

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD1823/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms V. Gates BL

Members: Mr J. Flanagan
Mr T. Brady

heard this claim at Dublin on 17 January,
14 & 21 March and 28 June 2012

Representation:

Claimant:

Mr Kevin Jolley, Blake Horrigan Solicitors,
McKeever House, 4/5 Ushers Court, Ushers Quay, Dublin 8

Respondent:

Mr Eoin Martin, Lyons Dermody Solicitors,
43-46 Parnell Square West, Dublin 1

The determination of the Tribunal was as follows:

The claimant worked in the cash office of the respondent's supermarket from May 2003. Three other employees, out of a total workforce of around 200, worked in the cash office with the claimant. Among the claimant's duties was the requirement to reconcile the cash boxes from the tills with the drawback from the individual tills as recorded on the electronic till system. Takings are categorized as cash, credit card, cheque, money off voucher and saving stamp. Whilst it is accepted that discrepancies between the total on the till and in the cash box must be reported to the financial controller (FC) there is a dispute between the parties as to whether a discrepancy in the make up between the respective categories leading to the same overall result should also be reported to the financial controller.

During May 2010 the cash office supervisor (OS) noticed that on 15 May 2010 a reconciliation of a till performed by the claimant included saving stamps despite no saving stamps being recorded on the drawback for that till. This raised OS's suspicion but she took no further action at that time. There was a similar occurrence on 27 May 2010 and again on 30 May 2010. Processed saving stamps are to be cancelled by the check-out operator and marked with the date of cancellation. They were kept in an open box in the cash office awaiting checking by the auditor prior to their destruction.

OS and another colleague (AC) noticed two books of stamps in this box which had not been properly marked. They took note of these books. These books showed up as being processed a few days later and at this point OS reported this information to the assistant store manager (AM) who in turn reported the matter to FC. All the suspect reconciliations had been carried out by the claimant.

FC noted the serial numbers and other identifiers on the stamp books in the box and allowed them to remain there, knowing that if the claimant was guilty as alleged, he may do the same thing again. Over the course of the June bank holiday week-end 2010 the cash office was closed on Sunday and the claimant was the only staff member working there on Saturday and Monday. When FC returned to work on Tuesday he discovered that two of the books he had taken note of had found their way back into the reconciliations on 3 and 5 June 2010. FC conducted an investigation and concluded that the claimant had substituted used stamp books for cash and pocketed the cash amount. The claimant had conducted both reconciliations and had marked and signed the saving stamps books.

AM spoke to the till operator regarding the reconciliation of her till for 3 June 2010 and she confirmed having taken no saving stamps that day. The claimant was not interviewed as part of the investigation; FC stated that "he did not want to give him the opportunity to lie".

When the claimant returned from a week's leave on 21 June 2010 AM suspended the claimant with pay and gave him a letter to the same effect. The claimant was given a second letter inviting him to a disciplinary hearing on 23 June 2010. This letter set out the allegations against the claimant, advised him of his right to representation and warned that dismissal was a possible outcome of the complaint being sustained as the respondent considered that the allegations amounted to gross misconduct. The respondent's position was that the claimant had been furnished with a copy of the up to date disciplinary procedure, effective 1 June 2010, with the letter inviting him to the disciplinary hearing. The claimant denied that he ever received the disciplinary procedure booklet.

The disciplinary hearing on 23 June 2010 was attended by the claimant, AM and the purchasing manager (PM) to assist AM. The claimant signed a waiver regarding his willingness to proceed with the hearing without being accompanied. His position before the Tribunal was that he had asked FC to allow him time to consult a solicitor on the day he had been suspended. The Tribunal is of the view that the claimant's evidence in relation to his attempts to contact a solicitor is not credible.

No notes were taken of the disciplinary hearing; the claimant submitted a statement to the hearing in which he denied the allegations against him. He again asserted that it was not policy to report all discrepancies to FC. The claimant was afforded the opportunity to question both OS and AC who had both prepared statements which were given to the claimant on 21 June 2010. After this meeting AM took the decision to dismiss the claimant and this decision was set out in a letter given to the claimant later that afternoon. The claimant was advised of his summary dismissal for gross misconduct as AM had concluded that the claimant had wrongfully misappropriated the respondent's money. He was advised of his right to appeal the decision to dismiss but chose not to exercise that option.

Determination

The Tribunal is not satisfied that the respondent carried out a full and fair investigation into the allegations against the claimant. It appears to the Tribunal that, at all times, the respondent had a closed mind to anything other than the claimant having perpetrated acts of gross misconduct in regard to the processing of saving stamp books. In particular the Tribunal is satisfied that, regardless of who signed them, the letter of suspension, the notice of the disciplinary hearing and the letter of dismissal were all prepared on 18 June 2010, that is, at a time before the claimant was given any opportunity to explain and defend his position. Further, whilst the claimant gave a written statement to AM at the commencement of the disciplinary hearing there was no real consideration by the respondent of the contents thereof and the respondent failed to take any statement from the check-out operator on the till the subject of the investigation. In the circumstances aforesaid, the Tribunal finds that the investigation was unfair.

Nevertheless the Tribunal feels if the claimant was genuine in saying that he reported the discrepancy to his supervisor, this should have been raised at the outset. He was unable to give a satisfactory explanation of how the stamps were recycled. The employer was not unreasonable in assuming that there had been gross misconduct on the part of the claimant. The claimant failed to raise the assertion, made under cross-examination, that he had reported the

shortfall to OS, this was never raised in meetings, never put in his entire statement and was never raised in evidence in chief. In the circumstances the Tribunal finds that the claimant was unfairly dismissed and awards him compensation of €2,000-00 under the Unfair Dismissals Acts, 1977 to 2005 and in making this award takes into account the significant contribution that the claimant made to his dismissal.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)