

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE *-claimant*

CASE NO.

UD626/2011, MN674/2011

against

EMPLOYER *-respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr R. Maguire, B.L.

Members: Mr J. Horan  
Mr P. Trehy

heard this claim at Dublin on 27th August and 29th November 2012

#### **Representation:**

Claimant: Mr. Brendan O'Hanlon, Mandate Trade Union, O'Lehane House,  
9 Cavendish Row, Dublin 1

Respondent : Mr. Eamonn McCoy, IBEC, 84/86 Lower Baggot Street, Dublin 2

#### **Summary of evidence:**

Dismissal as a fact was not in dispute between the parties.

#### Respondent's Case:

By the time of December 2010 the claimant held the position of checkout line manager in one of the respondent's stores. The Personnel Manager of this store gave evidence to the Tribunal that as a line manager the claimant was a member of management and he led a team of up to 70 staff in his role as checkout manager.

While undergoing a routine check of the self-scan area during December 2010 the security team observed the claimant handing his privilege card to another person. It was an abuse of the privilege card that the claimant handed the card to someone else to use. Only the claimant should have used it, as the card was in his name.

The Personnel Manager outlined to the Tribunal that a privilege card is provided to staff members

after one year's service. The card issues to staff members in their own name and address. The card can be allocated to another family member but only by changing the name and address on the card to their details. The conditions of use are provided to employees with the issue of the privilege card and the claimant signed these conditions. The conditions of use were opened to the Tribunal and it was submitted that they clearly state that each employee, where entitled, can have one card in one person's name. The person whose name is on the card is the only one who can use the card. The card can be used by an employee to make purchases for a partner or immediate family who are permanently resident at the employee's home address as held on company records. The employee may exchange the current privilege card for one in the name of their partner or immediate relative if they are permanently residing at the employee's home address as held on the company records.

The security team brought the transaction to the Personnel Manager's attention and he directed them to investigate further which resulted in four more transactions coming to light.

The witness outlined the transactions to the Tribunal as follows: the first transaction was on 17 December 2010 in the amount of €102 and this transaction involved the claimant's partner.

The second transaction was involving a fellow colleague, also on 17 December. On this occasion the claimant was seen to select a hard drive, proceed to a till and use his privilege card when purchasing the item. The claimant's colleague who was off duty then left the store with the product and the receipt. The claimant's explanation for this was that he had purchased the item as a Christmas gift for his partner.

The third transaction was on 18 December 2010 when the claimant's father purchased a laptop to the value of €499. The claimant's explanation for this was that he had given the money and the privilege card to his father to buy a laptop for the claimant's sister for Christmas.

The fourth transaction was on the same date when the claimant's father purchased grocery items and the claimant handed his privilege card to his father.

The fifth transaction was on 23 December, when the claimant's mother used the claimant's privilege card when purchasing groceries. The explanation proffered by the claimant was that he had given money to his mother to purchase the groceries.

However, prior to the four other incidents coming to light the claimant was called to an investigation meeting on 27 December 2010 in relation to the incident known about at that time. The Personnel Manager was present at the meeting as a note-taker and the meeting was conducted by the Deputy Manager who now resides abroad. A number of questions were put to the claimant and he stated that he was unaware of other such transactions. The aim of the meeting was to get an explanation for the groceries purchased using the claimant's privilege card. The meeting was concluded pending the outcome of the investigation.

A further meeting was then held on 29 December 2010. The Personnel Manager stated that at this meeting the claimant did not disagree with the transactions as put to him at this meeting but the claimant did state that he resided with his parents and he thought that it was permitted to allow his family to use the privilege card. He added that it was his money which had been used to pay for some of the transactions. For example, the claimant had given the money to his father to purchase the laptop and he had also given his father money to purchase groceries.

The claimant was then invited to attend a disciplinary meeting on 5 January 2011, at which he was advised that he was in breach of the privilege card policy and that in due course he would be invited

to a sanction outcome meeting. This meeting followed on 12 January 2011 and the claimant was informed by the Deputy Manager that he was dismissed from his position with the company.

In concluding his direct evidence to the Tribunal, the Personnel Manager stated that as far as the company was concerned the claimant was living at his partner's address as completed by the claimant on a personnel form. The Personnel Manager added that it was common knowledge that this was where the claimant resided.

During cross-examination it was put to the witness that the respondent had not established during the process where in fact the claimant was residing. The Personnel Manager replied that the company already held the claimant's address on record.

The witness was asked if the company considers there to be a distinction between misuse and abuse of the privilege card and he replied they were the same thing to the best of his knowledge. The claimant as a line manager would be aware of the policy as training other staff was part of his role.

It was put to the witness that the claimant was not provided with copies of the notes of the meetings or any other documentation. The Personnel Manager stated that he did provide the claimant with a copy of the notes when he was requested to do so by letter. It was put to the Personnel Manager that the claimant only received the notes prior to the appeal and not during the earlier process. He replied that they had been read to the claimant. He refuted that the claimant was given a reassurance at the outset of the process that he would not be dismissed.

It was put to the Personnel Manager that he had taken up a different role than that of note-taker in the meeting on 29 December 2010, as he had put a number of questions to the claimant. The witness responded that he had raised issues only if they had been omitted. He confirmed the Deputy Manager took notes of this meeting. The claimant remained on suspension until the next meeting on 5 January 2011. It was put to the Personnel Manager that the claimant received three hours notice to attend this meeting. The witness disputed this stating that the claimant would have been given 24 hours notice of the meeting.

In reply to questions from the Tribunal, the witness confirmed that the claimant was present in the store during the time the transactions took place. Even if the claimant had accompanied each person to the till, the transactions still constituted a breach of policy, as the claimant had to be residing with his family. If the claimant wanted another family member to be able to use the card then he must change the name and address on the card to that person's name and address instead of his own.

A store manager from one of the respondent's southern branches who was trained to be an appeal officer acted in that role in hearing and considering the claimant's appeal. He told the Tribunal he was familiar with the relevant procedures and that his function was to try to be independent with a view in deciding whether the dismissal sanction against the claimant was correct.

The claimant's appeal meeting took place on 8 February 2011 and was attended by the witness, the claimant, his trade union representative, a shop steward and a supporting officer for the respondent. The basis of the appeal was on the claimant's unblemished service to the respondent and that his breach in the use of his privilege card was of a minor technical nature. However, the witness felt that the trade union representative thought that the company had an ulterior motive in

dismissing the claimant. The witness said that the claimant accepted he was aware of and knew how the privilege card operated but conceded that he never read the full details of the rules governing that card. Those fifteen rules written in small print were presented to the Tribunal and stated inter alia that any staff member found breaching or abusing these rules might be liable to summary dismissal. As an employee and a checkout manager the claimant had a responsibility to ensure he used the privilege card in accordance with those rules.

The appeal officer said that there was no dispute as to the events involving the claimant and his card that led to his dismissal. Following that meeting this appeal officer took away the files for this case and these, together with the contents of that meeting, were to be considered as to the outcome of the appeal. This witness accepted that there were certain shortcomings in the respondent's procedure leading up to and including the disciplinary process. No letter of suspension issued to the claimant and the letter of dismissal was too vague. The claimant's trade union representative letter to the company on 23 February and 2 March 2011 which went unanswered should have been responded to.

The witness also stated that the investigation and disciplinary notes were incomplete and were not sent to the claimant during this process. Notwithstanding the fact that the respondent listed the claimant as residing at one address it concluded he resided at another and insisted on this despite the claimant repeating he lived at home with his parents at the time of the alleged breaches. At no stage during this process was the claimant asked where he was residing at the relevant time. The appeal's officer did not make any observations of a change of note taker during an investigation meeting on 29 December 2010. Neither the claimant's partner, who was also an employee of the respondent, nor another named employee, identified with alleged breaches of the claimant's privilege card, were sanctioned or indeed interviewed about their roles in this affair. The witness told the Tribunal that he was satisfied that a fair investigation was carried out in this case.

Having considered "the totality" of this case the appeal officer upheld the respondent's decision to dismiss. He relied to some extent on the earlier notes of meetings in this case. The witness confirmed his findings in a letter to the claimant dated 1 March 2011. In that letter he wrote that the claimant maintained at the meetings that he lived with his partner but during the appeal meeting he stated that he lived with his parents. The letter writer also wrote that he reviewed the full facts of the case and then listed instances when the privilege card of the claimant was breached. In upholding the decision the appeal's officer also considered other sanctions and the claimant's work experience and training.

#### Claimant's Case:

The claimant commenced employment with the respondent in the summer of 2004. He underwent some training but was given no specific instruction in the use of privilege cards for staff. While he did not read the detailed rules on that scheme he was nevertheless confident he knew how it operated and applied those operations as he understood them. Through promotion he secured the position of checkout manager in a large north Dublin branch of this multinational retail outlet which opened in 2004. Up to late December 2010 the claimant had not been subjected to any sanction or involved in any investigation process into his work conduct or performance. Apart from the period from January to August 2010 he resided at his parents' house and that is the address he used in correspondence with the company. For those eight months he lived in his partner's dwelling. That partner was also an employee of the respondent based in the same branch.

On 27 December 2010 the claimant was called to a meeting where he met the Personnel Manager and the store's Deputy Manager. Those gentlemen raised the issue of an alleged abuse of the claimant's privilege card. He did not believe that he was misusing the Privilege Card in the transactions in question. At that meeting the claimant explained the circumstances of the allegation. At the end of this short meeting he was suspended from duty. Two days later he was given thirty minutes notice to attend another meeting. However, on leaving the meeting, the Claimant was reassured by one of those managers that this matter would not lead to his dismissal and not to worry about it. The notes of that meeting showed that the issue went from an allegation to an abuse. At first he was interviewed by the Deputy Manager but then the Personnel Manager did the questioning in what the claimant described as a very aggressive style.

Due to his suspension and the ongoing process the claimant asked that all correspondence on this issue be sent to his partner's address. He wanted to avoid the scenario where his parents became aware of this process. At no stage did he tell the managers that he was residing at his partner's address, contrary to what was written in their notes. A further meeting took place on 5 January 2011 and this was labelled as a disciplinary hearing. There the claimant accepted he could have made an honest mistake in the use of his privilege card during certain transactions the previous month. He added that there was no intention on his part to deceive the respondent and commented that he might have wrongly interpreted the rules of the privilege card scheme. Besides, the respondent did not suffer any financial loss through the alleged misuse of his card. One week later he was verbally informed of his immediate dismissal. The reason given was his abuse of his privilege card.

The claimant was upset and shocked at this sanction and appealed the decision. He felt he was not given an explanation for his dismissal and attempts were then made to receive such an explanation. The claimant accepted it was contrary to the rules to carry the privilege card on his person while at work but it was common practice for employees to do this. The claimant was not furnished with documentation related to his case during the investigation and disciplinary process.

## **Determination**

The Tribunal accepts the evidence of the Claimant that he honestly understood that his use of the Privilege Card in December 2010 was not prohibited.

Unreliability of documents relating to the privilege card:

The Tribunal finds that the various documents outlining the use, misuse, transfer and all rules relating to the Privilege card are ambiguous at least and do not set out with adequate accuracy the rules relating to the use of the card. The Tribunal notes in particular that the Manager who heard the appeal against dismissal admitted in evidence that gifts for unconnected parties could be bought by an employee with their privilege card, though this is apparently explicitly prohibited by the rules that the employer relied on. In the face of contradicting evidence from the Claimant himself as to his state of knowledge, the employer erroneously concluded after the appeal hearing that on the basis of signing two documents that the claimant was "fully aware of rules of privilege card usage and the consequences of abuse."

The company treated this use as "fraud" as per their literature in relation to the card, notwithstanding the fact that the Claimant did not know that he had misused the card. Each

of the transactions complained of could have been done in compliance with what the Respondent now states the rules of the privilege card are, given that other employees had their own cards, or the Claimant could have purchased his families groceries or other items after the end of his shift instead of giving the card to his parents.

Lack of warning:

The Respondent made its decision to terminate the Claimant without any warning as to the conduct complained of. The Claimant had never been subject to any disciplinary proceedings and had an entirely untarnished record in the Respondent.

Improper procedure:

The Claimant was not adequately notified of the investigative and disciplinary meetings; he was not provided with material considered by the decision-makers; he was not given an adequate opportunity to respond to findings and accusations; and was misadvised by his employer as to the gravity of his alleged infractions – the Tribunal accepts that he was told after the meeting where he was suspended that he was not in danger of losing his job.

The failure by the Respondent to conduct a fair procedure precluded the Claimant from properly and fully presenting his case and involving his union representative at all appropriate stages.

The Tribunal is dismayed that even formal correspondence requesting documentation being considered in relation to the appeal against the decision to dismiss the claimant was not responded to, let alone given a response with documentation. The company accepted in evidence that there should have been a response to the requests for such documentation, which came from both the Claimant and his recognised union representative.

The Tribunal notes that the Claimant had an unblemished career within the Respondent from the time he entered the company just after his eighteenth birthday. He had repeatedly risen in responsibility and standing within the company up to 2010, when he was responsible for up to 70 staff in the check-out area of what was then the busiest shop of the Respondent in the country. The Tribunal was impressed with the honesty and sincerity of the Claimant who has been unable to find employment since he was dismissed, apart from a two-month part-time role in a local pharmacy.

The dismissal was upheld ultimately not only on the basis that there was abuse of the privilege card, but on the basis that the claimant “continuously changed [his] version of events, which brings into question [his] honesty in this situation and in turn the bond of trust that must exist between an employer and employee.” In fact, there was no basis shown for this finding.

Where an employee gives uncontroverted evidence as to his honest belief in using a privilege card and the company has made no fact-based finding as to his fraudulent intent, the company’s disciplinary policy stating that “the objective of the company in applying its disciplinary procedure is that its actions should be corrective rather than to seek to punish the individual” should have informed the sanction and should have ensured in this instance that any sanction fell far short of dismissal.

The Tribunal finds that the case it was referred to by the Respondent, UD 1545/2009 Uwadiae v. Tesco Ireland Holdings Limited is not apposite, as in that case the Claimant knew that he was misusing his card. Further, in that case, there was no question as to the fairness of the procedures

used. In addition, in that case it was stated by the witness who terminated the claimant on behalf of the Respondent company that “if the privilege card was given to a family member to purchase goods this would justify summary dismissal.” This was not the policy apparently operating in the Respondent at the time of this case, as in this case, the Manager who heard the appeal stated that he had not dismissed an employee who had used her privilege card while at work to scan at the till to get a discount for her mother’s shopping. This shows that the Claimant was treated differently to other employees without any apparent reason.

The Respondent’s sanction of dismissal was not within an acceptable band of reasonableness. A large number of options were open to the Respondent company in terms of any disciplinary sanction and the Tribunal finds that summary dismissal was not a reasonable sanction. The claim under the Unfair Dismissals Acts, 1977 to 2007 is allowed.

The Tribunal finds that in the exceptional circumstances of this case, having heard the submissions of both parties on the potential remedy, that the Claimant be re-instated into his job as at the date of dismissal or a role of similar grade. The reinstated date is to be activated immediately upon receipt of this Order. In those circumstances the claim under the Minimum Notice and Terms of employment Acts, 1973 to 2005 does not arise.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)