

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

EMPLOYEE – *claimant*

UD2222/2011

UD2137/2011

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr D. Peakin  
Mr M. O'Reilly

heard this appeal at Dublin on the 27 March 2013

Representation:

Appellant(s) : Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

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

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of appeals by both the employee and the employers against the recommendation of a Rights Commissioner Ref: R-109623-UD-11/EH. The employee was seeking to have the recommendation varied whereas the employers were seeking to have the recommendation upset.

The Tribunal has carefully considered the evidence adduced by the four witnesses who gave oral evidence in the course of this hearing. This matter comes before the Tribunal on foot of a duality of appeals by both parties in respect of a rights commissioner recommendation dated the 26 October 2011. The claimant is making a claim under the Unfair Dismissals legislation that his dismissal by reason of gross misconduct was unfair and unreasonable.

In circumstances where the termination of the employment is not in dispute the onus rests with the respondent company to demonstrate that the decision to terminate the claimant's employment on the 18 April 2011 was fair and reasonable in all the circumstances.

The claimant had worked with the respondent company off and on since 2003. After a two year break between 2007 and 2009 he returned to the retail unit in Skerries in and around December

2009 and worked there doing two to three shifts a week up until his dismissal in 2011.

In March of 2011 an internal auditor was directed to go in to the Skerries branch of the respondent company for the purpose of conducting a root and branch audit. The results of this audit were somewhat alarming as the Skerries branch was found to be at only 22% of optimum performance. All sorts of difficulties were noted including cash control issues, stock control issues and inaccurate daily checks and balances. In the course of the examination the district manager came to be examining in-store CCTV footage. In consequence of her own observations the district manager asked the auditor to examine this footage to determine if her own observations had merit. The auditor examined the CCTV footage and felt that he had observed the claimant helping himself to the pick and mix sweets stand without paying for it.

The claimant himself contacted the district manager having regard to the overall audit and about potential meetings then taking place and the district manager confirmed that he needed to talk to the auditor regarding some "retail irregularities". The claimant had no way of knowing that his own personal performance was at issue and attended the meeting with the auditor. The aforementioned district manager acted a note taker.

At the meeting which took place on the 14 march 2011 the claimant was advised that he had been observed on seven occasions over the course of a couple of days. The claimant was also observed taking a can of coke. The claimant was not shown the footage. In his evidence the claimant did not deny that this taking of confectionery was possible but that everything taken and consumed would be paid for either immediately or as soon as practicable. The claimant stated that he would allow a colleague ring it in for him if the colleague was free or he would ring it in as miscellaneous if he was working on his own.

The claimant indicated that the policy of running food items through his personal account was not always operated by him. The claimant in evidence to the Tribunal gave evidence to the effect that the store manager was pretty laissez faire about the speed with which confectionery would be paid for. He was never criticised about the way he operated the policy so the auditor's observations in this regard were a surprise to him.

The claimant is adamant that whilst payment patterns may have been erratic and subject to having to take second place to serving customer he always paid and the employer was not at a loss because of the way in which the shop was being allowed run or the way in which the claimant was tardy in making payments.

The respondent's auditor went on to reconcile the video footage he had with the cash takings for the day. He could find no evidence to suggest that payments had been made either in respect of the confectionery takings. However these reconciliations were never shown to the employee who was defending himself somewhat in a vacuum.

The claimant was brought along to a disciplinary meeting. It is important to note that each and every member of staff in Skerries all faced disciplinary type meetings over different issues at this time. One of the claimant's colleagues had also been noted taking sweets without immediate payment and he was sanctioned with a warning.

The Tribunal fully accepts that the claimant went in to the disciplinary meeting in the full expectation that he would be receiving a warning for his failure to comply with the company policy of payment "then and there". It is doubtful the claimant would have proceeded

with this meeting without a representative if he knew his job was on the line.

The Tribunal accepts that the claimant was shocked to be dismissed and immediately sought to appeal this decision. Much play was made by the respondent of the fact that the appeal process was not exhausted but the Tribunal finds that the claimant's belief that the respondent company was stonewalling is absolutely credible in circumstances where he had not (and to date has not) been given relevant video footage and a full six weeks had passed before any attempt was made to set a date. The claimant started the LRC process and the appeal process was abandoned. The Tribunal notes the company did provide some paperwork though the reconciliation work conducted by the auditor was not opened to the Tribunal.

On balance the Tribunal finds the claimant was unfairly dismissed in circumstances where the sanction of dismissal was wholly disproportionate to the failure of non-compliance. This is particularly so where the company's own store manager and the claimant's line manager had had no difficulty with the way in which the claimant had paid for his confectionery.

The Tribunal varies the recommendation of the Rights Commissioner and awards the claimant €10,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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