

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*

UD2216/2010

MN94/2013

WT991/2010

against

EMPLOYER - *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. F. Murphy

Members: Mr. D. Morrison
Mr M McGarry

heard this claim at Castlebar on 18th September and 4th December 2012

Representation:

Claimant: Mr. Tomás Lally, Information Officer, Citizens Information Centre,
Cavendish House, Link Road, Castlebar, Co. Mayo

Respondent: Ms Judy McNamara, Peninsula Business Services, Unit 3 Ground Floor Block S,
East Point Business Park, Dublin 3

The appeal under the Working Time Act, 1997 was withdrawn at the outset of this hearing. With the consent of the parties a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was added.

Respondent's Case

The respondent (SL) described himself as a sole trader who employed the claimant as a clerical officer in September 2007. This witness had over thirty-five years experience as a businessman. In this case his main business activity was concentrated in the fruit and vegetable trade and family members and others assisted him in this activity. A contract of employment setting out the claimant's working terms and conditions stated her employer as a limited company and that document was signed and dated on 1 June 2010 by a daughter of the respondent.

The witness told the Tribunal that up to 2010 he only had minor difficulties with the claimant in

relation to her work. Due to an injury the claimant was out on sick leave from mid February to early April 2010. The following month she was issued with an informal warning for poor performance. A copy of a document containing that warning presented as evidence bore the signature of a son of the respondent and a hallmark of a consultancy agency. The witness, however, did not know whether this was a written warning. By that time the financial affairs of the business were in decline and the witness felt that some of the staff, including the claimant, was contributing to the problems encountered by the business through carelessness and errors in the recording of sales and purchases and in the accounting processes.

It was suggested that a practice and procedure was in place for employees who wished to purchase products from the stores for their own use. This entailed writing a list of the goods purchased and placing it on a board and then paying for those goods at a later date. SL was not satisfied that this practice in fact existed but it was put to the witness that such a procedure was adhered to by the claimant among others. The witness stated the claimant obtained goods but did not adhere to the alleged practice and did not pay for them. As a consequence he met the claimant on the 13 August 2010 to discuss this issue. As a result of that meeting he suspended the claimant pending a further investigation into her alleged wrongdoing. The witness accepted that in the heat of the moment he might have effectively dismissed her at that meeting and had he done so it would have been a mistake and wrong. That suspension was confirmed in an undated detailed letter he sent to the claimant just prior to inviting her to a disciplinary hearing on the 27 August 2010. The claimant was notified that she could face dismissal as a sanction in this case. She was further advised she could be accompanied by a union representative or a work colleague.

At the meeting the claimant was accompanied by a work colleague who was described as a witness. The respondent and one of his daughters also attended the latter as a minute taker. All parties agreed the meeting could be audio recorded.

Following consideration and some consultation with others the witness wrote to the claimant on the 2 September 2010 using a business name heading. This letter informed the claimant that she was being summarily dismissed for gross misconduct. The letter writer stated that the claimant was unable to give a satisfactory explanation in relation to her alleged wrongdoing. He did not consider alternative sanctions. Prior to that decision the respondent had concluded “a very detailed investigation” and had studied statements from other employees regarding the non-payment of goods.

Under a heading: Statement of grounds for commencing formal action, the letter read:

Gross misconduct as agreed with regards your mistakes at work. Mistakes were so severe that they caused loss of integrity for the business and created a serious mistrust with third party suppliers.

Theft of company goods resulting in the inability to prove payment for goods in the last month along with statements from fellow employees clarifying non-payment of goods.

The respondent reminded the claimant of her right to appeal his decision. She was told the employer was nominating his son to be the person who would consider the appeal. This was the same person who signed the informal warning in May 2010. The claimant was not satisfied that the son was an independent person in this context. In exercising her right to appeal the claimant objected to that person hearing it. In turn the respondent replied that it was a small family run company. As an alternative the employer offered his accountant and company auditor to hear the appeal. The claimant did not respond to this suggestion. Subsequent to the dismissal there was

correspondence between the respondent and the claimant. No appeal took place.

AB (former office manager) interviewed and recruited the claimant. When the claimant commenced employment AB outlined her role and duties and commenced a training process. Over time she became aware of errors and mistakes which included incorrect statements going to customers and payments not being registered. As the mistakes became more frequent she informed the respondent around December 2009. The claimant never complained that she was overworked or had any difficulty with the job. Collective meetings were held with all staff where discussions were had on improving and reducing errors. In an effort to reduce mistakes with invoice calculations she suggested the claimant move desk away from answering phones so as she could concentrate on the task.

With regard to employees purchasing produce the policy was that another employee would weigh and process any purchases by employees.

Two further witnesses for the respondent confirmed that they would on occasion carry produce to the claimant's car from the store. Both stated they never processed payments for produce purchased by any employee.

Claimant's Case

The claimant commenced employment in September 2007. Her role included general office duties. Two employees left in 2009 and a third employee moved to a different area of the business. By the end of 2009 she became responsible for the duties of all three. The workplace environment was not one where you could talk about the heavy workload or request assistance but more of a just get on with the job attitude. Notice of meetings would be two minutes before hand and were always negative with no praise ever given to employees.

In February 2010 having suffered a fracture she was out on sick leave for a period. The claimant returned to work on the 2 April 2010 on a busy Easter weekend. While on sick leave her work was not processed and she returned to a backlog. The computer system was down and records were being kept on a word document until around the 14 April 2010.

The errors she made were few and were easy mistakes to make. The pressure and heavy workload led to the mistakes and she was offered no alternatives to deal with the increasing responsibilities. She was never sure who to report to or who was in charge. Collective meetings were held and employees were told of errors and warnings were given to all employees.

On the 13 August 2010 having worked the full day when she was leaving she met SL in the car park and he asked her to call to his office. At that meeting the respondent immediately referred to errors and mistakes she had made. He then accused her of theft and she realised she was going to be dismissed. She had always followed the same procedure as other employees when purchasing items. She had a list kept at her desk and would pay for the goods and enter payment into the cash book. At the time of that meeting she was certain she had three weeks of goods to pay. Initially SL dismissed her but after she objected to the process he suspended her pending an investigation.

A disciplinary hearing was later held and she attended with a colleague. She believed the respondent had already made a decision and she would be dismissed. In a letter dated the 2 September 2010 her dismissal was confirmed. An independent appeals officer (BL) was offered however as he had been involved in her disciplinary hearing and was a member of the business she

objected and was later offered MH the accountant for the respondent. No appeal was held.

CCTV footage dated the 5 August 2010 at 16:07 was viewed by the Tribunal. The claimant explained that the items she took that day were included on a list for payment which was attached to the notice board in the office for pricing up. That list disappeared and as she was no longer an employee from the 13 August 2010 she could not check where that list was or what was included on the list. She often paid for goods weekly and sometimes fortnightly.

Determination

The Tribunal is unanimous in finding that it was inappropriate for the employer to arrange for a family member to conduct the independent appeal. Accordingly, the claimant's rejection of the named family member to conduct the appeal was justified.

However, having considered all the evidence in this case the Tribunal finds by majority, with Mr. McGarry dissenting, that the claimant was not unfairly dismissed for the following reasons:-

- The problem with the initial appeal notwithstanding, the employer mended his hand and offered an independent appeal which the claimant failed or refused to participate in.
- The claimant's acceptance of making errors in her work
- The claimant was unable to offer a satisfactory explanation for her conduct which had given rise to a deep suspicion on the part of the employer and did not succeed in rebutting the opinion held by the employer of dishonesty
- The employer's trust and confidence in the claimant had broken down

For all these reasons by the aforesaid majority it is the view of the Tribunal that the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

No evidence was heard in relation to the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 that claim must also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)