

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD774/2006

against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B.L.

Members: Mr. J. Reid  
Ms. M. Mulcahy

heard this claim at Dublin on 19th April 2007 and 19th June 2007

Representation:

Claimant : In person

Respondent : Mr. Boyce Shubotham, William Fry, Solicitors,  
Fitzwilton House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

#### **Claimant's Case:**

The first witness had worked for three years as a till operator in the store. She had spent ten years previously there on seasonal work. In her time at the store, it was common practice for members of staff to take magazines and newspapers home once the barcodes had been removed. A member of management was required to sign these items out of the store. A security guard stationed at the door would check that the items were authorised and then permit the staff members to leave with them. The witness had seen the letter sent by the claimant to the staff after her employment ended. Under cross-examination, she told the Tribunal that she had never wanted any magazines so she had not availed of this facility. When the barcodes were removed, the newspapers and magazines were disposed of.

The claimant gave evidence. She told the Tribunal that she had worked for the respondent company on a fixed-term contract from April 2002 to April 2004 as a checkout manager. This was renewed for a second contract to April 2006. She expected this contract to be renewed for a further term. She had a good working relationship with all managers for the time she had worked there. When the new store manager (SM) commenced employment at the store in October 2005, they "got off badly from the start". He began to treat her dismissively and rudely.

In approximately November 2005, she was helping staff stock shelves, when SM appeared behind her and tapped her on the shoulder indicating that she should follow him. He proceeded to the clock area where there was a customer seated. SM looked at the customer and then at the claimant as if to say get on with it. The claimant dealt with the customer who was unwell. SM had not said one single word to her. If she passed him in the hallway, he would look at a piece of paper or out the window rather than greet her. At any meeting with him, he would question her integrity by saying things like "I find that unbelievable/amazing you didn't know that". The claimant was asked to take two members of staff away from the till for training on one occasion and she made the decision that the store was too busy to spare the staff at that time. The other checkout manager was questioned over this decision and when the claimant arrived into work the following afternoon, the other manager was visibly upset. They were both called to a meeting and when SM asked them why this had occurred, the claimant explained. He told the claimant that when there was an order given, it must be obeyed. He called the cash office in front of everyone present to verify that the tills were busy at that time and to do a comparison between that time and earlier in the day. He made a comment on the relationship between the claimant and the other checkout manager saying that there was a problem. When the claimant denied this, he looked directly at her and said "if it comes between choosing between you...". The claimant took this to mean that she was going to get sacked.

She wrote a three-page letter to the area manager and four weeks later she had a meeting with him in SM's office. He questioned her at length regarding the issues between herself and SM and told her that he took the matter very seriously. When asked if she had been bullied, the claimant told him that she was "too long in the tooth to be bullied". She was being harassed and she was coping by keeping her head down as much as possible. He told her that he would investigate the matter and get back to her as soon as possible. The subject was not brought up again until March. The claimant was not aware if any approach had been made to SM regarding her complaint. She felt that the complaint had not been dealt with at all.

After making the complaint, the claimant was not invited to any managers' meetings. Previously, she had attended four per month. Her late shifts were trebled with no consultation. Her days off were assigned with no arrangement. Normally she would have been asked about what days she wanted to take in lieu of working extra hours. When she picked her Spring break, which had been authorised by the Personnel Manager, she was told that her leave had been denied by SM. When the claimant objected, she was told "don't start crying on me". The claimant outlined a number of other instances. She had written a letter objecting to SM picking out holidays for people (when this had been done previously by the managers responsible for the rota) and was told not to put these things in writing and in future to telephone with any complaints she had. When she was informed about a customer complaint that was unfounded she felt she had to justify something she had nothing to do with. When she would offer an explanation to anything she was asked, everything she said was double-checked with another member of staff. She was falsely accused of having a float missing from a till. This was incorrect as it belonged to another department. She received no apology for the false accusation.

This behaviour culminated in March 2006 when she was accused of bringing magazines and newspapers out of the store without paying for them. For the duration of her employment in the store, once the newspapers and magazines were "topped" (when the barcodes were removed from the top of the front pages) they were brought out to the back of the store. Some were put into the dumper and some were put aside for return. Any staff member who wanted a magazine or paper could take one when they had been topped. Any manager could authorise this. A manager did not need authorisation to remove the items.

On the 3<sup>rd</sup> March 2006, the claimant attended for work at 2:30pm and her manager told her that she (her manager) had been dismissed. The claimant was distraught at this news and when she was called to the office two hours later, she thought it was regarding her manager's dismissal. SM and the other store manager were in attendance. SM told her that he had been "made aware of a grave act of misconduct" the previous evening, that the claimant had committed. She had no idea what he was talking about. He went on to explain that she had removed magazines from the store the previous day and placed them in her car. When security had asked her to return them to the store, she told them there was no need. The claimant said that this was common practice and told SM that she had kept some back for him in the past. He agreed but said that he had never taken them out of the store. She told him that it was custom and practice within the store and she had authorised it for staff members on a regular basis in the past. SM said that it was "too grave" and a "sackable offence". He said that she "should have known better" and "not to bring other managers into it". When the claimant defended her actions, she said that the accusations were "trumped up" and SM was just trying to get rid of her. She was told to go to the training room but it was busy so she sat on the stairs until she was called back. She was told to return to the checkouts while the matter was being investigated.

The claimant went to her car and was very distressed. She felt that the accusations were very unfair and that SM would not listen to her. She telephoned the area manager and he told her that he was unavailable at that time to attend the store, but would come within the week. She hung up the telephone on him and returned to the store where others were getting ready to go home. She went home and approximately one hour later, the area manager telephoned her to call her to a meeting the following day.

The claimant attended this meeting on the 4<sup>th</sup> March. SM and the area manager were present. On this occasion she was asked to bring a witness and she availed of this. She attempted to tell the area manager that SM was picking on her still and asked him why nothing had been done on foot of her previous complaint. She tried to give him a copy of her assessment and details of other complaints. She told them that she felt undermined, did not feel like a manager any more and was unhappy. The area manager refused to accept any documents from the claimant. The claimant was then informed that she was suspended on full pay until the following Tuesday for investigation. The claimant pleaded with him not to take this course of action. She told him that she had admitted removing the items from the store as she had done on numerous occasions and that she was a competent manager. She would not be fool enough to take them if she had ever been told not to. She was called to a meeting on the 7<sup>th</sup> March with a witness and told that after discussion with head office, there was to be a black mark placed on her record.

The claimant got notice of grave misconduct. She loved her job and was devastated. She would return if she did not have to work under SM. She re-iterated that SM was impossible to work with.

Since her resignation, she has re-trained (under FAS direction), and has obtained computer/ IT qualifications. She applied for approximately twenty jobs but so far has been unsuccessful.

In cross-examination she was asked about her date of birth. She stated her date of birth as being 1945. The reason she put 1950 on her application form was when she came to Ireland seventeen or eighteen years ago she took five years off her age as she felt she looked young. The Social Welfare records show her correct date of birth. She also put 1950 on form T1A to the Tribunal but subsequently asked her solicitor to correct it but he did not do so.

In advance of the meeting of 7<sup>th</sup> March the claimant decided she was going to resign. She thought she would be sacked or would have to resign. She said it was untrue what the respondent said at this meeting in that they felt she had broken procedures and probably did not understand the rules clearly and she would have a record on her personnel file. The note on her file was to be grave misconduct. There was no disciplinary action taken against her in relation to the complaints. She agreed it was reasonable for the respondent to put the matter on file. The claimant was suspended without consultation with the other managers. She felt it was far too severe, it was unfair and she was mortified.

In relation to the magazines she did not agree it was an act of misconduct and she did not breach procedures. It was common practice and she signed out magazines for other members of staff. She would not blatantly sign something and did not know it was against company policy. While she agreed she took magazines that did not belong to her she did not get another manager to sign out as she was responsible for the magazines and newspapers.

In answer to questions from Tribunal members she did not ask for a reference as she did not want a black mark and she had left under such bad terms and conditions.

The Tribunal also heard evidence from a check out supervisor who worked with the respondent from October 2004 to April 2005. Magazines were taken by management and staff and you would have to get permission from the checkout supervisor before doing so. The cover page was taken off and she would sign for the staff. There might be free CD's or children's magazines. The CD's were left for the customers. She was never told that this practice was not allowed.

### **Respondent's case:**

The grocery manager SM gave evidence to the Tribunal. At a meeting in November MM said the claimant was trying to undermine her in the store. He decided to arrange a meeting with the human resources manager, MM and the claimant and they had an opportunity to put points and respond accordingly. In relation to the magazines the security manager saw the claimant leaving with magazines. He went to her car and asked her to return the magazines. He attended the investigatory meeting on 3<sup>rd</sup> March 2006. He explained to the claimant that she had left the store with five magazine returns and he asked her the policy on staff purchases. Her response was when you leave with goods you have to have a signed receipt. She said it was common practice to remove de-headed magazines. He explained that it was an investigatory meeting and could lead to being disciplined up to and including dismissal. The claimant got very upset and said she was not the only one taking magazines yet she was the only individual held accountable and that he was bullying and harassing her. She also referred to MM saying how dare he sack her. He asked the claimant to return to shop floor but she said she was going home. He did not invoke the disciplinary procedures.

In cross-examination witness said he had a meeting every week with the management team but he did not recall having a meeting with the claimant when he started. He did not decide to pick on the claimant. He had no recollection of various incidents put to him by the claimant including those in December 2005 where he had given the claimant two days off and then rostered her to work those days. Neither did he recall calling the claimant to the office in relation to a missing float. He could not answer why prior to his coming to the store the claimant did not work two nights. His role was to ensure the store was properly managed. The claimant was service manager and she was there to work in the store the hours she was required to do. He plans the holidays to ensure the store is

covered and this is usually done from January onwards and it is not always possible to give everybody their complete holidays as requested and this would entail managers swapping holiday slots. Reference was also made to the claimant's assessment and as far as he was concerned he did discuss the claimant's assessment with her. Regarding MM and training which was cancelled in November, witness said this happened because there was not sufficient cover and if there was to be training it had to be structured.

In relation to the meeting of 3<sup>rd</sup> March the claimant was not asked to have someone present as it was an investigatory meeting. In relation to the magazines he said it was a serious breach of return procedures. He did not say it was a dismissible offence.

In answer to questions from Tribunal members witness said that in relation to training meetings the claimant did not go as she was on the weekend shift but anything that was relevant was passed on to her. In relation to assessments his role would be to assess the managers in his store and it's a two-way assessment. When the claimant had to increase her nights the other managers had to do an equivalent increase in hours. This meeting was investigatory rather than disciplinary as the respondent wanted to ensure that the claimant understood the policy with regard to staff purchases etc and he asked questions regarding gift policy and returns policy. Staff are given training with regard to these policies and as the claimant was working with the respondent for four years he had to establish if she understood the policies.

Since the claimant left six weeks after her assessment it would have been difficult in that short time to put in place suggestions/policies agreed during the assessment.

The Tribunal also heard evidence from the area manager, AM. He visits stores in the area every two weeks. He is from Wexford but the respondent does not have a regional office in Wexford. Following receipt of letter from the claimant dated 15<sup>th</sup> November 2005, copy of which was submitted to the Tribunal, he arranged to meet the claimant. While he was not sure of the exact date of this meeting as far as he knows it was early December 2005. He went through the letter with the claimant and he would not have been aware that this was how she felt. It was a difficult meeting and the claimant was upset. Having asked the claimant she wanted witness to deal with SM. He was worried the claimant was being harassed and bullied but she said she was not being bullied. She requested that he go through the letter with SM which he did and felt he had dealt with the matter to the satisfaction of the claimant.

From memory the next time he got a call from the claimant was the 2<sup>nd</sup> or 3<sup>rd</sup> March regarding the return of magazines. He was aware as AM had been in touch with him. She requested that witness come down and meet her and he agreed to go to the store the next day, being Saturday. It was a difficult meeting and he insisted that the claimant bring a colleague with her and this she did. He told the claimant that the matter needed to be investigated. It is company policy that any magazines not sold are topped and either sent back to the company or re-cycled. Breach of this policy could merit disciplinary action if serious enough. The meeting was difficult and the claimant was under pressure. He explained that it was an investigatory meeting and invited the claimant to discuss any points she wished. At the outset he explained that he was there at her request. She had been very upset on the phone the previous day. The claimant said AM had said on the previous day that it was gross misconduct and a dismissible offence. She also had an issue that she had not been told regarding MM. She mentioned the November letter and accepted that witness had dealt with in the manner she wanted. MM had accessed the computer and saw her file and wanted to know if there was one on her personally. It was a stressful meeting with a lot of emotion flowing.

The claimant felt that AM was trying to get rid of her and witness felt that AM was putting her under pressure. During the meeting she was upset. She did understand the consequences. The claimant went through what she did and witness explained company policy regarding magazines. He felt the best thing to do was to suspend the claimant with pay pending investigation. The respondent needed to get all the facts and be impartial. An investigation was carried out and a meeting was arranged for the following Tuesday, 7<sup>th</sup> March at 4.30pm. He drove from Dublin to the store and insisted that the claimant bring a witness with her. The claimant agreed that what he put to her on Saturday was true; she had taken the magazines. When asked the claimant had nothing further to add. During the investigation he followed up on points made by the claimant. He discussed what was going on with senior persons in the company and he also discussed and investigated what the claimant had said regarding other managers taking magazines. They denied that this was the case. There was a breach of procedures but it was felt that the claimant did not understand therefore a note of a verbal warning was being put on her file. The claimant put three envelopes on the table, handed in her keys and badge and got up and left. Her letter of resignation was read out to the Tribunal. The claimant also sent a letter to the staff.

In cross-examination witness agreed that prior to her letter of complaint in November 2005 the claimant had not made any complaints in the previous three years. He did not have a copy of the agreement signed by the respondent in relation to out-of-date magazines being re-cycled or returned. The claimant commented that how was she supposed to know she was not to take these magazines.

In answer to questions from Tribunal members as to his undertaking to speak to AM he was asked if they reached an understanding as to how or what should be done. Witness went through the claimant's letter and AM was clear on the points raised. AM had to deal with the communications problems raised by the claimant. Witness was confident that the claimant outlined the issues and that the situation would right itself. There was no written record of this meeting with the claimant. He did not know if other employees were disciplined with regard to the magazines. The reason he did not revert to the claimant regarding the progress with AM was because the claimant did not want him to do so. At the meeting of 3<sup>rd</sup> March the claimant said she was satisfied with the way the matter was resolved.

### **Determination:**

The Tribunal in considering the evidence looked at the actions taken by the Respondent against the Claimant. This was a verbal warning that followed a period of suspension on full pay while they conducted their investigation into the incident. The manner in which they conducted their investigation was not in conformity with best practice and could have been improved on. The claimant was a manager who was fully conversant with the rules in relation to magazines and articles to be removed from the premises. She knew that she required permission and a signature in order to remove items from the premises. The fact that a practice had developed in the premises of removing newspapers and magazines was a mitigating factor but was not an excuse for the condoning of the practice. It was clear from the evidence that the Claimant was a valued employee of the Respondent and while there was some evidence that there was friction between her and the Manager of the store this, in the opinion of the Tribunal, did not amount to harassment. It was also evident that the Claimant was quite capable of handling this situation. The Claimant could have appealed against the decision to issue her with a verbal warning. This she chose not to do but rather she decided to treat the incident as grounds for constructive dismissal. The Tribunal find that this, along with the manner of the processing of her harassment claim by the Respondent, did not constitute sufficient grounds to justify her in treating herself as being constructively dismissed.

Therefore her claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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