EAT Determination – UD826/2013
Byrne v Marks & Spencer (Ireland) Ltd.

"there is to be no toleration of theft, no matter what its form and no matter what its value"

This quote was included by the Tribunal in its determination as a policy of the employer. The Determination is relatively short but in terms of the concepts it contains it may have far reaching ramifications. It concerns the dismissal of an M&S store worker for making and drinking a hot drink behind the counter of the café contrary to workplace regulations and noticed on security tv. The claimant accepted the incident occurred. An investigation was conducted within the hour. The Tribunal identified significant failings in the investigation and disciplinary process including:

- the same manager being involved in the investigation and the disciplinary process

- the employer failed to tell her what she was accused of

- the employer did not outline the evidence against her

- the provisions of the company handbook upon which the employer sought to rely were not put to the employee

- the employer failed to be seen to conduct a fair hearing

- the employer was injudicious by setting the claimant up to look bad (by not giving her the evidence)

and yet the dismissal was considered fair.

The Tribunal was informed the claimant had accepted she had taken the beverage. The position generally taken by other divisions of the Tribunal is that the guilt or innocence of the claimant is irrelevant (see *Hayes v Kinsellas of Rocklands*, **UD690/2012** for example). In the instant case the claimant accepted that she had the drink but the Tribunal appears to have gone further and accepted this as **theft**. This combined with the zero tolerance company position appears to be used to ignore the less than perfect procedures of the employer. While it may or may not have been theft as defined the unfortunate aspect of this is that the claimant has effectively been identified as a thief on foot of an apparently tainted or less than perfect investigation.

What might have been expected is that the dismissal would be found to be unfair on foot of the less than perfect investigation and disciplinary procedure, with the claimant's acceptance of her taking the beverage taken into account as contributing to her situation thereby reducing any award made. (An even more recent case has also found a dismissal fair in a zero tolerance situation but in that case **(UD828/2013)** the investigation was found to be fair.)

This determination is likely, however, to be welcomed by employers generally. Yet it appears far removed from what has been the standard position of the Tribunal generally. In **UD690/2012** the Tribunal stated "*It is important to recognise that investigative and disciplinary procedures that might be sufficient in one instance may not be in another, particularly in a case w[h]ere criminality is on the agenda. … … Where there is a possibility of a finding being made by an employer that an employee has stolen goods, particular care must be taken*." The Tribunal also stated *"In hearing this claim, it is not a matter of deciding the issue of guilt or innocence. The question for the Tribunal is whether, following a fair and transparent investigation and disciplinary process, the respondent's decision to dismiss was*

one that a reasonable employer might have made." Prudent employers are unlikely to throw out the investigation rule-book just yet.

Conclusions

Questions/issues arising from this determination:

1. The claimant accepted that she made and drank the drink without paying for it immediately. So, is her 'crime' that she drank behind the café counter or that she did not pay for it, or both? The Tribunal found the allegations were not precisely articulated to the claimant.

2. The employment handbook provision appears to be a zero tolerance for theft.

3. The investigation was found to be substandard and therefore arguably technically unfair if the thrust of the Determination is understood correctly. If so, any finding of 'theft' arguably could be considered tainted by the unfairness of the investigation.

4. The Tribunal appears to have taken the claimant's acceptance of the incident and gone a step further by implicitly upholding a finding of theft. This changes the issue from a breach of procedure to an offence. The claimant has been identified as a thief without what might be considered acceptable investigation. This runs counter to the normal approach of the Tribunal where guilt or innocence is not relevant.

5. Some consideration of zero tolerance policies, in a situation where the impugned act of the claimant is minor, versus the action a 'reasonable' employer would take in such circumstances would be useful in terms of guidance for practitioners and employers.

6. Also, a consideration of the claimant's working hours on the day would have been relevant and particularly when she last had a break.

7. Consideration of an employee's employment record would appear appropriate at the decision making stage in addition to whether there were any mitigating circumstances relevant for the claimant on the day.

8. This determination suggests that in a situation of zero tolerance where the incident is accepted the standard of investigation is irrelevant to the fairness of the dismissal. This appears to run counter to the general approach taken by the Tribunal in the past.

For a fuller review of theft/misappropriation investigations see the second issue of our Investigation Series entitled "Is it Yours?"©.

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