

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

CASE NO.

MN2353/2010

UD2413/2010

Against

EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. L. Tobin
Mr A. Butler

heard this claim at Wicklow on 24th July 2012.

Representation:

Claimant: In person

Respondent: Mr. David O'Riordan, Sherwin O'Riordan, Solicitors, 74 Pembroke
Road, Dublin 4

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent owns many fuel stations throughout the country. The claimant worked as a shop assistant in a station in Co. Wicklow. TM was his manager. He had issues with refunds being done and these were a matter of concern to him.

There was a promotion in the fuel station whereby a free can of red bull to the value of €2.50 was given with €30.00 fuel purchased. Upon examination of the full day's sales TM noticed an irregularity. He examined the CCTV footage for the day in question together with CS, Assistant Manager. Refunds were made to the value of €7.50 on three cans of red bull by the claimant's colleague A and then A walked away. The claimant walked over to the till and in the same transaction scanned a package of cigarettes. The price on the receipt was €1.05.

There were no customers in the shop at the time the items were being scanned on the till and no fuel transaction occurred at that time.

The claimant and his work colleague A were invited to TM's office for an informal chat on 8th October 2010. They were shown the CCTV footage of the incident. The claimant was told he could go down the official route of being suspended without pay pending an investigation and the Gardaí would be contacted or he could resign. After a break of fifteen to twenty minutes the claimant tendered his resignation.

Claimant's Case:

On 19th October 2010 the claimant, a shop assistant commenced work at 3 pm. About an hour and half later TM called into a meeting with his colleague A. He had started work at 3 pm that day and it was about an hour and half later when TM invited him to a meeting. He was shown CCTV footage of an incident that occurred at the till. The CCTV footage showed the claimant's colleague A making refunds at the till and in the same transaction the claimant scanning a packet of cigarettes immediately afterwards. The claimant did not see anything wrong in what he had done. He was shocked. He panicked and did not know how to respond. Both the claimant and his colleague were told that the Gardaí could be called or they could resign their positions.

He was given about fifteen minutes to consider his position. When he returned to the meeting he signed a resignation letter and was told to leave the premises. The claimant was also told he was barred from the premises.

The claimant has not secured employment since the termination of his employment.

Determination:

The Tribunal has carefully considered the evidence adduced. The claimant together with his colleague was called into a meeting with the station manager wherein they both worked. At this meeting the claimant was shown CCTV footage which showed the two colleagues engaged in a till transaction wherein three cans of the soft drink red bull were rung into the till as refunds and the credit for that refund used to purchase a packet of cigarettes.

It was accepted by the claimant that this account of the footage shown is correct. In the course of giving evidence the claimant offered an explanation which was that there had been a promotion in the garage whereby customers who bought in excess of €30.00 of fuel would be entitled to a free can of red bull. Apparently not all customers wanted to take the red bull and told the claimant's colleague (employed as the cashier) that he was welcome to keep same. The claimant explained that his colleague did not like the red bull and rather than leave the said cans (which is what management say they would have expected him to do), he rang the three cans into the till as refunds which effectively created a credit for the claimant's colleague in the amount of €7.50 which was used as part payment by the claimant to purchase a packet of cigarettes.

At the meeting conducted by the manager (in the presence of a witness) it was put to both colleagues that this was theft and considered gross misconduct. The claimant and colleague were given the choice to resign their positions or be suspended and face the full rigors of an internal investigation including notification of the theft to the Gardaí.

Clearly the claimant was in a very difficult position. In his defence the claimant said he did not believe that he had done anything wrong in circumstances where the red bull cans had been freely returned. The manager in evidence indicated that the issue of customers returning red bull on a voluntary basis was never raised at the time of the meeting. At any rate, the company held the view that the claimant ought to have known that the act of refunding cans for the purpose of creating a cash credit for the benefit of the claimant could never be allowed or allowable. This amounted to theft and a gross misconduct.

The Tribunal does not accept that this was a case of constructive dismissal. The claimant was brought into a meeting presented with conclusive evidence and invited to resign. The respondent did not conduct a fair hearing. However, there can be no doubt the transaction described amounted to gross misconduct and the respondent was entitled to dismiss the claimant for theft.

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)