

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

- *claimant*

CASE NO.

UD2033/2010

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 J. Hennessy
Mr. J. Dorney

heard this claim at Kilkenny on 5th April 2012 and on 12th June 2012

Representation:

Claimant: Ms. Yvonne Blanchfield, Owen O'Mahony & Co, Solicitors, 5
John's Bridge, Kilkenny

Respondent: Ms. Breda O'Malley, Hayes Solicitors, Lavery House,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

Summary of the Evidence

The claimant commenced employment in the respondent's supermarket in February 2000. She worked as a sales assistant/checkout operator and was trained on the job by a fellow employee.

In June 2009 the respondent company launched a Real Rewards Scheme for its customers. Later in 2009 the respondent introduced a 5% loyalty cash-back scheme for its staff and their immediate family. Staff received training in relation to the schemes and the checkout operators, including the claimant, received additional training as they were operating both schemes.

The respondent's former financial controller and operations manager (OM), who was part of the team that had been involved in the roll-out of the scheme to checkout operators, gave evidence that they had been given clear instructions that their loyalty cards could only be used for themselves and immediate family members, that misuse of the card was a disciplinary

matter having serious consequences and could result in the card being withdrawn from all employees. These points were also reinforced by the manager to his staff during meetings with them. Staff were informed that reports on the usage of the loyalty cards would be compiled for head office and they were aware that CCTV cameras were in operation in the store. The respondent's position was that trust was vital in the position held by the claimant.

In or around 15 March 2010, head office informed the manager that the recent report on the usage of LC, had shown that the claimant had used her card on 47 occasions within a short period. Such usage was considered excessive. A spread sheet of the transactions was opened to the Tribunal and while the report was lengthy and there were clusters of transactions, the respondent focused on the period between 1 March 2010 to 12 March 2010 and these were the only instances put to the claimant during the subsequent investigation and disciplinary process.

As part of its investigation OM and the manager confirmed from the CCTV footage that the claimant had used her loyalty card on customer transactions and also observed her scanning three copies of a national newspaper on 8 March while no customer was present and using her card on the transactions. On 25 March 2010 OM and the manager apprised the shop steward of the situation, showed him the CCTV footage and instructed him to bring the claimant to the office. On their way to the office the shop steward informed the claimant that she was 'in trouble' for using her card in customers' transactions. The claimant maintained that she had been called to the office by a trainee manager.

When the claimant was shown the CCTV footage of the transactions and told that her card had been used 47 times in a twelve day period she explained that customers had given her permission to use her own card. When asked about the transactions regarding the three newspapers the claimant was unable to give an explanation. When the manager reminded the claimant that he had outlined at a staff meeting that the loyalty cards were only for employees and their immediate family members, the claimant recalled this and then admitted wrongdoing. The shop steward did not make any intervention at the meeting.

The respondent's position was that the claimant admitted wrongdoing and accepted that she had defrauded the company. The claimant's position was that the manager shouted at her saying that she had robbed the shop and defrauded the company. It was common case that the claimant apologised, offered to hand back her card and to repay the money earned on those transactions. At the conclusion of the meeting the claimant was suspended on pay, pending a further meeting the following day.

In her evidence to the Tribunal the claimant maintained that members of management had told her on several occasions that customers could give their card points to other customers if they wished. She had never been told that she could not have points from customers. She did not believe that she was doing anything wrong because customers had told her she could take their points. She had not admitted to defrauding the company. She had later remembered the incident of the newspapers: she had sold three newspapers one morning but they did not scan on her checkout till, she accepted the monies from the customers, later that day she scanned the newspapers on a different checkout and put the monies in the till. While there had been 47 transactions in the period, it probably only involved about six customers. She had apologised to the respondent because she had been told that she had done wrong. OM denied the claimant's assertion that she had never been told that she could not have points from customers' cards.

The manager confirmed to the Tribunal that the claimant was not given an opportunity to consult with the shop steward prior to the meeting on 25 March 2010, that during the meeting she had said that she did not realise that she could not use a customer's points, that the staff handbook including the grievance and disciplinary policies had not been updated to reflect the introduction of the Real Rewards Scheme and the guidelines around its usage and that 'The Training Checklist for Checkout Operators', which was produced in evidence, did not state that an employee could not accept a customer's points. The manager refuted the claimant's allegation that he had accused her of robbing. He was not involved in making the decision to dismiss.

Subsequent to the meeting of 25 March OM consulted with head office on the case. At the disciplinary meeting on 26 March 2010 OM advised the claimant that her actions constituted gross misconduct and that the company had no option but to dismiss her. The respondent's position was that there was a clear repeated breach of trust and the serious abuse of the staff loyalty card could not be left unpunished. It had been a difficult decision for the company as the claimant had given 10 years' good service. The decision was confirmed to the claimant by letter dated 1 April 2010 wherein she was informed of her right to appeal the decision within 10 days. The claimant was stunned when she was informed that her employment was being terminated; she did not think that she was in serious trouble and could lose her job.

The trade union industrial organiser (IO) only became aware of the problem when the claimant came to him subsequent to her dismissal. He found that the claimant was very confused about the situation and she did not understand the term "disciplinary". IO had an informal meeting with the manager within the ten-day time frame between the dismissal and the expiration of the appeal period to explore some compensatory package for the claimant but the manager was not amenable to this and indicated would report the matter to the Gardaí if the claimant pursued a claim. He informed the claimant of the outcome of the meeting and the claimant was very clear that she did not want the Gardaí involved. He confirmed that he is aware that a right of appeal exists for all employees but he was 'side-tracked' by the mention of the Gardaí by the respondent. He did not tell the claimant that it would be a waste of time to appeal the decision. The claimant's position was that she had gone to her trade union to clear her name and she had not given any instructions to look for money; she just wanted him to speak to the manager. The manager denied threatening to involve the Gardaí. The claimant believed that she was exercising her right to appeal by contacting IO.

Determination

The claimant was dismissed for fraudulently obtaining cash credit through the respondent's Real Rewards Scheme. She was summoned from her work to attend the meeting of 25 March. She had not been given any prior notice of the meeting or of its purpose. Although characterised as an investigation meeting, the Tribunal finds that the meeting of 25 March went far beyond an investigation and became a disciplinary meeting when it was put to the claimant that she had defrauded the company. In failing to give the claimant prior notice of the meeting and its purpose, including that it could lead to her dismissal, the respondent failed to afford the claimant fair procedures. Further on procedural issues, the Tribunal is not satisfied that the respondent approached the meeting with an open mind as there was little or no exploration of the claimant's responses. The only evidence before the Tribunal on the meeting of 26 March 2010 was that it was there that the decision to dismiss was imparted to the claimant.

The Tribunal, having had the advantage of seeing and hearing the parties give evidence, is acutely aware of the particular need that existed in this case to ensure that the claimant had adequate and fair representation to enable her to deal with the case the respondent was putting to her. The respondent's failure to afford the claimant the opportunity either to obtain representation of her choice or to consult with her shop steward prior to the meeting of 25 March was a failure not only to apply its own or fair procedures but it seriously disadvantaged the claimant against whom a serious allegation was being levelled.

On seeing the CCTV footage at the meeting on 25 March, the claimant immediately gave an explanation for using her card in customers' transactions. Given this explanation, the claimant's entire evidence, the respondent's failure to update its policies on the introduction of the Real Rewards Scheme or in any way document its prohibition on accepting customers' points, and further in light of the claimant's ten-year unblemished record of service with the respondent the Tribunal finds that a reasonable employer would have accepted that there was some lack of clarity surrounding the use of the loyalty card in the claimant's mind and that she had not knowingly acted dishonestly. Whilst it is not clear to the Tribunal whether the claimant made all the points, which she gave in her evidence to the Tribunal, at the meeting on 25 March, these are facts that would or should have been elicited in any fair and adequate investigation.

For these reasons the Tribunal is satisfied that the dismissal was both substantively and procedurally unfair. It awards the claimant the sum of €40,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)