

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE – *claimant*

UD1772/2010

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr F. Murphy

Members: Mr D. Morrison
Mr M. McGarry

heard this claim at Castlebar on 8 March
and 14 & 15 June 2012

Representation:

Claimant:

Mr Owen Swaine, Swaine Solicitors,
14 Father Griffin Road, Galway

Respondent:

Ms Rosemary Mallon BL instructed by, on the first day,
Ms Sarah Grace and on the subsequent days, Ms Gill Woods,
Both of Arthur Cox Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

The claimant worked as a bank official in the respondent's Castlebar branch having been employed by the respondent since February 2000. The employment was uneventful, with the claimant regularly training other staff as part of her duties, until the incident which led to her dismissal. On 16 March 2010 the claimant was suffering with a medical condition which flares up from time to time such that she needed to obtain a prescription from her GP in order to get medication to treat these flare ups. Due to a shortage of staff in the branch the claimant contacted her GP by telephone in order to be issued with the prescription which was then faxed to her.

On this day the claimant had left her car to be serviced at a local garage, this was the first time she had used this garage. She was to collect the car that evening before 6-00pm and then to collect her children on her way home. After the branch closed for the day part of the claimant's duties involved balancing the cash in the branch. This was achieved soon after 5-00pm on 16 March 2010. After this operation was complete it was no longer possible to operate the electronic banking systems in the branch. Sometime later the claimant realised that she had no means to pay the garage for the work which had been done on her car. In particular she had left her purse containing her credit cards in another car which she had been using prior to 16 March 2010 and had no cheques remaining in her cheque book.

At around 5-40pm the claimant then removed a sum of money, some €350-00, from the till and left a debit docket in the till to that effect. It is common case that the branch manager (BM) was still on the premises at this point. The next working day was 18 March 2010, a day when the claimant was not due at work. Sometime after 9-00am but before the branch opened the claimant telephoned her colleague (AC) who was performing the same duties as the claimant had been on 16 March and asked AC to put the €350-00 back in the till from the claimant's account. AC did not reverse the debit note but instead brought the matter to the attention of her team leader (TL) who in turn brought the matter to the attention of BM on 19 March 2010. There was a misunderstanding between the claimant and her husband in that, initially, there were not funds in the claimant's account to enable the money to be repaid when attempts were made to process it.

On 19 March 2010 BM spoke to the Area Manager (AM) to seek his advice on how to proceed. BM then contacted the respondent's Human Resource advice centre and as a result conducted a fact finding exercise. This resulted in BM meeting the claimant along with a union representative and a note-taker on 24 March 2010. The claimant recounted the events of 16 March 2010. She accepted that it was against the respondent's policies and procedures to process activity on her own account. BM then wrote to the claimant the same day suspending her with pay following further investigations into the alleged "removal of €350-00 without authorisation from the cash you were operating on the day".

On 25 March 2010 AM wrote to the claimant inviting her to a disciplinary meeting. In this letter AM set out the allegations against the claimant as follows

- Taking €350-00 from your cash till on 16 March 2010
- Putting a signed debit docket for €350-00 in your till but did not ask a cashier to process it through the branch teller system
- Recording your till as balanced despite knowing it to be €350-00 short
- Not telling your line manager that you had taken €350-00 from your till
- Phoning a colleague to process the transaction on 18 March 2010 as you were not due to work that day
- It was alleged that these actions represented a failure to exercise adequate control over cash
- Not adhering to the respondent's instruction regarding the balancing of cash

The claimant was made aware that the allegations could be considered to amount to gross misconduct as defined in the respondent's disciplinary policy, specifically:

- Misappropriating or withholding, even temporarily, any document, record, money or other assets belonging to the group

- Knowingly falsifying or suppressing the records of the group
- Fraud, theft or dishonesty

The claimant was supplied with a copy of the notes of the fact find meeting, the respondent's code of conduct and the respondent's disciplinary policy.

The disciplinary meeting was held on 12 April 2010 and was attended by the claimant, a union representative (TU), AM (acting as disciplinary manager), a Human Resource representative and a note-taker. The claimant recounted the events of 16 March 2010. AM took the view that the actions of the claimant had led to a breakdown in trust between the respondent and the claimant due to a breach of fundamental bank rules amounting to gross misconduct. AM informed the claimant of the decision that she be dismissed from the service of the respondent following an adjournment of the disciplinary hearing.

The decision to dismiss the claimant was confirmed in a letter from AM on 20 April 2010. This letter included advice on the claimant's right of appeal. In fact the claimant had sent an email to AM on 19 April 2010 indicating her wish to appeal his decision. On 5 May 2010 a Human Resource Manager (HR) from Human Resource Policy & Advice Services wrote to the claimant advising her of the details of the appeal.

The appeal hearing on 14 May 2010 was conducted by a Business Banking Manager (BB), described as the appeal hearer in the respondent's notes of the appeal, and a Human Resource Business Partner for retail (BP), described as HR representative in the notes. In fact the respondent's disciplinary policy calls for a disciplinary committee of two. BP and BB meet the specified criteria for committee members. The claimant was accompanied by a union representative and there was a note-taker.

At the end of the appeal hearing BP indicated that the respondent would endeavour to inform the claimant of the result of the appeal by 21 May 2010. After the appeal hearing BP and BB had a different view of the matter. It is common case that BB, who did not give evidence to the Tribunal, felt that the penalty of dismissal was extreme and had, initially, reached a different conclusion than BP. The evidence of BP was that BB had changed his view of the appeal after receiving advice from HR. In the event the claimant was informed of the failure of her appeal in a joint letter from BP and BB on 7 July 2010.

The claimant later exercised her right of an external appeal. HR wrote to the claimant on 25 November 2010 setting out the details on when and how the external appeal would be conducted. The external appeal was heard on 17 January 2011. The notes of the appeal hearing indicate that HR reminded the independent person conducting the appeal that the test to be applied was whether the decision of AM to dismiss the claimant fell within the band of reasonable responses of a reasonable employer. On 31 January 2011 the claimant was advised of the rejection of the external appeal.

Determination

The Tribunal is satisfied that the claimant's action in regard to the leaving of the debit note in the till was covered in the respondent's code of conduct and meets the definition of gross misconduct contained therein. The code of conduct provides that the sanction may

included dismissal. This was the sanction invoked by the disciplinary hearing. It is clear from the evidence of BP that her colleague BB, who was described as the Appeal Hearer in the notes of the appeal hearing and was not called to give evidence to the Tribunal, felt that the penalty of dismissal was extreme. This appeal was heard on 14 May 2010 and notification to the claimant of the rejection of her appeal was not communicated to her until 7 July 2010, over seven weeks after that hearing. In circumstances where BP was told that the function of the appeal hearing was to apply the band of reasonableness test to the initial decision, a view which was repeated by HR at the external appeal hearing, and in the absence of evidence from BB the Tribunal is not satisfied that BB was not subjected to undue influence as a result of which he changed his view of the appeal. It follows that the Tribunal is not satisfied that the conduct of the appeal was fair in all the circumstances and, accordingly, the Tribunal finds that the dismissal was unfair.

When considering the remedy in this case the Tribunal has come to a majority decision, with Mr Morrison dissenting, that the claimant be re-engaged under the Unfair Dismissals Acts, 1977 to 2007 into an equivalent role within the respondent within six weeks of the issuing of this determination. In his dissenting opinion Mr Morrison would have awarded compensation as the appropriate remedy.

The period from the dismissal until the re-engagement is to be considered a period of unpaid suspension thereby preserving the claimant's continuity of service.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)