

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE

UD573/2010

against the recommendation of the Rights Commissioner in the case of:  
EMPLOYER

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. P. McGrath

Members: Mr. B. Kealy  
Mr. S. Mackell

heard this appeal at Naas on 7th June 2011

Representation:

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Appellant:

Mr. Gerard F Burns, Burns Nowlan, Solicitors, 31 Main Street, Newbridge, Co Kildare

Respondent:

Mr. Paul Dunne, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an appeal by the employee against the recommendation of the Rights Commissioner r-082157-ud-09-TB

### **Respondent's case**

The first witness (A.N.) was a former Site Manager for the respondent. Before he commenced in 2007 there had been some problems with annual leave and some people were taking more leave than they were entitled to. Therefore A.N. set up a site specific procedure whereby no more than 10 days consecutive leave would be granted to any employee and leave had to be applied for in writing.

In July 2008 the claimant did not return to work on the day she was supposed to and was issued with a final written warning to last one year. On the 12<sup>th</sup> January 2009 the claimant applied for annual leave from 20<sup>th</sup> April 2009 to 1<sup>st</sup> May 2009 (10 days). However in or about March 2009 the claimant applied for an unpaid day off on Friday 17<sup>th</sup> April 2009 in order to attend a hospital appointment in Naas. A.N. approved this application without seeking proof of this appointment. However, on the morning of 17<sup>th</sup> April, A.N. received a text message from a supervisor who worked for the respondent, informing A.N. that he had seen the claimant queuing for a flight in the

Airport. The claimant returned to work on 5<sup>th</sup> May 2009 and A.N. met with her on that day. A.N. asked her why she had said she flew home on 17<sup>th</sup> April and she told him that the specialist in Latvia had contacted her and requested that she attend his office on 17<sup>th</sup> April. A.N. asked the claimant to produce proof of this appointment and change of flights. The claimant was then suspended with pay pending further investigation.

A meeting was arranged for the following day and the claimant was informed that she could bring a representative with her. However the claimant declined to bring a representative saying that she did not want them to know she had lied. The claimant admitted to A.N. that in fact there was no change of flights or an appointment with a specialist in Latvia. Having taken time to reflect on the situation and considering all the circumstances A.N. came to the conclusion that he had no choice but to dismiss the claimant.

An appeal was lodged and heard by the head of HR for the respondent (M.C.). The claimant was represented by her Union Representative at the appeal and also present was M.C. and a translator provided by the respondent. M.C. upheld the dismissal and told the Tribunal that it was the appropriate sanction given that the claimant was already on a final written warning and that there was no mention of an appointment in Latvia at the appeal hearing.

### **Claimant's case**

The claimant confirmed that she had applied for annual leave from 20<sup>th</sup> April 2009 to 1<sup>st</sup> May 2009 (10 days) and was aware that she was not allowed to take more than 10 days leave at a time. However she had told her supervisor that she wished to take that day off in lieu of Good Friday and he had said that was OK and she could do as she pleased with that day. The claimant asked him several times if he had cleared this with A.N. and was told not to worry that it was fine.

On the 16<sup>th</sup> April 2009, which was her last day of work before taking time off, A.N. said "see you tomorrow" as the claimant was leaving. The claimant told him that she would not be in the next day and he seemed surprised and asked why. The claimant was shocked that he would ask this and said she had a hospital appointment so as to avoid any difficulty. It had always been her intention to fly out on 17<sup>th</sup> April and the flights were originally booked for that date.

It was never the claimant's intention to deceive A.N. or the company and she felt that dismissal was too harsh a sanction. The claimant acknowledged that she had been on a final written warning because she took sick leave after annual leave the previous July and failed to provide a medical certificate in the required time frame. She did not understand why a final written warning had been issued but did not appeal it.

### **Determination**

The Tribunal has carefully considered the evidence put forward by both sides. On balance, the Tribunal accepts that the claimant had acted in such a way that the bond of trust between employer and employee had been broken. The claimant knew that the company policy was to allow no more than 10 consecutive days of annual leave. The claimant needed the Friday before her two weeks holiday and claimed to have a medical appointment, in Naas, which she never had. This left her free to travel out in the early hours of Friday 17<sup>th</sup> August 2009.

Once the respondent discovered the appellant's travel arrangements there can be no doubt that the manager felt he had been hoodwinked by the appellant. Perhaps the matter might not have attracted

a termination of employment had it not been for the fact that the appellant already had a live letter of warning on file from the previous summer.

The Tribunal affirms the Rights Commissioner's findings that the appellant was misguided but that the dismissal was quite harsh. The Tribunal finds that the appellant was unfairly dismissed and In all the circumstances the Tribunal makes a determination to the like affect as the recommendation of the Rights Commissioner r-082157-ud-09-TB and awards the appellant €2,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

