

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

UD2206/2010

EMPLOYER – *appellant*

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

EMPLOYEE– *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. K. Buckley

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard this appeal in Cork on 29th February and 3rd July 2012

Representation:

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

Respondent(s) : Mr. John Brooks, Brooks & Company, Solicitors, Baldwin Street,
Mitchelstown, Co Cork

This case came before the Tribunal by way of an employer appeal of a Rights Commissioner recommendation under the Unfair Dismissals Acts, 1997 to 2007, reference r-088881-ud-09/pob.

The case involved an allegation of theft by the appellant against the respondent arising out of which the respondent was dismissed from her employment.

The parties made extensive written (filed) and oral (noted) submissions to the hearing relying upon various legal authorities.

Appellant's case

MC was the store manager for three months prior to the incident and knew the respondent. MC was not in work on the 23rd June 2009 when the respondent was stopped and searched. The following day when she arrived at work, PO and TOK informed her of the incident. She investigated what had happened but could not speak to the respondent as she was not in that

day. The respondent was found to have had a novel in the store for which the appellant supplied, and which she had no receipt for.

MC looked at the CCTV and saw the respondent going up the aisle, pick up the book, then saw the book on the respondents work trolley, saw her go into the bailer, dispose of the rubbish on her trolley and leave the book on the trolley. The camera then showed the respondent going to the clock machine and to and from the canteen. The respondent did not have her handbag with her. MC said not all of the store is covered by CCTV cameras and the footage viewed was from a number of different cameras.

On the 25th June, the respondent attended work and was asked to attend an investigation meeting with TH her shop steward. MC asked the respondent what happened to the book and was told by the respondent that she did not remember. She asked the respondent if she recalled getting the book from the shelf, going to the stores and the canteen. The respondent said she did not remember, but that her daughter had bought her a book. CCTV was not viewed at that meeting. MC then told the respondent that the issue needed further investigation and told her she was suspended with pay. MC then contacted DOM the respondent's union representative.

MC said the appellant had zero tolerance on theft and she was not happy that a book was taken, and not returned without an explanation.

On the 30th June 2009, she held a disciplinary meeting with the respondent and DOM. She showed them the video footage a number of times. DOM left to talk to the respondent. The respondent then said for the first time that she had selected the book for a friend. However this person was not visible on the footage and the footage did not support a ten minute conversation the respondent claimed she had had with her friend. It did not change the issue, where was the book. The book was taken from the shelf and was still not accounted for.

On the 3rd July 2009, the respondent was invited to an outcome meeting. The letter of dismissal was read out to her and she was told she had five days to appeal. The appellant had gone through the three stages agreed with the trade union. The respondent was dismissed for a breach of the company honesty policy.

Staff are not allowed to purchase items while working. They can during breaks but must keep a receipt and there is an area in the store for staff to store purchases bought.

The respondent had signed her contract of employment in December 2003 when she joined the company. She also received a copy of the company handbook. Staff are given induction training and the respondent accepted the handbook.

VS held the appeal. She asked MC for her version of events and why she had come to the decision.

During cross-examination MC said she did not know that the video footage was viewed before the respondent was searched. She said the respondent had told her the book was given to her by her daughter and confirmed that the respondent was not asked to produce the receipt.

MC said she told TH about the incident before the first meeting. She said she could not make TH tell the respondent before the meeting. At the first meeting the respondent was speechless,

dumbfounded. She did get upset.

There was a store sticker on the book on her trolley, but there was no sticker on the book in her bag. The respondent told her she had been talking to a lady from a book club about the book. The respondent said she may have left the book in the warehouse. The respondent left the store with a book and did not have a receipt for it.

The respondent had come to her looking for additional hours. If MC had had a problem with the respondent she would not have sent her to another store which she had. She said in jest to the respondent, be careful, you might get your P45.

In response to the Tribunal MC said she could verify that none of the books in question were sold that day. An external company looks after the books. The books were counted but there could have been one in the store.

Giving evidence, CC who was the shop manager of the book shop where the respondent's daughter said she purchased the book, said the original receipt was part of a PDF document. The Tribunal pointed out that two different receipts had been put forward in evidence. CC said that she cannot produce an exact replica of the original receipt. She did not recall the respondent calling into the shop in 2009. The respondent's daughter must have given her the date and time of purchase in order for her to print a receipt. CC posted it to the daughter in June 2009. One book was sold on 18th June 2009 at lunch time but she could not say to whom it was sold.

In order to reproduce a receipt, CC would export it to a word document and print it. It was receipt number 102968.

In reply to the Tribunal, CC stated she was asked by the respondent's daughter to give a receipt for the book purchased on 18th June.

VS stated she heard the appeal on 13th July 2009. She is Regional Development Manager of the company. The notes of the appeal hearing were opened to the Tribunal. She investigated the course of events surrounding the incident. VS had expected to receive a receipt from the respondent for the book and was surprised when it was not sent in as evidence. A letter dated 15th July 2009 was received from the respondent stating she would not be forwarding a receipt as evidence.

A letter dated 28th July 2009 was issued to the respondent with a request to forward the receipt for the book otherwise the dismissal decision would be upheld. A deadline of 10th August 2009 was given. A reply was received from the respondent on 30th July 2009 again refusing to forward a receipt on the basis that MC had already refused the offer of a receipt. A final letter, upholding the decision was issued to the respondent on 10th August 2009.

In cross-examination, VS had no recollection of the respondent asking if her daughter could give evidence. The receipt would have had a huge bearing on the investigation. Staff checked the journals and confirmed that the book was not sold. She accepted a copy of a receipt has now been produced by the respondent. The claimant has a staff search policy in operation. There are no set criteria, it depends on the situation. She said MC mentioned the P45 in jest to the respondent.

Breach of the honesty policy comes under serious misconduct. The respondent was dismissed for breach of the company honesty policy.

In re-examination, VS stated that at the appeal meeting of 13th July 2009, the respondent was in possession of the receipt.

In reply to the Tribunal, VS stated that the question of the respondent ringing her daughter never arose. Her interpretation of the respondent saying "I only got it", was that she only recently got it.

CCTW footage was shown at this stage in the hearing.

The Security Officer who produced the footage explained each stage of the movements of the respondent as the footage was being shown. He was in the canteen when the respondent said "I only got it". The book he saw the respondent reading in the canteen was pink/purple with a €14.99 sticker on it.

In reply to the Tribunal, the Security Officer explained that in relation to the respondent's conversation with the neighbour, there was no CCTV coverage of the back wall. There was noway of disproving her conversation with the neighbour.

Giving evidence, T O'K stated that she was the non-food manager of the store. On the day in question, she met the respondent coming out of the back store. The respondent had a book in her hand. T O'K felt it was strange that the respondent was there given that she works in the grocery area and not in the non-food area. That area was not part of her stock. T O'K continued her visit with the regional manager. She then went to SW and looked at CCTV footage and saw the events. After approaching the duty manager, MS, it was agreed a staff search would be carried out.

A staff search can be carried out at any time of the day. When the respondent came into the security office, she threw her bag on the table. She opened her bag and the book was inside. T O'K asked for the receipt and the respondent said she did not have one. The title was "paradise" something. It was a large blue/purple book.

In cross-examination, T O' K stated the respondent said that she did not buy the book in the store. She said "I did not get this today". She did not think the respondent mentioned where she got the book. T O' K looked for the book in store but could not find it.

In reply to the Tribunal, T O'K said that it is standard practice to spot check staff on a daily basis. The respondent did not mention that her daughter gave it to her as a present. If they had not suspected the respondent, a staff search may have been carried out anyway.

Giving evidence the Group Personnel Manager, AD, was asked by the CEO to revisit the case. She met with the respondent on 24th October 2009. AD carried out a comprehensive investigation and upheld the decision to dismiss the respondent. She found, inter alia, that there was no evidence to show the respondent purchased the book, as the receipt produced was not an original. A letter was issued to the respondent on 6th November 2009 outlining the full findings of the investigation.

During cross-examination, AD confirmed she had the authority to change the dismissal

decision. It is against Tesco policy to take company magazines, papers or books into the canteen. The respondent took the company book into the canteen to read it. AD made her decision based on the evidence.

Respondent's case

While stacking shelves on 23rd June 2009, a lady approached the respondent and asked her about books she had read lately. The respondent told her she had one in her locker and went to the shelf to show the lady the book. She handed the book to the lady and continued her work. The lady then said to her "I'm going to leave it". When the claimant emptied the bailer, the book was on it. She brought the book into the canteen in order to return it later on. The security officer, who happened to be in the canteen at the time, asked her about the book.

After her break, the respondent went to her locker to change her shoes, and then went to the ladies toilets and on in to the home shopping area. After she clocked out she was searched. She put her bag on the table and when she was asked for the receipt for the book, the respondent explained that her daughter had bought it for her. The lady who had approached her earlier was familiar; the respondent had seen her in the chipper and thought her name was M.

The respondent was off work the next day. On her return MC asked her where she got the book and the respondent stated her daughter had bought it for her. The respondent said she would ring her daughter and ask for the receipt. MC said that "friends stick up for friends and family stick up for family" and that a receipt would not make any difference. A few days prior, MC had said to her "I will give you your P45" in relation to another matter.

At the appeals meeting, the respondent told VS that MC did not want receipt. VS told the respondent to get a copy of the receipt. The respondent felt it was too late to produce the receipt as people were already talking about her. She refused to produce the receipt but then changed her mind and submitted it.

She told the same story to AD, who was asked to re-examine the matter.

Employees regularly brought newspapers into the canteen and returned them. The respondent dropped the book somewhere but did not know where. She has not been employed since her dismissal despite applying to various companies.

During cross-examination, the respondent confirmed she had the book belonging to the company in the canteen. She did not know where she had left it after the canteen.

In reply to the Tribunal, the respondent said she tried to find the lady who had spoken to her in the shop but had only seen her in the chipper a few times. She posted the receipt months after the event.

Giving evidence, TMcD, the respondent's daughter, stated she bought the book for her mother. She was not allowed into the meeting with VS. After the appeals meeting she went to the shop where she bought the book to get a receipt. It was posted out to her and she subsequently gave it to her mother.

During cross-examination, TMcD stated she went to the shop to ask for a receipt three to four days after the appeals meeting. She had telephoned prior to that but was told she would have to

come to the store.

Determination

The Tribunal accepted that this was a difficult case. There was a complete contradiction between the evidence of the parties given at the hearing. The Respondent appeared to have been a conscientious, well liked member of staff. The Appellant had a zero tolerance attitude towards theft. A book/novel was found in the Respondent's handbag during the course of a random search at the Appellant's supermarket premises at Mitchelstown, Co. Cork, on the 23rd of June 2009. The Respondent stated that the book/novel found in her handbag was one purchased by her daughter and given to her as a gift. The Respondent accepted that she had taken an identical book/novel from the Appellant's bookshelf on the day in question, but was not able to say where the book/novel had been left. The Appellant gave evidence that the book/novel taken from the bookshelf in the supermarket was never subsequently accounted for.

The Respondent was provided with ample opportunity to provide a receipt in respect of the book/novel. She was written to by the Appellant and asked to produce evidence of a receipt. It was explained to her that the provision of a receipt would exonerate her. The Appellant Company issued a letter to this effect. The Respondent stated in evidence that she had a receipt in her possession at the time of the investigation. She also stated that she refused to produce the receipt, even though she had agreed to provide it to her employer at first instance. The Respondent explained away this refusal to produce the receipt simply on the basis that she felt that the Appellant Company were being supportive of the Store Manager, rather than her. The Respondent was provided with at least two opportunities in circumstances where the employer asked the employee to produce evidence that would exonerate her. This was met with a categorical refusal by the Respondent even though she stated in evidence that she had a receipt available to her at the time. A copy of a receipt was subsequently furnished to the Appellant Company some weeks after the final decision had been taken to dismiss the Respondent from her employment. The receipt furnished was not a copy of the original receipt and suggestions of doubt were cast by the Appellant on whether the copy receipt furnished was in fact evidence that the book/novel had been purchased by the Respondent's daughter as alleged.

The Respondent stated that she had obtained the missing book/novel for an acquaintance whom she had met on the supermarket floor. The Respondent said that she had spoken to this acquaintance about the particular book/novel in question in the supermarket. No evidence of this discussion was evident from the Appellant's CCTV records. There was evidence given that there was no CCTV coverage at the back wall of the store where the conversation is alleged to have taken place. According to the Respondent she had a ten minute discussion with her acquaintance on the shop floor in relation to the book/novel. The CCTV time recording supported the Appellant's contention that this could not have been the case. The Respondent gave evidence that she hadn't seen this acquaintance since the date of the incident. She also stated that she didn't know where the acquaintance lived and accordingly wasn't in a position to call the acquaintance as a witness. The Tribunal was of the view, given that Mitchelstown is a relatively small local town, that it should have been possible for the Respondent to locate the acquaintance if the Respondent had a mind to do so.

The Appellant stated that the Respondent did not mention the issue of the acquaintance at the original investigation meeting of the 25th of June 2009. This was supported by the Appellant's minutes of that date's meeting. The Respondent was accompanied at this meeting by her Shop Steward. The issue of the book/novel being taken for a friend seems to have been first raised by the Respondent at a later meeting of the 30th of June 2009, where she was accompanied by her

Union Official. Neither the Shop Steward or Union Official were called to give evidence.

The Tribunal found the Appellant's written responses to the correspondence from the Respondent to be quite unusual given the circumstances that the Respondent found herself in.

The Tribunal also found that the Appellant had followed acceptable and proper procedures in investigating the matter.

On the facts presented, the Tribunal had reservations concerning the Respondent's explanation surrounding the circumstances of the missing book/novel. Ultimately, however it was the Respondent's blanket refusal to produce a receipt that she said that she had in her possession that cost the Respondent her position. The Tribunal found the Respondent's explanation for the refusal to hand over the receipt to be unconvincing.

In all of the circumstances, the Appellant's appeal against the decision of the Rights Commissioner is upheld and the Tribunal is of the view that the Respondent was not unfairly dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)