

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
-claimant

CASE NO.
UD1424/2009

against
EMPLOYER
-respondent

under
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)
Chairman: Ms K. T. O'Mahony B.L.
Members: Mr G. Andrews
Ms S. Kelly

heard this claim at Limerick on 24th November 2010
and 8th February 2011
and 7th April 2011

Representation:

Claimant: REP

Respondent: Ms Mairead Crosby, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Summary of the Evidence

By letter dated 26th February DM informed the claimant that he was being summarily dismissed for gross misconduct on the grounds that he had removed hard drives from the respondent's store without prior authorisation and without making any payment and that in placing them on his eBay account for sale, knowing that these products are sold by the company he was trading in competition with the company., which actions caused an irretrievable breakdown in the respondent's trust and confidence in him.

The claimant was employed in the respondent's electronics shop in the city and, having been promoted twice, was assistant manager at the time of the events herein. At the relevant time the respondent had 15 employees, some of whom were part-time. The respondent's search policy provided for random searches of all staff, including management.

It was the respondent's position that on Thursday, 5th February, 2009 a sales advisor (S) could not locate some hard drives in the store. S maintained that having completed a search of the claimant's person at finish time that evening, the claimant went back to retrieve a box and when the claimant put the box on the floor S heard something rattle as if there was something else in the box. When S asked what was in the box the claimant replied that it was a speaker. On their way to work the next morning S told B, who had been duty manager the previous day, about the missing hard-drives and that he thought that the claimant had something else in the speaker box the previous evening. On arriving at work S and B carried out an extensive search but did not locate the missing hard drives. On B's advice S brought the matter to the attention of the store manager (SM). B, knowing that the claimant buys and sells goods on line, checked eBay and saw that three Seagate hard drives, of the same type as those missing, were being offered for sale by user *Woodenbright*, who had an address in the city. B thought this was too much of a coincidence. S, who was responsible for hard drives, did a stock take and found that four were missing. S did not complete a discrepancy report. The four hard drives had been delivered to the store in December 2008 and January 2009, the tills showed they had not been sold. SM conducted a full search for the hard drives in all areas where they could be located. In cross-examination SM admitted that the hard drives could have been moved by some member of staff and put in a place not searched.

The claimant's position was that in line with company policy for purchasing items he, as assistant manager, had purchased a speaker from B, who was the duty manager on 5th February 2009. The box containing the speaker was sealed with an extra layer of tape, labelled to indicate it contained a speaker and left in the manager's office. When he had finished work at around 9.00pm he collected the box from the office, went to the canteen where the searches are carried out and the claimant and S did searches on one another.

The following day, Friday 6th February, the claimant felt that there was an "atmosphere" in the workplace. On several occasions the claimant saw S, B and SM in discussion in the office; he felt S should have been out on the floor. When he asked SM what was going on, he told him that some hard drives were missing. The claimant was not asked to help search for them. On Saturday, 7th February, the claimant was working with B and told him that he sold some 500 gb hard drives in the recent past and hoped that he had not sold them under the wrong code but on examining the receipts it was established that had not occurred. On Sunday, the claimant was managing the premises on his own.

On Monday morning, 9th February 2009, when S logged on to the internet he found an eBay account open under the name *Woodenbright*, which was the name discovered by B when he had checked eBay the previous Friday. S showed this to SM. The respondent has strict policies in relation to internet use. SM decided to conduct an investigation but decided to only look at the claimant because of his eBay account.

On the same day, 9th February, SM called the claimant, who had started work at around 12.30pm, to an investigation meeting. He told him the meeting was about the four missing hard drives. At the meeting the claimant admitted that he was *Woodenbright* and that he had used the internet at work twice on Sunday, because his system at home was down; he was aware that he should not have used it and apologised for doing so. He maintained that everyone used it. He informed SM that he buys and sells electrical goods, but not products sold by the respondent, on eBay. The claimant admitted that he had three Seagate hard drives for sale on eBay; these were from a box of hard drives he had purchased before Christmas from China for

a raid server he was working on for a friend. The claimant undertook to look for the receipt for his box of hard drives but he had purchased them a long time ago. SM suspended the claimant on full pay, pending further investigation. The claimant's position was that it was common knowledge that he buys and sells products on line. SM suspended the claimant on pay pending further investigation. SM's evidence was that no other staff member was 'looked at' as the claimant's eBay account raised suspicions. The claimant's position was that both S and M were aware that this internet was down that weekend. The claimant had not seen SM write his replies to the questions at the meeting.

The disciplinary hearing was conducted by a store manager from another branch (DM). The meeting was rescheduled from 13th February to 19th February to give the claimant an opportunity to procure the invoice and receipt for his alleged purchase of the hard drives. The letter inviting the claimant to the meeting outlined that he would be asked to respond to the allegations:

- **that he had removed three Seagate hard drives from the respondent's store without prior authorisation and without making any payment,**
- **that he may have placed the three Seagate hard drives for sale on his eBay account,**
- **that his actions may have caused an irretrievable breakdown in the trust the respondent had in him.**

The claimant was accompanied by his solicitor at the disciplinary hearing. At the hearing he explained to DM that he had purchased 5 x 1Tb hard drives from Hong Kong in October 2008 to build a raid server. He built a computer for a friend and did not build the raid server. He got married on 31st October 2008. He put some personal items for sale on eBay, including the hard drives, to pay off a small loan he had raised for his wedding. The items he had put on eBay were personal items and he was not in business. He suggested to DM, that since the respondent now had access to his eBay account they could check the veracity of his statement. He handed over eBay invoices showing the dates he had put the items on eBay. He indicated to DM that he had spoken to two co-workers, one of whom was B, about the system he was building at home and asked DM to check this out with them.

He was unable to furnish the receipt for the 5 x 1Tb hard drives at the disciplinary hearing because the person he was dealing with was off for the Chinese New Year. However, he handed over copies of the correspondence he had engaged in in the process of trying to obtain the receipt. The minutes recorded DM as stating "It is important that there is (sic) no receipts today." The claimant admitted that he had not got authorisation from the respondent to sell the hard drives but they were personal stuff that was lying around that he was getting rid of. The respondent sold the same hard drives. He was selling them for €90 each while the respondent's sale price was €150 each. The claimant was adamant that he was not trading as part of a business in competition with the respondent; he was only selling personal items.

When asked about the hard drives purportedly missing the claimant maintained that the hard drives were meant to be kept in the secure cabinet but they were kept all around the warehouse. The claimant had previously raised security issues with management. He maintained that since the till was removed from the back counter staff were giving stock to customers at the back counter who would then walk around the store and leave without paying. He and a former manager had set up a camera focusing on the secure cabinet and the back counter but on his return from his honeymoon he found that the camera had been moved. The claimant queried

how the respondent had gained access to his eBay account as a session is terminated once not in use for one hour and the user would be asked to input his password. He believed that someone had his password or had accessed his computer.

DM did not attend to give evidence at the hearing but a minute of the subsequent interview DM conducted with B (as requested by the claimant) confirmed the claimant's position that in late October or early November 2008 the claimant had mentioned to B that he was getting hard drives to build a server.

By letter dated 26th February DM informed the claimant that he was being summarily dismissed for gross misconduct on the grounds that he had removed hard drives from the respondent's store without prior authorisation and without making any payment and that in placing them on his eBay account for sale, knowing that these products are sold by the company, he was trading in competition with the company, which actions caused an irretrievable breakdown in the respondent's trust and confidence in him.

Following his dismissal, the claimant's solicitor wrote to DM indicating that he was enclosing the Hong Kong invoice dated 11th October 2008 for the five Seagate hard drives and "formally requested" an appeal of the claimant's summary dismissal. It seems that the invoice was not enclosed with the letter. The respondent took no steps to obtain the invoice.

The appeal hearing was held on 13th March, by the regional manager (AC) and the claimant was accompanied by his solicitor. At the hearing the claimant presented the invoice and the paypal confirmation of payment (both dated 11th October 2008) for the purchase of the hard drives from Hong Kong in October 2008. AC raised the issue that the receipt was for 5 x 1Tb whereas at the investigation the claimant had indicated that the box contained hard drives of different sizes. The claimant denied ever having said that the box contained hard drives of different sizes, as recorded in the minutes of the investigation. The hand-written minutes of the investigation had been sent to the claimant some days before the disciplinary hearing but he had not read them. He is dyslexic and finds hand writing particularly difficult and he had forwarded them to his solicitor (who had not been present at the investigation interview). The claimant had informed the respondent at his job interview that he was dyslexic. (No issue had been raised at the disciplinary hearing about the purported discrepancy in the description of the hard drives purchased by the claimant). The claimant asked that the Gardaí be involved and a full investigation be carried out by them. The claimant's evidence to the Tribunal was that in cases of theft the respondent involves the Gardaí and that the CCTV footage is reviewed; on a number of occasions it helped to identify the culprit. The respondent's position was that it did not involve the Gardaí as this was an internal matter and AC did not look at CCTV because it had not been used in either the investigative or disciplinary stages. While the claimant would have liked his job back he felt in the circumstances redundancy would be a more appropriate remedy.

AC was influenced by the fact that the claimant, despite having the disciplinary hearing adjourned from 13th February to 19th February, did not produce the invoice and receipt at the disciplinary hearing. He noted that the invoice furnished by the claimant at the appeal hearing did not have a company logo or shipping information; he questioned its validity and indicated that he would have to verify the legitimacy of the receipt. However, no evidence was produced by the respondent on any follow up on this issue. AC was also influenced by the facts that the claimant had an eBay account since 2004, that he had stated at an earlier stage in the disciplinary process that he had another 20 to 25 items to put on eBay and that was common

knowledge that he bought and sold on eBay. The claimant's appeal failed.

Determination:

The claimant was summarily dismissed for gross misconduct on the grounds that he had removed hard drives from the respondent's store without prior authorisation and without making any payment, and that he had placed them on his eBay account for sale and in doing so he had been trading in competition with the company, which actions caused an irretrievable breakdown in the respondent's trust and confidence in him.

The test to be applied in determining whether a dismissal for alleged misconduct is fair is well established and can be summarised as follows: Did the employer have a genuine or reasonable belief, based on reasonable grounds arising from a fair and adequate investigation that the employee is guilty of the alleged misconduct and finally whether the penalty of dismissal was proportionate to the alleged misconduct *Noritake (Irl.) Ltd. v. Kenna* UD 88/1983.

In confining its investigation to the claimant, the respondent adopted a closed mind rendering the investigation inadequate and unfair. The respondent failed to give any consideration to the claimant's explanation. Inconsistencies with regard to the sequence of events on the evening on 5th February were ignored *viz* whether the claimant collected the box from the manager's office before or after the search and whether this was of any significance. S's failure on 5th February to ask the claimant to open the speaker box when he claimed to having been suspicious when he heard something rattle in the box did not form any part of the investigation. And, perhaps crucially, the information provided by B to DM, subsequent to the claimant's disciplinary hearing, that the claimant had told him in October or November 2008 that "he had or was getting 1 Tb hard drives for a server he was going to build", did not come to light during the investigation. Having adopted a closed mind the CCTV footage was not examined. The defective investigation undermined the fairness of the entire process. Accordingly the dismissal is unfair. While it was the respondent's evidence that it confined the investigation to the claimant SM did interview both S and B but those interviews were merely to confirm the report already made to SM and were in no way of an investigative nature.

The Tribunal would further like to state that, absent the defective investigation, in dismissing the claimant the respondent had fallen below the standard of a reasonable employer in failing to take into account that:

- that the claimant had produced proof of purchase and payment for the box of hard drives;
- that B had informed DM on or around 24th February 2009, which was after the disciplinary hearing, that the claimant had mentioned to him the previous October or November 2008 that "he had or was getting 1 Tb hard drives for a server he was going to build";
- that selling the three hard drives he had left over, albeit without the authorisation of the employer, did not amount to trading in competition with the respondent to such extent, if any, that it warranted dismissal or serious sanction.

Furthermore, a reasonable employer would not conclude from the number of transactions the

claimant had engaged in or the fact that the claimant had an eBay account is proof that he was trading in competition with the company.

As determined in paragraph 3 of this determination, the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. The Tribunal determines that compensation is the most appropriate remedy and it awards the claimant the sum of €45,000.00 under the Acts.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)