

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE

CASE NO.  
UD1048/2009  
MN1060/2009

*-claimant*

against

EMPLOYER  
EMPLOYER  
*-respondent*

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr P. Pierson  
Mr O. Nulty

heard this claim at Monaghan on 18th February 2010

Representation:

---

Claimant: Rory O'Neill, Mallon, Solicitors, Glencarn Centre, Castleblayney, Co. Monaghan

Respondent: Mr. Barry O'Hagan, O'Hagan & Co., Solicitors, Market Square, Dundalk, Co. Louth

The determination of the Tribunal was as follows:-

#### **Respondents Case**

The Tribunal heard direct evidence from the general manager of the company, DL. DL told the Tribunal that the claimant ran the shop on her own five days a week and there had never been a problem with her conduct or behaviour.

On 14<sup>th</sup> April 2009 there was an issue with one of the cash envelopes from the shop where the claimant was employed. There had been a €5 mobile phone top up printed from the An Post machine in the store. The receipt for this top up had not been scanned as a transaction but was placed into the till. On 22<sup>nd</sup> April 2009 a phonecall was made to the claimant to enquire if she was aware of the discrepancy between the printed top up and the receipt in the till. The claimant said she did not know anything about it. DL then contacted Vodafone to find out which mobile number had been topped up with the credit.

DL asked the claimant on a further three occasions if she knew anything about the top up discrepancy and each time the claimant said that she did not. On 24<sup>th</sup> April 2009 the claimant was informed that a disciplinary hearing in relation to this incident would take place on Monday 27<sup>th</sup> April 2009. DL told the Tribunal that it is very seldom that the till does not balance.

At the meeting of the 27<sup>th</sup> April 2009 the claimant brought along a colleague and she was again asked about the mobile top up. The claimant again said that she did not know. The only time that the claimant said she knew anything about the top up was when she was given the mobile number that the top up was applied to. The claimant said that this was her boyfriend's number and she had put the top up on his phone as she often did. On the 14<sup>th</sup> April 2009 there had been 13 mobile phone top ups printed but payments were only made in respect of 12.

The company felt that this discrepancy was not a mistake because there were too many coincidences and the claimant could have investigated the matter herself by checking what phonenummer the mobile top up had been applied to. DL quoted the claimant's employment contract, which refers to gross misconduct as "*fraudulent misuse of Ready to Go call credit*".

### **Claimant's case**

During direct evidence the claimant told the Tribunal that she was employed as a sales assistant. She commenced working for the respondent on 12<sup>th</sup> December 2006 and there had been no issues with her employment until this incident with the mobile phone top up.

The claimant told the Tribunal that on Wednesday 22<sup>nd</sup> April 2009 she received a phonecall from M in Dundalk, who deals with shop takings, in relation to a problem with a top up voucher from the week before. The claimant told M that off the top of her head she could not recall a problem with her totals. The claimant told M to speak to DL about it and to get back to her.

A couple of days later (24<sup>th</sup> April 2009) she received a phone call from HMCE, the owner, telling her that she was to attend a disciplinary hearing in Dundalk on Monday 27<sup>th</sup> April 2009. The claimant asked HMCE if he was sure he had called the right store. He told her he was calling about the discrepancy with the mobile phone top up and asked her if she knew anything about it. The claimant told him that she did not. HMCE told the claimant that she could bring a colleague to the hearing with her.

After lunch, the claimant received another phone call from HMCE. He wanted to know who she intended to bring to the hearing with her. She told him that she had not organised it yet. The claimant called JC, and she said she would attend the hearing with her. JC told the claimant that she did not know what to do as she had never been to a disciplinary hearing before and the claimant told her she should take notes.

The claimant phoned HMCE to inform him who would be accompanying her to the disciplinary hearing. During this phone call the claimant asked HMCE was there anyway they could sort out this issue. He said no, the disciplinary hearing was taking place. After this phone call the claimant received a fax and an email confirming the details of the disciplinary hearing for Monday 27<sup>th</sup> April 2009.

At the disciplinary hearing the claimant was again asked if she knew anything about the mobile phone top up in question. She again said no. She told HMCE that she deals with a lot of

transactions every day and could not remember off the top of her head. HMCE then read out the mobile phone number that the top up had been applied to and the claimant recognised it straight away because it was her boyfriend's number.

When she realised it was her boyfriend's phone number she told HMCE that it was a genuine mistake. She had put the receipt in the till but had not scanned it. That is why the till and the money had balanced and she was not trying to defraud the company. As far as she was concerned she'd paid for the top up.

HMCE wrote to the claimant on 27<sup>th</sup> April 2009 and informed her that she was suspended with full pay to allow an investigation to take place following the allegations of alleged misuse of Vodafone Top Up credit. The claimant did not receive any feedback or outcome regarding further investigation.

**Determination:**

All the evidence given at the hearing was fully appraised by the Tribunal and it finds that the claimant would not have put the voucher into the till if it had been her intention to defraud her employer. During the hearing the respondent conceded that the claimant had a good record with them during her employment. The Tribunal determines that her explanation in the circumstances was reasonable and should have been accepted by the respondent. It was noted by the Tribunal that while the respondent stated that they considered this, a very serious matter, the claimant was allowed to work for them on the Saturday prior to the meeting on the Monday. The claimant was also not supplied with all the facts available to the respondent prior to the meeting. The Tribunal determines that the claimant was unfairly dismissed and awards her compensation of €17,000 under the Unfair Dismissals Acts, 1977 to 2007. The claimant is entitled to two weeks gross pay in the amount of €713.32 (€356.66 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

