

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **Claimant**

UD2072/2011

against

EMPLOYER- **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr D. Morrison
Ms H. Murphy

heard this claim at Castlebar on 27 June 2013

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:

The claimant was employed in the respondent's convenience store/ fuel outlet (the store) from August 2003. At the relevant times the claimant worked Monday to Friday from 4-00pm to midnight. Her principal duties involved till operation. Following an incident on 28 June 2010 when the store manager (SM) became aware of an incident whereby the claimant's level of customer service was unacceptable the claimant received a verbal written warning, to remain effective for six months on 29 June 2010, this was confirmed by a letter of 1 July 2010 from SM and the area operations manager (OM).

Following a further complaint from a customer regarding an incident on 18 August 2010, when the claimant was using the respondent's telephone when there was a queue of customers at her till, the claimant was called to an investigation meeting on 24 August 2010. Following this meeting OM wrote to the claimant on 16 September 2010 setting out the allegation against her and inviting her to a disciplinary meeting on 28 September 2010.

On 29 September 2010 OM wrote to the claimant to advise her that she was to be issued with a final written warning which was to remain effective for twelve months. The claimant was warned that any further activities warranting disciplinary action would lead to her dismissal. Despite being advised of her right of appeal in the case of both warnings the claimant chose not to appeal either of

them.

The respondent's disciplinary procedure sets out five stages:-

1. Recorded Verbal Warning, valid for a period of three months
2. Verbal and Recorded in Writing, valid for a period of six months
3. Final Written Warning, valid for a period of twelve months
4. Suspension Without Pay
5. Dismissal

On 23 August 2011 the claimant served a customer (AC) who bought mobile phone credit. AC left the store and returned some twenty minutes later to complain that he had bought the wrong credit. Due to the respondent's policy on such matters it was not possible for the claimant to process a refund as a member of management was required to authorise such a transaction. As no member of management was available the claimant advised AC to return the following day in order to process his request. She maintained that she dealt with him in a courteous and friendly manner.

It was common case that AC made no complaint about the claimant's role in this incident. A different customer (DC), who was present in the store when AC made the refund request, made a complaint to SM about the incident. He then submitted a written complaint about the claimant's conduct on 23 August 2011 dated 9 September 2011. This written complaint was requested by SM.

On 22 September 2011 SM suspended the claimant with pay pending further investigation into the incident of 23 August 2011. The claimant was advised that the allegation was viewed as a serious breach of conduct which, if proven, would lead to dismissal. The investigation meeting attended by SM, OM and the claimant was held on 25 September 2011.

On 26 September 2011 OM wrote to the claimant inviting her to a disciplinary meeting to be held the following day. The disciplinary meeting was attended by SM & OM; the claimant was accompanied by her daughter. During this meeting the claimant was shown a copy of DC's complaint of 9 September 2011. After a short interval at the end of the meeting OM told the claimant of her dismissal. This was confirmed in a letter posted to the claimant the same day. OM told the claimant that as her Final Written Warning was not time-expired the only option open to the respondent was to dismiss the claimant as the case against her was proven. The claimant was advised of and exercised her right of appeal to the Retail Manager. This appeal upheld the decision to dismiss the claimant.

Determination:

The Tribunal is satisfied that the date to apply to warnings issued under the respondent's disciplinary procedure should be the date on which the impugned conduct occurs. The final written warning related to an incident on 18 August 2010, the incident which led to the claimant's dismissal occurred on 23 August 2011. Accordingly, the Tribunal is satisfied that, by 23 August 2011, the final written warning of twelve-month duration was spent. It must follow that the respondent should have considered that the claimant had no current warnings against her at the time of the incident for which she was dismissed. Leaving aside any consideration of procedural fairness in the consideration of the final complaint against the claimant it is clear to the Tribunal that the incident 23 August 2011 could never have amounted to an offence warranting dismissal, even if the respondent's evidence were accepted in full. Furthermore the Tribunal is satisfied that the respondent failed to carry out a full and fair investigation into the events of 23 August 2011.

Finally the Tribunal fully accepts the claimant's evidence as to the events on the 23rd of August and subsequently, and finds that she was not guilty of any breach of the disciplinary code.

It must follow that the dismissal was unfair. The Tribunal determines that compensation is the appropriate remedy and having heard evidence of loss, extending some seventeen months after the dismissal, the Tribunal awards €27,993-00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)