a new handbook in September 2011. The Human Resources Manager who, in fairness, was new to the store on the 28th of May, advised that she was not aware of the handbook or its contents and believed in assessing matters that company employees 'never could' have availed of customer points. The different handbooks clearly contradicts this position and the Tribunal believes that the HR Manager was predisposed to a very definite view that there could have been no confusion on the issue of customer points.

Accordingly, the deciding officer incorrectly took carriage of the matter on the premise that the claimant had accepted that she had been guilty of loyalty card fraud when the relevant minutes reflected that this was simply not the case. He was, accordingly, predisposed in a certain direction and from that point on could not be a fair, unbiased decision-maker. Indeed, the Human Resources Manager confirmed to the Tribunal that, because of the perceived admission, the entire process was truncated and "a lot more would have been involved" otherwise.

The evidence of the claimant to the Tribunal is that it was only in the short gap between the investigatory meeting and disciplinary meeting that her witness explained the issue to her and that her job was at risk. Desperate to keep her job she asked for a chance when she went to the disciplinary meeting but was told that if she was to be given a chance, 'everyone would want a chance'.

The Tribunal is further concerned that an extraneous issue in relation to the use of customer change was documented in the minutes put before the decision-maker. This was wholly inappropriate and could lead to a tainting of the decision-making process.

The investigation itself was flawed in several respects. The process lacked openness and transparency. The claimant was not informed initially as to what was being investigated, was not given time or opportunity to prepare, was not adequately represented, did not get to fully and effectively participate, was not provided with copies of all relevant materials and did not understand the consequences for her.

Any reasonable employer, would in the Tribunal's opinion, when presented with an individual such as the claimant, would have been concerned as to her ability to participate meaningfully without representation.

The company's disciplinary process allows for an employee to be accompanied by a friend or colleague. The Tribunal is of the opinion that, in the circumstances of this particular case, any reasonable employer would have offered the claimant the opportunity to be represented and assisted by a suitably capable representative throughout the process.

When some 30 minutes after the investigatory meeting, the claimant was brought back into the disciplinary meeting she was not informed that it was to be a disciplinary meeting or of the

possible consequences for her. Indeed, the Store Manager (the deciding officer) confirmed to the Tribunal that it was at the end of this meeting that the claimant was first advised that she could be dismissed.

It was at this meeting for the first time that a specific allegation was made to the claimant (as in the minutes) that she had committed loyalty card fraud. It is quite clear from the minutes that the claimant was only now beginning to fully understand her predicament. However, it was also clear at the subsequent meeting on Monday the 31st May 2010 that the claimant believed she had been sacked on the previous Friday. A reasonable employer at that point would again have questioned the extent to which the claimant understood the whole process and had adequately represented and communicated her position and any defence she might wish to raise.

The minutes from the Monday meeting show the claimant to indicate that she believed 'it was not fair' yet nobody sought to ask why she thought that to be the case.

The deciding officer failed in the Tribunal's opinion to ensure that the claimant understood the process and could fully participate without representation, failed to give her the opportunity to view and comment on all the materials he intended to rely upon, failed to consider the current company handbook's provisions referable to the loyalty card points and approached the entire process on the basis that there had been an admission of loyalty card fraud.

Sanction for loyalty card fraud or abuse could include dismissal, however, the deciding officer advised the Tribunal that the understanding at managerial level was that dismissal would follow automatically on a finding of such activity. In this regard, the claimant did not get the benefit of the company's written policy in so far as she was not considered for lesser sanctions.

It was quite clear in evidence to the Tribunal that the deciding officer used the period between the Friday and the Monday to ensure that there was documentary evidence in existence sufficient to ground a decision to dismiss which the Tribunal believes was made in all but name on the Friday.

The Tribunal feels it appropriate that we address the evidence given by the claimant that she only used customers' points when her hours were reduced to 15 hours per week and as a means of improving her situation though this was not information before the deciding officer when he dismissed her. It could, however, be relevant to the measure of loss. This was open to the interpretation that the claimant knew the practice to be wrong but decided to avail of it to 'get back' in some way at her employer. It is equally open to interpretation that the claimant believed it to be a legitimate practice which she could use provided she asked the permission of the customer and that it was on that basis that she commenced to ask customers. For the Tribunal the latter explanation had a ring of truth about it given that the evidence was volunteered by the claimant and was consistent with her position throughout.

The conclusion of the Tribunal is that the claimant was unfairly dismissed. The Tribunal must have due regard to the economic climate and those obstacles that face someone in the c laimant's position in seeking to secure alternative employment and mitigate her loss. The Tribunal is satisfied that the claimant discharged the onus which was on her to mitigate her loss. Accordingly, the Tribunal awards the Claimant compensation in the sum of €20,000 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal also allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, by awarding the claimant the sum of€953.92 (being the equivalent of four weeks' gross pay.)

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)