

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
EMPLOYEE            -*Appellant*

CASE NO.  
  
UD1514/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER            -*Respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr P. Pierce  
              Mr C. Ryan

heard this appeal at Dublin on 20th December 2011 and 23rd March 2012 and 2nd April 2012

#### **Representation:**

Appellant: Mr. Marcin Szulc, Maguire McClafferty, Solicitors, 8  
              Ontario Terrace, Portobello Bridge, Dublin 6

Respondent: Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower  
              Baggot Street, Dublin 2

#### **The determination of the Tribunal was as follows:**

This claim came before the Tribunal by way of an employee appealing against the recommendation of a Rights Commissioner dated 29<sup>th</sup> June 2010 reference r-084585-ud-09/RG.

#### Respondent's Case:

Giving evidence the Loss Prevention Manager outlined and described in detail the workings of the respondent's distribution centre. The distribution centre supplies around 136 of the respondent's stores with non-perishable goods. Certain goods are stored in a high value area such as laptops and mobile phones. The high value area has roller doors and is enclosed by mesh. The CCTV facilities of the distribution centre were outlined in detail to the Tribunal.

The appellant was working on a nightshift in the warehouse on the night of the 11<sup>th</sup> July 2009 and into the morning of the 12<sup>th</sup> July 2009. At the beginning of a shift each picker is given a scanning device into which they enter a four digit card number. This device is retained by the picker

throughout their shift.

The loss prevention team carries out five counts per day on a certain number of high value items. If the physical count does not match the stock quantity on the computer system an investigation is required.

At 6.15 a member of the loss prevention team carried out a count on MP3 players and realised that there was a discrepancy against the system of -17. He notified the Loss Prevention Manager who was off duty at that time. Previous counts of the MP3 players were carried out at 11am, 13.20pm and 16.15pm and these had all shown a variance of -2 which was considered a picking error. In such cases this is checked with the store who received the goods and the store is charged for the extra goods and an adjustment made to the distribution centre's stock system. However, a variance of -15 was considered to be a very high number by the Loss Prevention Manager.

When a discrepancy arises the loss prevention team investigates by examining who picked at the location in the relevant time period and for what quantities. The CCTV footage is also reviewed. Once this information was compiled in this instance it was sent to the manager of the shift as the responsibility for the full investigation lies with the management team.

During cross-examination the respondent's crime incident report was opened to the Tribunal. The Loss Prevention Manager stated that the authorities were not informed of the incident as the company tried to resolve the issue internally.

In reply to questions from the Tribunal, the Loss Prevention Manager confirmed that the MP3 players were stocked at section SC183. The appellant's picking orders for that shift did not require her to stop at bay SC183. However, she was assigned to pick from bay SC275 which was located 10-12 feet across the aisle from bay SC183. The Loss Prevention Manager stated that while the CCTV footage did not show the appellant removing MP3 players from bay SC183 it did show that she went to that bay at 23.11 on the 11<sup>th</sup> July 2009, for a period of 1 minute 13 seconds. It was the respondent's case that the MP3 players could have fit through the mesh surrounding the high value area. After 1 minute and 13 seconds the appellant crossed the aisle to bay SC275. CCTV footage was viewed by the Tribunal.

MK the operations manager said that the case escalated to him. He took all the research which had been done by the shift manager AJ and the loss prevention officer into consideration. He interviewed the appellant and asked why was she at the wrong location, if she had talked to the hygiene man and if she seen any empty packaging. The appellant informed him that she had gone to the wrong location because she was talking to the hygiene guy. She scanned a box and said the box was open, then she changed her mind and said no, she had to open the box to scan it. MK felt the appellant had opened the box and placed its contents (20 MP3 players) on a pallet. He then believed that the hygiene man came back and took them through the wire mesh. This man was interviewed and admitted to knowing the claimant. He is an agency worker and could be seen returning to the location 11 times on the CCTV footage. An investigation outcome meeting was held with the appellant on 21st July.

On 16<sup>th</sup> August he wrote to the appellant informing her that she was dismissed and had a right to appeal if she so wished. He felt it was a fair decision as he took everything into account, she was an experienced picker and he felt she was involved.

Under cross examination MK confirmed that it was not put to the appellant that she had specifically laid out the MP3 players for the hygiene man and confirmed that nobody had seen her actually take

anything. Asked what exactly she was dismissed for, as her dismissal letter stated she was dismissed for theft or fraud or attempted theft or fraud, MK stated that it is a standard letter that is produced in India. The company did not notify the authorities of the theft. MK said he had no regrets about the way the case was handled.

AJ the warehouse section manager said that he was shown the CCTV footage by the section manager. He held an investigation meeting with the appellant on 13<sup>th</sup> July in the presence of a representative/translator. He asked why she was in that area etc. She told him she had been distracted could have been talking to someone on the other side. He showed her the empty box and she said she didn't take anything. AJ told her she was being suspended because he wasn't happy with her answers. He didn't advise her that the incident could lead to a dismissal.

CG the personnel manager gave evidence that the investigation was passed to her for a full investigation. A meeting took place on 21<sup>st</sup> July with the appellant, her union representative and a translator. The facts were put to the appellant, she was shown the CCTV footage and CG felt there was still no clarity at the end of the process. The appellant did say it was a genuine error, she was in the wrong area and had made a mistake.

Under cross examination CG said she did not recall if she had seen the crime incident report. Her role was to establish the activities around the area at the time of the incident and get the appellant's recollection of her activities. She then passed her findings to MK. Her conclusion was that there were no satisfactory answers. Asked if MK's decision was based on her findings GC said there were no findings just unanswered questions.

MD the night shift manager gave evidence that he spoke with the hygiene man who worked for a cleaning agency. MD asked him about his location at the time of the incident and told him MP3 players were missing. He said he had spoken to the appellant and had seen the package after their conversation. MD didn't want to accuse him at the time, he never came back to work and there has been no further communication with him. Under cross examination MD said he didn't reach any conclusion about what happened, it wasn't for him to decide, he just passed it on for further investigation.

MC the operations manager gave evidence of the appeal which was heard on 27<sup>th</sup> August. He listened to all the points raised, along with KD the group personnel manager. He also walked through the location where the alleged theft took place. The decision to dismiss was upheld.

#### Claimant's case:

IV got employment with the respondent through an agency. She began work in 2007 and her employment was uneventful until July of 2009. She confirmed that she was in the wrong location as was shown on the CCTV but stated that a wrong location is only shown once you scan a product. She went to the right corner but scanned a wrong product. The box itself wouldn't scan so she had to open it to scan the product inside. This may have taken over one minute as it depends on the size of the box and there may be three sides to open. At her first meeting an empty box was put in front of her but all the questions were about why she was in the wrong area. It was never put to her that she had stolen the product and she was never asked if she had helped anybody to steal them.

## **Determination:**

The dismissal in this case arose from the disappearance of 15 MP3 players from the respondent's premises in Donabate, County Dublin on a date in July 2009. The respondent suspected that the appellant, by visiting a location in the high-value area of the warehouse where she was not authorised to go at the time in question, had colluded with another individual in an alleged theft. Having examined CCTV footage and other work records and on the basis of interviews with the appellant, the respondent believed that she had opened a box, removed a number of MP3 player sets and left them in an area which could be easily accessed by her conspirator. The CCTV footage was not probative of her suspected role although the respondent was convinced that the appellant, an experienced warehouse worker, was present at the location in question with an improper purpose.

The respondent carried out an investigation into the incident comprising separate interviews with the Appellant who was accompanied by a trade union official. The respondent also interviewed her alleged conspirator. Unhappy with the responses it received from the appellant; it initially suspended her on full pay pending further investigation and disciplinary procedures. In the event, the respondent, convinced that in all probability the appellant was guilty of serious misconduct, dismissed her by letter dated the 18th of August, 2009.

The appellant appealed the dismissal on the grounds that a full investigation had not been carried out by the respondent. She also complained that the sanction imposed was severe.

The Tribunal, though apprehensive about the conduct of the appellant and unimpressed by the evidence given at the Tribunal hearing, is nonetheless uncomfortable with the general approach taken by the respondent.

Specifically:

- 1) the evidence against the appellant was merely circumstantial and it was inconclusive;
- 2) the respondent clearly regarded the incident as criminal in nature but it failed to formally present her with an allegation of gross misconduct;
- 3) the respondent also neglected to inform the appellant that the investigation process into which she had been invited was a serious one that could result in her dismissal from her employment;
- 4) the respondent's investigation and disciplinary processes were not distinguished from each other; and,
- 5) the appeal process had significant flaws.

The Tribunal finds that the dismissal was unfair by virtue of the fact that the evidence was circumstantial and particularly because of the procedural deficiencies described above. However, it believes the appellant contributed significantly to the circumstances which led to her dismissal.

The Tribunal understands that the appellant did not secure significant employment in the two years since her dismissal. It also accepts that she sought to mitigate her loss. The Tribunal therefore upset the decision of the Rights Commissioner and awards compensation in the sum of €1,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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