

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

UD781/2011

EMPLOYEE – *claimant*

Against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. D. Winston
Mr A. Butler

heard this claim at Dublin on 10th September 2012
and 23rd November 2012

Representation:

Claimant(s): Mr. Fran Rooney BL instructed by Sinnott & Company, Solicitors,
15 Belgrave Road, Rathmines, Dublin 6

Respondent(s): Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

SL told the Tribunal that she worked in the respondent's cash office in Swords; her duties included the balancing of the register and ensuring cash and wallets were in the safes and that the safes were locked. She issued and separated floats. She passed the float to one of the managers and she placed the cash for the previous day in the float. At the end of each day the manager distributed the floats. The respondent used float bags and cash wallets, it has two sets of floats numbered one to eleven. She balanced the takings for the previous day on the next day.

A problem occurred in November 2010 as one of the registers indicated that it needed a pick up.

The register showed an amount of €1,780.00 and it should be €178.00. She contacted J, this was an unusual situation and they had to do a phantom pick up, they had receipts but there was €178.00 in the till. The computer system had to be made aware that there was no money in the till. The claimant did the float that morning and he entered the wrong float amount in till No. 7. In total the respondent had eleven registers but the store was not always busy enough to warrant using eleven registers. Seven to eight floats were issued for each day. If no further sales were allowed on a register the practice was to move to another register. She finished work at 11.30am. and minused out the register. When there is an amount of over €1,000.00 in the register a pick up is required and the registers have to be cleared of that amount of cash. The cash is placed in a bullion box which is bolted. The screen flashed if a pick up needed to be done. The manager and assistant manager verified the amount of money in the wallet. The manager entered the amount of money taken out and entered in. Two receipts were printed, one for the register and one for the wallet, and these were put in the bullion box.

On Tuesday 23rd November 2010 she balanced the payment. The claimant told her that a cash wallet was missing, he had an empty wallet that he would bring it to her shortly. There were 29 wallets in the safe and there should be 30. 30 wallets were issued at 8a.m and were signed by the cashier and 29 wallets were returned to cash. There was a shortage of €791.00. She balanced the cash and entered all the cash in bags.

The claimant did a pick-up of €800.00 at 15.09 hours. The situation was that the register indicated that there was a shortage. All wallets were accounted for and the empty wallet was provided by the claimant the next morning. She had never dealt with a situation like this. The till had to be reimbursed during the pick-up. She passed it to security personnel to establish if there was paperwork completed on Tuesday 23rd November. She was not in work on Wednesday, Thursday or Friday. She balanced the register and if she could give an explanation for the variance she would. She could not find an explanation for this.

On Tuesday the claimant told her that he looked for the wallet and he could not find it. The claimant came to the cash office a few minutes later and he told her that he found a blue wallet and he could not figure out why it was a different colour wallet. When she received the empty wallet she was under the impression that there was no wallet missing and sometimes it can have a variance.

She then went on leave and returned to work on Monday 29th November 2010. The claimant told her that a manager in head office in the UK telephoned him on Thursday/Friday regarding the variance and the cash that was missing. She tried to contact Mr. S in head office. He telephoned her later and told her it had to be the case that the money was physically missing. She obtained the keys of the bullion boxes and went to the registers. She tried to fix the register. The claimant told her that he would have to get the keys and she presumed he found it in a drawer somewhere. She tried to use different colour bags and it was not company policy to use the same colour bags.

In cross examination she stated that she was employed for eleven years with the respondent. She worked in the cash office for about seven years and she was there five years when the incident occurred. She did not receive training in cash management, was given no external or internal courses and no formal training. The procedures she had to follow were documented in writing and the cash office had a system called BSP best standard practice. The money from the previous day was reconciled the next day. She counted everything that was processed.

It was her job to establish whether the registers balanced or not. She had a wallet with €800.00 in it. She went to security and also sent an e mail at the end of the day. Her boss was manager of the store. She brought it to the attention of the assistant manager and the claimant who checked her work and counted the money

On the 23rd November 2010 she did not know who checked the money. The print out indicated that there was an issue. She could not remember who signed it for her that day. The procedure is that the manager has to check work and she told security when she left. The procedure when money was missing was to inform security personnel. When head office contacted the store she was told that security personnel spoke to the claimant. Money was missing and this was not a situation that she dealt with on a daily basis.

She was properly trained to undertake her job. She let loss prevention section know what she thought. She had never done a phantom transaction previously. There was no procedure for this in place as it had never happened before. Other floats were empty of cash; you could open another register if one was not working. Entering the float only created a bigger problem. It appeared that two extra zeroes were keyed in.

On the 29th November 2010 JOD told her that the claimant and security received calls from head office in the UK to establish if they could find out what happened. The claimant spoke to Mr. S in the UK office on Wednesday, Thursday and Friday. She was not sure of the exact number of bullion boxes in the store; they were on every second to third register. She could not say if there was a bullion box on Register no. 7. If the claimant took money from the register there may not have been a bullion box at either side. No one should open registers unless they were operating them. A week later she still had not established what went wrong. She opened the safe the next morning, this was in a small room and this was noted on CCTV. She had to sign the key out and go to the cash office. She had to connect the fob to the long part of the key to open the safe. If it had slipped out of the envelope it would be seen on CCTV. She was not allowed to check CCTV, she was not aware if security checked CCTV.

She could not comment that the claimant was there on his own. When put to her that it was possible that some other person did not put money in the bullion box she replied that she presumed that the CCTV would have shown if someone would have done so. She was informed that the cash office was being checked on Monday night for a missing wallet. She and the manager would have put the floats away. The claimant told her that a wallet was empty and two employees looked for the wallet.

She would have been on her own when balancing the cash. At the end of the day the float was put away. A phantom transaction was entered as the claimant had done an incorrect entry that morning. The policy now in place is to use twenty wallets a day either red or blue.

In re-examination she stated that she signed to say she issued thirty wallets.

The loss prevention manager GH told the Tribunal that he looked after all aspects of loss

prevention and stock. He was informed on Tuesday//Wednesday that he observed the claimant walk away with the cash in his hand on to the shop floor and he did not observe him again. The claimant did not put money in a bullion box. He had questions to ask the claimant regarding the money. He met the claimant along with NMcC (the loss prevention investigator) and he put a series of questions to the claimant. He asked the claimant what he did with the money and he could not remember what he did with it. The claimant admitted he walked away from the register and he did not know where the money had gone. The claimant told him he was on "auto pilot" and that he did not put the money in his pocket.

In cross examination he stated that it was normal practice to take withdrawals from the cash register several times during the day. The CCTV on the shop floor was in operation as far as the back area, he lost sight of him on the shop floor. The policy was that the cash was placed in the bullion boxes when the store closes. The duty manager took the money into the cash office/safe. At the first meeting with the claimant on the 4th December 2010 he explained the policies in place. The claimant did not request to see the CCTV footage again. If he had asked he would have shown it to the claimant. No one else could have taken the money and the claimant did not put the money down anywhere. The claimant should have put the money in a bullion box. He suspended the claimant after he consulted with the HR manager. He was suspended on gross misappropriation of company funds. The claimant was given plenty of chances to respond.

In answer to Tribunal questions he stated that the claimant could access CCTV. He could not answer why someone would take money knowing that CCTV was in place. The claimant was an assistant manager and had €800.00 in his hand and he told him that he did not put it in his pocket. He gave the claimant every opportunity to tell him what happened to the money.

The Loss Prevention Investigator NMcC told the Tribunal that she was asked by GH, the loss prevention manager, to investigate the loss of a pickup wallet which contained €800.00. She looked at what happened during the entire day from the time the money issued to the cash office until the end of the day including register No. 7. The float was inputted incorrectly on Register 7 at the start of the day. She reviewed CCTV reports in detail and she observed an issue at 10.00a.m. when the cashier arrived to sign on and the float was input incorrectly by the claimant. The till would not operate. A number of managers/staff tried to correct it, it was corrected and the till operated after that.

She observed the claimant going to the service area and he received €50 in notes from Register 7 while walking away. She observed the claimant put money in the wallet. The claimant walked past register No. 3 and 1 and walked down past the shop floor and past two bullion boxes and he did not place the money in a bullion box. A pick-up of €800.00 was done by the claimant on the 24th November 2010. A ghost pick up was done to rectify an error that was created earlier that day. She then observed the claimant at register 5, he did a pick up and put the wallet into the bullion box that was completed fifteen to twenty minutes after the transaction at register no. 7.

In cross examination she stated that there are six to eight cameras in the store. She reviewed every camera to try and track the claimant that day. She had continuous CCTV footage. She reviewed all floor cameras, she looked at the stock room and she looked at the cash office and corridor. The claimant stopped at register No. 3 and she observed something under his arm and when she observed him up again on CCTV he did not have a wallet. She reviewed the cash

office and anyone that was involved with register No. 7. Empty wallets may have been missing previously but it was not a regular occurrence. JOD an assistant manager did ghost pick-ups. When put to her that the claimant was the only one on duty at management level at the time and he was doing a number of things she replied he was doing his duties. The claimant was not distressed by anything when he had cash in his hand. She did not know what happened to the money..

The store manager told the Tribunal that she dismissed the claimant. She was not in work on the 22nd November 2010. On the 23rd November 2010 she became aware that a float was entered incorrectly. She had confidence in the LP department. She spoke to the claimant a week later about the pick-up and he told her that she was not the best person to speak to. She was aware that GH was in the store and that was normal practice. GH met with the claimant GH gave her the investigation notes and she had access to all areas, witness statements, data and reports. The claimant was invited to a disciplinary meeting on the 10th December 2010. The claimant chose not to have representation and he was aware he was entitled to it. JH store manager was present.

She made it clear to the claimant it was a disciplinary hearing after meeting with GH regarding the missing money. Issues were put to the claimant and he had the opportunity to try and recall what happened. She spoke to him about his auto pilot statement. She believed that the matter needed to go to a disciplinary for misappropriation of company funds.

The claimant had done numerous pick-ups that morning She challenged the claimant that he was aware that he had the money. The claimant accepted that he was responsible for the safekeeping of money. The claimant did nothing to explain how this happened, he made no attempt to look for the money or investigate it. She felt that the claimant's demeanour was very close to non-co-operation. The claimant was aware that he did have the money that was missing. At the conclusion of the meeting she told him she would have to reflect on it. The claimant mentioned a conversation with BG, a store manager and if anything new came to light. The claimant did not bring anything new to the meeting. The claimant could recall what colour the wallet should have been. She clarified the seriousness of the situation to the claimant as a result of the claimant not being co-operative.

She had to take time to make a decision and she was leaning towards dismissal and it was not a decision she would take lightly. She met the claimant the next day. She confirmed to him the outcome of two disciplinary hearings. She asked him if he had anything he wanted to add and he responded no. She felt that she was going to dismiss him based on misappropriation of company funds, he replied okay and she made it very clear to him it was not a decision she made lightly. The claimant was much more vocal on this occasion.

In cross examination she stated that the respondent did not recognise trade unions, if someone needed a trade union representative that would be facilitated. The claimant was given all the information he requested. She did not glean from the claimant that he was very upset that money was missing. At that point she felt it was important that the claimant should be given an opportunity to come up with something. It was very important for her to make the claimant aware of what he was accused of. The claimant was aware of the route she may take. She dismissed the claimant on the 15th December 2010 and she consulted with HR on legislative matters. A part of her decision was based on the claimant's attitude.

In answer to questions from the Tribunal she stated that the letter dated 10th December 2010

was a template letter which she amended as necessary. If someone was investigated and if a dismissal resulted the offence was discussed. During the last meetings she had with the claimant he gave her no explanation for the money that was missing.

Claimant's Case

The claimant told the Tribunal that he commenced work with the respondent in 2008. He was then assigned to Swords as an assistant manager on promotion. He was an assistant manager for a year in this store. His duties varied and included processing deliveries, organising floats ensuring stock on sales floor, audit checks and HR. On the day in question he went to the cash office. As far as he could recall he took out red/purple envelopes that morning and he put the wallets in a service desk cheque drawer. Different employees were assigned to floats and had access to cash. At 3p.m. he and JOD were the only two assistant managers on duty. JOD went to lunch between 2pm to 3p.m. and he was the only one in management at the time. He was preparing for a delivery at 4p.m. He took cash out of register 7 and put it in an envelope, some of the envelopes did not have zips on them. He did not put cash into a bullion box and he did not know why he did not do it. He could not recall whether he was called away and he could not remember what he did with the money at that point. He could have been called to the fitting room, he could have been paged and he could have been called to answer a telephone call.

He did not know where he went with the money. At some stage the money was put down somewhere. He could have put it on the table in a fitting room and he possibly left it on a shelf or in the canteen. Most areas in the store were covered by CCTV. He was aware on the 26th November 2010 that there was an issue with one of the registers. He was not in work the previous day and on Friday he went to the cash office to establish if there was any discrepancy.

He brought it to the attention of Loss Prevention who told him to speak to Head Office in the UK. He was very proactive and he went to the cash office. A sales audit was done to void a transaction. Too many picks ups were done that day and a pick up needed to be voided. There was a problem of a variance in the register and it would require a manager to overwrite the till.

The previous time when a wallet was missing the store was placed on lock down until the wallet was returned. If a lock down occurred he could have been completely exonerated. At no point did he take the money. He thought it strange that the store manager commented on his demeanour and he could not say how he acted at that particular time. At some point he did not respond the way the respondent expected him to act. He saw the CCTV several times

He requested investigative notes and he did not receive a reply to his request. These notes were hand delivered to him on Monday before the meeting on Tuesday. Two disciplinary meetings took place and he did not have the disciplinary files that he requested. He presumed the meeting held on the 15th December 2010 was to discuss the case. At the end of the meeting different facts were presented to him and misappropriation of funds was mentioned at the previous meeting. At the appeal hearing he was told he was not dismissed for misappropriation of funds. He went through all the points in the minutes and he was dismissed for not following procedures. Misappropriation and following procedures were two different things.

He was familiar with the grievance procedure and if he did not follow procedures he would not expect to be dismissed. Several procedures were not followed by lots of employees. Some of the questions he asked at the appeal hearing were not answered. He was told he contributed to his dismissal by not following procedures. He may have contributed to the loss but he stated he

did not take the money. The misappropriation of funds related to a particular pick up. He was more or less accused of stealing money and no one else was suspended. He could have left money anywhere and he was trying to manage staff in the store.

In cross examination he stated that he found an empty wallet in a press at the service desk. He could not recall if the store manager told him at the disciplinary meeting on the 14th December that she had her mind made up about dismissal. He spoke to BG, store manager about the incident and he told him that there was nothing that he could do.

In answer to questions from the Tribunal he stated that he never thought of reimbursing the respondent at any time. It did not occur to the claimant to repay the money. He looked at six discs at the appeal. He felt that if the money was lost on the floor it would be picked up. He obtained alternative work at a lesser salary in June 2011.

Determination

The function of the Tribunal in a case such as this is well established in law. The Tribunal is not required to determine whether the claimant did or did not misappropriate company funds. While the Tribunal acknowledges that the standard of proof in a criminal trial may not be met based on the evidence it heard, nonetheless the standard at bar is on the balance of probabilities.

The function of the Tribunal is to establish whether the respondent has proven that the dismissal was not unfair having regard to the terms of the Unfair Dismissals Acts.

To establish this the Tribunal must be satisfied that the allegation was fully and fairly investigated by the company, that the investigation and disciplinary process respects the rights of that claimant, that the conclusion that the offending act had been perpetrated by the claimant was reasonable on the balance of probabilities and that the dismissal was a proportionate response within the band of disciplinary sanctions which would be imposed by a reasonable employer.

The Tribunal is satisfied on the evidence that the conclusion reached following a comprehensive and fair investigation was reasonable on the balance of probabilities. The Tribunal is satisfied that the decision to dismiss following a disciplinary and appeals procedure in which the claimant's rights were respected, was well within the band of sanctions which a reasonable employer would impose.

In the circumstances the Tribunal determines that the claimant's appeal under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)