EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	CASE NO.
EMPLOYEE	UD277/2011

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

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. C. Corcoran B.L.
Members: Mr. J. O'Neill
Mr. P. Woods

heard this appeal at Dublin on 1st June 2012 and 16th July 2012

Representation:

Appellants:
Ferrys, Solicitors, Inn Chambers, 15 Upper Ormond Quay, Dublin 7

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

This case came to the Tribunal by way of an appeal by the employee against the decision of the Rights Commissioner Ref: r-092762-ud-10/EH

Preliminary issue:

The Tribunal pointed out that it appeared from the documents received by the Tribunal members that the FormT1B was not submitted within the required time limit of six weeks. The appellant's representative claimed that the T1B was posted and faxed to the Employment Appeals Tribunal on 23rd December, 2010. There was no record of this fax having been received in the Tribunal, only a letter and T1B form received on 30th December, 2010 by post. The Rights Commissioner decision was dated 15th November, 2010 which would bring the appeal outside the limit of six weeks.

The appellant gave evidence that he only became aware of the Rights Commissioners decision

on 23rd November, 2010 by way of a telephone call from his solicitor.

The appellant's solicitor gave evidence to say he notified the appellant by telephone on 23rd November, 2010 of the Rights Commissioners decision.

The appellant's representative referred the Tribunal to Section 9 of the Unfair Dismissals Act, as amended by Section 8 of the Unfair Dismissals (Amendment) Act 1993, where the time is said to run from the date of receipt of this notice by the other party, and that as this date was 23 rd November 2010, the claim is within time.

Based on the evidence adduced, the Tribunal finds that the appeal has been filed with the Employment Appeals Tribunal within the six week time limit and that the Tribunal has jurisdiction to hear this case.

Respondent's case:

The respondent is a Supermarket Chain and the appellant was employed there from 17th December 2006 until he was dismissed on 3rd November 2009.

The Appellant was dismissed for a breach of the Honesty Policy. He appealed this decision and the person who heard the appeal upheld the decision to dismiss the appellant.

The Store Manager (GD), of the store in which the appellant worked, stated that he made thedecision to dismiss the appellant based on his findings in relation to the appellant's dishonesttaking of a four pack of Red Bull. GD interviewed the appellant on 24th October 2009 after theappellant had agreed to and undergone a "staff search". GD had reason to believe that the appellant had taken the Red Bull during his shift without paying for it. The appellant had takenthe Red Bull at 23:48 on 23rd October 2009 having started his shift at 21:00 on the same day.
Later in his shift at 01:58 on 24th October 2009 the appellant took some other items and paid for those items immediately. However he did not pay for the Red Bull until after he was interviewed by GD after his shift had ended on 24th October 2009. GD stated that he asked the appellant twice had he taken anything apart from the items he had paid for and twice the appellant answered no. However when GD prompted him in relation to the Red Bull the appellant replied that he had forgotten about those and would pay for them now. The appellant subsequently paid for the Red Bull at 10:25 on 24th October 2009.

GD held two disciplinary meetings with the appellant and his representative on 29th and 30th October 2009 and dismissed the appellant at the end of the second meeting. GD told the Tribunal that one of the reasons he dismissed the appellant was the fact that the appellant had tobe prompted in relation to the Red Bull was indicative of his dishonesty. A copy of the respondents Honesty Policy was submitted to the Tribunal and GD referred to a "zero tolerance" in relation to this. GD defined this zero tolerance as being "regardless of the value itis the dishonest taking of goods". GD regarded the taking of the Red Bull as an act of dishonesty.

The appellant appealed the decision to dismiss him and the person who heard the appeal (LOC) told the Tribunal that she concluded that the appellant was guilty of serious misconduct by breaching the Honesty Policy and that the taking of the Red Bull was not an honest mistake as the appellant had said. LOC upheld the decision to dismiss the appellant.

Appellant's case:

The appellant commenced employment with the respondent on 17th December 2006 on a part time basis while he was still at school. He became full-time after he finished school and after a short time he became a Line Manager. The appellant worked the night shift and had worked at least three twelve hour shifts before the night on which the incident, which led to his dismissal, occurred.

At the time that the appellant took the Red Bull energy drink from the shelf, for his personal consumption, he was thirsty and fatigued and very busy. He brought them back to his work station, in the stores, and intended to pay for these drinks later but forgot to do so. When he was interviewed at the end of his shift he initially forgot about the Red Bull he had drank but when it was pointed out to him that he had taken them he remembered and immediately offered to pay for them.

The appellant's representative pointed out that the CCTV clearly shows the claimant taking the Red Bull without any attempt to conceal what he was doing despite having full knowledge of the position of the CCTV camera. Therefore it was the appellant's case that he did not dishonestly take the Red Bull and that he honestly forgot to pay for them but promptly did so when his oversight was pointed out to him by GD.

The appellant acknowledged that he was in breach of the Honesty Policy insofar as he did not pay for the Red Bull immediately but contended that this was not an act of dishonesty but rather it was an honest oversight and as such dismissal was too harsh a sanction.

Majority decision

The Tribunal finds, by majority decision, that the appellant was unfairly dismissed by the respondent. The dissenting opinion of Mr. J. O'Neill is outlined below and this is followed by the determination of the Tribunal.

Dissenting opinion of Mr. J. O'Neill:

A number of facts are not disputed:

The appellant was a Line Manager in the respondent company with responsibility for about twelve staff on his shift. He took a pack of four Red Bull cans from a shelf at about 23:48 on 23/10/2009. Contrary to company policy on purchases by staff, he did not pay for these items immediately.

Later during his shift he took four more items prior to his meal break. He paid for them at a self-service check-out at 01:58.

After completing his shift he was subject to a staff search. He denied twice that he had taken anything other than the items purchased at 01:58 but subsequently after some prompting he admitted he had taken the cans of Red Bull. He said he had intended to purchase the cans but had forgotten about them and had forgotten to pay for them.

He paid for four cans of Red Bull at 10:25 on 24/10/2009 at a self-service check-out. He said

he then returned these cans to the shelf. He could not account for the fact that he did not collect some unopened cans of Red Bull that he took at 23:48. He said he did not know what had happened to these cans.

The only evidence therefore of his removal of the four cans of Red Bull and his failure to pay for them was the CCTV footage and his own admission. He chose not to view this footage when invited to do so. However, His representative chose to view it.

There are background factors including the following:

"Shrinkage" is very important for the company and is a KPI (Key Performance Indicator) for management. A rough definition of shrinkage is a difference between purchases and sales. Shrinkage at the appellant's branch was said, by the Store Manager, to be about twice the national average. It was discussed regularly at weekly management meetings attended by the appellant in his managerial capacity.

Pilferage, including pilferage by staff, is one of a number of possible factors contributing to shrinkage. Surveillance, including CCTV surveillance, is a key control measure. The appellant was identified in CCTV footage removing the four cans of Red Bull. The footage showed no evidence of concealment of his removal of the cans. Evidence was not presented about how management connected his removal of the cans to his failure to pay for them.

The company's Honesty Policy states that staff found converting goods to their own use without the authority of a Store Manager or a more senior manager will be subject to dismissaland/or prosecution regardless of the monetary value involved. The appellant acknowledged thathe was fully aware of this policy.

Conclusion:

The company conducted an investigation, a disciplinary process and an appeal hearing into the case. The appeals officer viewed and took account of the CCTV footage but did not visit the location of cameras and was unaware of the type of cameras used. The appellant's rights as an employee at the investigation stage, his rights under the disciplinary code, his right of representation at the disciplinary and appeals meetings, his right to review all the evidence including management's notes of the meetings and the CCTV footage, his right to put his version of what occurred, and his right of appeal, were explained and respected. The fact thatthe appeals officer did not visit the location of the cameras was not of such importance as toinvalidate this procedure.

The appellant's representatives at the Tribunal hearing did not challenge the validity of the procedure although they disagreed with the dismissal decision. The quality of procedure used was of a high order and was comprehensive, fair and reasonable.

Shrinkage is a material and serious issue for the respondent and the company relies on its managers to address and rectify it where possible. It is reasonable for the company to expect a manager such as the appellant to lead by example and to set high standards.
The appellant's explanation for his behaviour is as follows:

- He took the cans of Red Bull without immediately paying for them and without the authority from senior management prescribed in the Honesty Policy. His explanation

was that he was very busy, fatigued and thirsty.

- Within two hours he took four other items and paid for them at 01:58 in accordance with company policy. He said he did not pay for the cans of Red Bull at this stage because he forgot to do so.

- He was subjected to a staff search at the end of his shift and when queried he denied taking any items other than the items he paid for just prior to his meal break. He made this denial twice and only admitted taking cans of Red Bull when told that management had reason to believe he had done so. He said he had denied taking the cans because he had forgotten about them.

The appellant seriously breached the trust that is essential in the retail sector between employee and employer, particularly when the employee is entrusted with responsibilities for managing other staff.

The company has responded to the serious issue of “shrinkage” by, inter alia, defining a policy of no tolerance for breaches of the Honesty Policy, communicating it to employees and enforcing it as appropriate through fair investigative , disciplinary and appeals procedures. An alternative of tolerating some level of dishonesty would give rise to a variety of difficulties for staff relations and for the business generally.

The company has a duty to protect its business and to conduct its staff relations in an ethical and orderly manner, and it has a right to do so by, inter alia, formulating and upholding the Honesty Policy. I concur with the Rights Commissioner who examined this case in the first instance that “forgetting to pay” is not an adequate defence for breaching this policy. Theexplanation offered by the appellant for his behaviour is unsatisfactory, lacks credibility and isunacceptable. In my opinion his dismissal was not unfair.

(END OF DISSENTING OPINION)

<u>Determination:</u>

Having carefully considered all the circumstances in this case, and the evidence adduced at the hearing the Tribunal finds, by a majority decision, that the Respondent has not discharged the onus of proof required, and that the Appellant was unfairly dismissed.

The procedures adopted by the respondent were inadequate given the serious accusation made against the claimant i.e. that he had no intention of paying for the four pack of Red Bull. The fact that the appellant was aware of the positioning of the CCTV cameras and made no attempt to avoid being captured on CCTV would lead a reasonable employer to conclude that he was not acting dishonestly when he removed the items for his own consumption.

It is also noted with some trepidation that the appeals officer did not visit the location of the CCTV cameras, and did not seem to be familiar with the security system operating on the shop floor at the relevant time, and that a prudent and reasonable employer would not act in such a manner, in these circumstances.

In cases such as these where serious allegations are made attracting serious consequences to one's reputation, career and prospects it is essential and imperative that the corresponding procedures adopted in the investigative process be carried out with the utmost vigilance and care, especially when the onus of proof lies on the party making such allegations.

Having regard to the appellant's unblemished record before this incident and the fact that he had been promoted, together with the fact that he paid for the items as soon as he realised his error, and that the incident occurred at a time when he was exhausted, busy and tired, this Tribunal is satisfied that a reasonable employer in the circumstances would conclude that the appellant having regard to his position in the respondent company was careless and neglectful and was a bad example for the workers in his charge, but not dishonest, and that the sanction of dismissal in the circumstances, was disproportionate.

Accordingly this Tribunal, by majority decision, overturns the decision of the Rights Commissioner Ref: r-092762-ud-10/EH, and orders that the appellant be re-engaged by the respondent in accordance with section 7 (1)(b) of the Unfair Dismissals Acts 1977, as amended, and that he be re-engaged in the position of an ordinary worker with the respondent company (i.e. that he be demoted from the position of Line Manager, which he held, to the position or grade he had held before he was promoted). Such order to come into effect after 6 weeks from the date of the issue of this determination from the Tribunal has elapsed.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)