

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE
–Claimant

UD905/2007
MN446/2008

against

EMPLOYER
- Respondent

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1967 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. Casey
Mr. J. McDonnell

heard this appeal at Cork on 16 May 2008 and 24 & 25 March 2009
and at Ballincollig on 7 & 8 September 2009

Representation:

Claimant:

Mr. Eoin Clifford B.L. instructed by Ms. Eileen Hayes,
P. J. O'Driscolls Solicitors, 41 South Main Street,
Bandon, Co. Cork

Respondent:

Mr. Eddie Farrelly B.L. instructed by Ms. Denise Fanning,
DAS Group, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

The claimant commenced employment in April 1998, having known the directors of the respondent, which operates primarily as a builders providers, for some twenty years before then. From around 2000 the claimant was the debtors' controller. Her duties included checking tills, bookkeeping and lodging monies received with the bank. At the time of the dismissal the respondent had around 20 employees. The employment was uneventful, with the claimant receiving a significant pay rise from April 2007 until an incident on Friday 18 May 2007. On this day a sales clerk (SC) approached the managing director's wife (DW), who is also a director of the respondent and reported that before lunch there had been a number of €50 notes in his till but when he returned after lunch there were no such notes in the till. Further a credit note for €111-39, which involved the return of cement, PVC and sawn whitewood, had been issued in his name and he had not issued any such credit note. The other sales clerks were approached to see if they had issued the credit note in error under SC's code and none of them had. A check was made of CCTV footage of SC's

till over the lunch period and the only person seen at SC's till was the claimant. At this point DW felt that the claimant had simply made an error, which she was embarrassed about admitting to. It is common case that the claimant was fastidious about her work and was very concerned about making mistakes. When DW spoke to the claimant, after showing her the CCTV footage, the claimant asked DW. "Are you accusing me?"

Later on the same day SC brought a further credit note, from 3 May 2007, which had been raised under the code of another sales clerk (SC2) to DW's attention. It is in dispute between the parties whether this was brought to the claimant's attention on the evening of 18 May 2007 or Saturday morning 19 May 2007. The respondent's position is that the claimant attended the workplace on 19 May 2007 in a social sense rather coming to work, as she was not due to work that day. This credit note concerned the return of concrete lintels, when there is no evidence to show that they were returned. The respondent's position is that when this was put to the claimant she responded, "Are you pointing the finger at me?" DW had by now taken a less benign view of the claimant's conduct.

The claimant maintains that she was not in work on Monday 21 May 2007. The respondent's position is that there are receipts in the claimant's handwriting bearing that date. The claimant was not due to be in work on 22 and 23 May 2007. On 22 May 2007 she visited her GP and obtained a medical certificate. As a result of the concerns raised in regard to the afore-mentioned incidents the general manager (GM), who is the son of the directors, began to conduct an investigation to ascertain if any more irregularities could be found. On the same day a human resource consultant (HR) was hired to help the respondent in the investigation. The claimant came to work on 24 and 25 May 2007, despite being covered by a medical certificate, and told DW that she was likely to be off work for some two or three months for health reasons. The claimant's position is that she gave the medical certificate to DW on 24 March 2007, later found it on the floor that afternoon, took it home and later posted it in. It is common case that the respondent had received the certificate early in the following week. The only medical certificate opened to the Tribunal was dated 25 May 2007. This covered the claimant for an ongoing period by reason of gastritis, depression and vertigo. The claimant had suffered from vertigo and gastric problems on occasions during the employment.

As a result of the investigation HR and GM met the claimant on the afternoon of Friday 25 May 2007 in the presence of her colleague, the creditors' clerk. The claimant felt that she had been given inadequate time to prepare for this meeting. At this meeting the respondent presented and went through with the claimant the written details of five incidents that had come to light during the investigation.

1. An incident of 4 May 2007 where a customer had presented a cheque for €2,000-00 and been given €1,800-00 cash back and asked for the balance of €200-00 to be paid off his account. In the event a credit note was made out for €100-00 and only €100-00 put against the account
2. An incident of 15 May 2007 whereby the same customer as in 1 was had a credit note raised against his account for the return of laminate floor covering purchased on 16 April 2007 despite there being no record of its return. The customer gave evidence that the laminate was laid in his parents' house and he had neither requested nor received a credit note
3. The 3 May 2007 credit note for lintels as set out above
4. The Till incident of 18 May 2007, the €50 notes and the cement credit note. This was the

incident that first gave rise to the respondent's concerns

5. An incident where a grease trap had been credited as if returned on 7 February 2007. This customer gave evidence that he had used the grease trap and had neither requested nor received a credit note

At this meeting the claimant was shown the paper trail associated with the incidents. This included hand written notations on receipts for cash tendered to clear accounts, but some of which the claimant had converted to credit notes. The claimant accepted that these notations were in her handwriting. She was then suspended with pay and given one week to respond to the allegations.

The claimant, accompanied by her brother-in-law, provided a written response to these allegations on 1 June 2007 at a meeting with HR and GM., as follows:

1. The claimant recalled receiving the cheque for €2,000-00 and being asked to put €200-00 against the customer's account but in error she only put €100-00 against his account. This was an error and there was no fraudulent or dishonest intent on her part
2. To the best of her recollection and knowledge she had not dealt with the customer on 15 May 2007 and did not issue the credit note for the laminate flooring
3. The claimant had no knowledge or recollection of ever having dealt with the customer involved with the lintels
4. The claimant could not recall attempting to create a credit note but it was possible someone had approached her and asked her to issue it for goods returned
5. The claimant denied creating this credit note and totally refuted the allegations against her

In summary the claimant said she had answered all the allegations to the best of her knowledge and refuted all allegations that she had acted dishonestly. She pointed out that she was under considerable stress given the number of people and the poor systems in operation within the respondent. She felt let down by her employer.

The claimant was unable to add anything to the written response when questioned by HR. It is common case that, after this meeting, HR discussed with her brother in law the respondent's proposal that the claimant would resign. HR was unable to meet his deadline to inform the claimant of the final outcome by 5 June 2007 because more information came to light in relation to the second allegation against the claimant. In light of her response that she had not dealt with this customer on 15 May 2007 further checks were made. On this day the customer had presented a cheque for €2,150-00 and the customer's instructions to the claimant to put €350-00 against his account had not been fully complied with and a credit note created for the balance in a similar manner to the first allegation. HR wrote to the claimant on 5 June 2007 to explain that there would be a delay in coming to their conclusion.

The claimant, accompanied by her brother in law, met HR and GM on 8 June 2007 and the allegations concerning the afore-mentioned cheque for €2,150-00 were put to the claimant. She was again shown the CCTV footage of the events of 18 May 2007. It is common case that after this meeting HR told the claimant's brother in law that the claimant had two choices, either to resign or

to be dismissed. After this meeting HR and GM were of the view that they had heard nothing to allay their concerns that the claimant had breached the respondent's trust and confidence in her. The claimant's brother in law wrote to HR on 11 June 2007 to complain that the allegations against the claimant were unfounded and the result of the respondent's poor transaction procedures. Before this letter was received on 12 June 2007 HR and GM met the directors and decided that in light of their dissatisfaction with the claimant's response to the allegations there was no alternative but to dismiss the claimant. HR wrote to the claimant on 13 June 2007 to tell her that she was being dismissed as nothing the claimant had put forward in reply to the allegations against her had altered the view that the respondent had reasonable grounds to believe that the claimant had acted in a manner which amounted to gross misconduct and the working relationship between the claimant and the respondent had collapsed.

Determination

The Tribunal has come to a majority finding in this case with Mr McDonnell dissenting. The claimant complained that the respondent's poor transaction procedures were responsible for the situation in which the claimant found herself. Even if the majority were satisfied that there were problems with these procedures, which it is not, the majority is satisfied that the conduct of the claimant in creating the credit notes complained of was not an error but a deliberate act. The majority finds the facts that the amount of the credit notes, which in some cases were inclusive of the VAT, matched the amounts which the claimant had failed to put against the customers' accounts as well as the claimant's hand written notation on the credit notes are compelling evidence against the claimant. The majority is satisfied, based on those facts, it was reasonable for the respondent to conclude that their trust in the claimant was irrevocably sundered.

Whilst DW was of the opinion, following the second incident and the claimant's response when asked about it, that the claimant was misappropriating the respondent's funds, the respondent, thereafter, still conducted a full and fair investigation into the matter to establish the facts. The majority notes the claimant's evidence that she visited her GP on 22 May and despite his advice that she should be off work for a number of months, she nonetheless voluntarily went in to work on 24 & 25 May 2007. In such circumstances and where no issue was raised by her or her representative, her brother in law, the majority does not find it fatal to the respondent's case to have continued with the disciplinary process at that time.

Accordingly, by the aforementioned majority, the Tribunal finds that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. This being a conduct related dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1967 to 2005 does not arise

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)