

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD754/2011
MN819/2011

against

EMPLOYER

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: Ms. A. Gaule
Mr. M. O'Reilly

heard this claim at Dublin on 14th September 2012

Representation:

Claimant:

Mr. Richard Grogan, Richard Grogan & Associates,
Solicitors, 16 & 17 College Green, Dublin 2

Respondent:

O'Mara Geraghty McCourt, Solicitors,
51 Northumberland Road, Dublin 4

Respondent's case

The respondent operates food outlet store on a franchise basis. The claimant was employed there from 2005 until she was dismissed for gross misconduct on 18th February 2011. Initially the claimant was a Sandwich Artist but subsequently progressed to Store Manager with responsibility for six employees.

There was one witness (DF) for the respondent and he was a brother of the Company Director (GF). GF was living abroad and DF acted as agent for GF in the running of the business. However DF had his own full time job and was not involved in the day to day operation of the store. DF assisted managers in their tasks and once was required to speak to the staff at the claimant's store in order to impress upon them that the claimant was the manager and thus in charge of the store.

The respondent is primarily a cash business and when DF took over he had concerns about the handling of funds. Therefore he put certain cash handling procedures in place. The claimant had difficulties with these procedures and DF issued a final written warning to her on 17th June 2010 with regard to her personal use of cash from the business.

On 12th January 2011 DF sent an e-mail to the claimant requesting a count of all monies in the safe. Having received these figures, DF decided to have a follow-up on-site audit on 25th January 2011. This audit discovered that the “float” was significantly less than the €600.00 that was supposed to be there and DF saw the claimant as responsible for this short-fall. The following day the claimant gave DF €500.00 and wrote him an e-mail. DF took this as an admission of guilt and wanted to call the police. However, having discussed the matter with GF it was decided to take a different approach and DF summoned the claimant, by letter dated 4th February 2011, to a disciplinary meeting scheduled for 11th February 2011. DF did not interview any other member of staff during his investigation.

The claimant was dismissed, without notice, by letter dated 18th February 2011, for “unauthorised possession of company money”. This letter also informed the claimant that, if she wished to appeal the decision to dismiss her, she should write to GF. No such appeal was received but DF told the Tribunal that, had there been one, GF would have heard it.

Claimant’s case

The claimant commenced employment with the respondent as a Sandwich Artist but soon progressed to Store Manager. However, she never received any accounts or management training.

Before GF moved abroad and DF took over there were occasions when the claimant would not be paid her wages on time and there was a permitted practice of the claimant taking a “sub” from the safe until she got paid, at which time she would repay the loan. However this procedure was no longer permitted when DF took over and the claimant received a written warning from DF in respect of borrowing €200.00 from the safe.

On 12th January 2011 the claimant replied to a request from DF for a safe count and told him that there was €600.00 in the float. However this was not the case and when this was discovered by DF on 25th January 2011 the claimant gave DF €500.00 to replace the missing funds. The claimant did not see this as an admission of guilt but did feel responsible, as manager, for the situation. In her e-mail of the 28th January 2011 the claimant did not mean that that she took the money and told the Tribunal that she had not taken the money. Other staff members were messing the till up all the time and furthermore nobody replaced the money in the change bag after the store was robbed three years previously.

The claimant did not appeal her dismissal because she knew it would not change anything.

The claimant was unemployed from the date of her dismissal until she went on maternity benefit in or around May 2011. After her maternity benefit finished she was unemployed again until she commenced a Fás traineeship on 5th June 2012.

Determination

The Tribunal has carefully considered the evidence it has heard. The claimant had been employed at the respondent's food retail outlet since 2005. The claimant had worked her way up to a management position and was a trusted and valued member of the workforce.

The respondent adduced no evidence in relation to any training that the claimant had been given in respect to the handling of funds and the management of her fellow employees.

There was a history of the Company Director and/or an agent acting on his behalf having come down to the business to deal with staffing issues which had arisen and it is certainly clear that the management of funds was relaxed. It appears that the claimant had gotten into the habit of taking "subs" in relation to her own wages, which she would re-pay when she was paid herself.

What appears to have happened is that the Director with whom the claimant had been dealing, had moved abroad and his brother (DF), acting as agent, took on the task of running the premises. The claimant was given a final written warning in respect of her handling of funds, by DF in 2010.

The claimant was asked to perform a safe count in January 2011. DF opted to follow up the safe count request with an on-the-site visit and inspection. It was practice for the shop to have a float of €600.00 available at any given time in the safe. It is clear from the evidence that the inspection revealed that the float of €600.00 was not contained in the safe and the fund had been significantly reduced.

The claimant was questioned in relation to the shortfall and in evidence the claimant accepted that any shortfall could reasonably be blamed on the manager as it was her job to ensure that monies were handled in an appropriate way.

The tribunal accepts that it was carelessness over a protracted period of time that saw the float reduced. The blame did not rest entirely with the claimant as her staff were putting money in and taking money out of the float in a disorganised and unaccountable way. However, the claimant as manager was ultimately responsible.

In reaction to the discovery the claimant offered and in fact did replace the missing money. At no time did the claimant deny her responsibility.

In considering all the evidence the Tribunal does not accept that the claimant's actions showed "mala fides" on her part. She'd certainly made a serious mistake which may ultimately have given rise to her dismissal but certainly did not negate the respondent's obligation to perform a fair and reasonable investigation, including taking statements from her co-employees, which might have at least demonstrated that the practice was historic and/or show that more than one person was involved in this careless practice.

The respondent chose not to perform a fair or complete investigation and dismissed the claimant without notice, only allowing the right of appeal to a person whose opinion had been sought in the course of the "purported" investigation. The Tribunal finds that the respondent did not act fairly and reasonably in all the circumstances of the investigation.

Having regard to all the circumstances the Tribunal finds that the claimant was unfairly

dismissed and awards her €4,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and €1,923.04 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)