

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Arlene Toland, Old Road, St Johnston, Co Donegal *-claimant*

CASE NO.  
UD865/2011  
MN985/2011

Against

Marks & Spencer, Paddy Harte Road, Letterkenny, Co. Donegal *-respondent*

Under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. D. Morrison  
Ms. R. Kerrigan

heard this claim at Letterkenny on 22nd October 2012  
and 8th January 2013

**Representation:**

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Claimant: O'Gorman Cunningham & Co, Solicitors, 16 Upper Main Street,  
Letterkenny, Co Donegal

Respondent: Mr Tiernan Doherty, IBEC, Floor 3, Pier 1, Quay Street,  
Donegal Town, Co Donegal

**Background**

The respondent is a large supermarket chain in which the claimant worked as a sales advisor. The claimant was issued with a formal warning for absenteeism on the 4<sup>th</sup> of January 2011 which is stage 2 of the respondent's disciplinary process. A further disciplinary process commenced on the 7<sup>th</sup> of January 2011 in regards to breaching the respondent's Social Networking Policy. The claimant was dismissed as a result.

The respondent was not in a position at the hearing to provide evidence of the disciplinary meeting or provide the witness who made the decision to dismiss the claimant. The hearing proceeded on the basis that the respondent was not in a position to prove that the dismissal was fair.

## Respondent's Case

The claimant's manager (SK) gave evidence of her decision to issue the claimant with a stage 2 formal warning for absenteeism. The claimant already had a stage 1 warning for an unrelated matter. The claimant missed 8 shifts in a 26 week period which triggered the initial investigation. After holding a meeting with the claimant SK made her decision. SK was aware that 5 out of the claimant's 8 absences were medically certified. SK was not aware of any appeal against her decision.

SK undertook the investigation into the breach of the respondent's Social Networking policy which led to the claimant's dismissal. It was brought to SK's attention that the claimant participated in 3 conversations with a colleague on a Social Networking site; the conversations concerned a manager in the store. SK investigated the 3 incidents and felt that 'there was sufficient evidence that the company's Social Networking Policy was breached and that the claimant had a disciplinary case to answer.' The claimant was suspended on full pay at the investigation meeting on the 7<sup>th</sup> of January. At that point SK passed the investigation outcome to the nominated disciplinary officer.

The claimant was dismissed by letter on the 24<sup>th</sup> of January 2011. The claimant appealed this decision.

The respondent's head of HR in Ireland (SF) gave evidence. SF never received the appeal to the stage 2 formal warning for absenteeism. Her first sight of the written appeal was at the dismissal appeal meeting. SF could not consider the stage 2 appeal at that stage as 'I couldn't consider a handwritten document 4 months later and was undated.' The respondent's absenteeism policy does not distinguish between medically certified or uncertified leave. As the respondent did not receive the stage 2 appeal it was not a case of waiting until its conclusion before instigating the disciplinary process for the breach of the Social Networking Policy.

Before the disciplinary meeting outcome was issued, the option of a lesser sanction was offered through the claimant's representative to the claimant if she apologised. The claimant requested the options in writing so an e-mail was sent to the claimant's representative listing two options. These were:

- 'A) One sanction which will bring her up to Stage 3 as she is already on Stage 2 with no appeal,*
- B) Stage 4 and as she is already on Stage 2 this will result in dismissal'*

Although the e-mail does not state that if the claimant apologised option A would be used by the respondent that was the intention. SF is not aware if the option to apologise was ever directly put to the claimant by the respondent nor did she mention it at the appeal meeting. In option B, 'stage 4' is a typing error and should read 'stage 3'. The typing error was discovered and clarified before the decision issued to the claimant. (The respondent's disciplinary policy has five stages; a stage 1 being the least severe sanction. If you are on a stage 2 warning and receive a stage 3 warning it equates to a stage 5 sanction which is dismissal.)

The e-mail was sent to a union representative at 16.43 requesting an answer from the claimant by the following morning. The e-mail was then forwarded to the claimant's shop steward at 17.27. The reason the claimant was not given a lot of time to consider was, that if the

respondent did not issue the disciplinary outcome letter that day they would be breaking their own policy on time-limits for outcomes on a disciplinary process.

The appeal meeting took place with the claimant and her representative. SF felt that the claimant's refusal to apologise 'tied our hands regarding the appeal outcome.' SF did not mention the option to apologise at the appeal meeting. The claimant's refusal to apologise and her breach of the Social Networking Policy resulted in SF upholding the decision to dismiss the claimant.

### **Claimant's Case**

The claimant really enjoyed working for the respondent and excelled in her position until an incident occurred where her phone was stolen. The claimant reported that the phone had been stolen and could be heard ringing in another staff members locker. As the other member of staff was in a management position the complaint was never followed up and she believes a 'witch hunt' commenced against her.

The claimant was never aware or attended any meeting to receive a stage 1 disciplinary sanction. The claimant attended the disciplinary meeting, produced medical certificates and explained her absences and still received a stage 2 disciplinary sanction. She immediately appealed this sanction through her union representative and signed the appropriate appeal form that was enclosed with the letter of the 4<sup>th</sup> of January 2011 informing her of the stage 2 sanction.

Immediately another disciplinary process commenced in relation to breaches of the Social Networking Policy; the claimant had never heard of or had sight of this policy prior to the meeting. The claimant attended the investigation meeting and explained that her participation in the Social Networking Site conversations were limited to 'lol, ur mental (other staff member), I like it!! and lol wats ur rds like?'. The claimant did not want to engage in talking about the manager and did not intend to hurt or disrespect anyone. The claimant accepts that by commenting at all on the posts by the other staff member that she did participate in the conversations regardless of her intentions. The manager that undertook the investigation (SK) is a 'friend' of the claimant's on the Social Networking Site so the claimant was aware that anything she said could be seen by SK.

Before the outcome of the disciplinary meeting was issued the claimant was informed that she had options; she asked for these in writing as she had little faith left in the integrity of the respondent. At no stage was she asked to apologise, 'today was the first I heard of it'. If the claimant had been asked she would have apologised immediately. The e-mail she received was unclear and the typo was never clarified; as far as the claimant could see she was being dismissed either way. The claimant was told she had two hours to respond to that e-mail.

The claimant appealed the decision to dismiss to SF. SF upheld the decision to dismiss the claimant. SF did not mention the option to apologise at the appeal meeting.

The claimant gave evidence of her loss and her attempts to mitigate her loss.

## Determination

As respondent did not adduce any evidence to prove the dismissal, the Tribunal had to treat this case as an uncontested unfair dismissal.

The only remaining issue for that the Tribunal had to determine was the claimant's level of contribution. The respondent argued two basis of contribution;

1. That the claimant by her conduct in relation to a Social Networking site contributed to her dismissal
2. That the claimant failed to mitigate her loss by her failure to avail of an option to return to work.

The Tribunal reject the second basis of contribution as, the claimant was time pressed into making a decision on her options; no time was afforded to her to consider her position or get advice. Also the options presented to her contained errors within them. The respondent put adherence to company policy over a fair an open consideration of the case.

The Tribunal accept there was some contribution as a result of the claimant's careless misuse of a Social Networking site and the compensation awarded reflects this.

The Tribunal find that the claim under the Unfair Dismissal Acts, 1977 to 2007 succeeds and make an award of €18,000 finding that sum to be just and equitable having regard for all the circumstances.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds. The Tribunal award the claimant the sum of €841.56 being the equivalent to two weeks' pay in lieu of notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This 22 January 2013  
(Sgd.) Shirley Kelly  
(CHAIRMAN)