EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
Employee	UD483/2005
against	
Employer	
under	

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Reid
Ms E Brezina

heard this claim at Dublin on 21st October 2005
and 16th February 2006
and 17th February 2006
and 6th June 2006.

Representation:

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Claimant(s): Mr Kieran Connolly, Branch Secretary, SIPTU, Liberty Hall, Dublin 1

Respondent(s): Mr Frank Beatty BL
Instructed by Mr Alec Gabbett, Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

It was common case that the claimant had been dismissed by the respondent.

The first witness for the respondent was the human resources manager had been employed by the respondent from July 2003 to September 2004. The human resources manager told the Tribunal that she was still employed in a human resources role by the respondent. The claimant had commenced employment in a temporary capacity in 1998 and was made permanent in 1999. The claimant had been employed as a porter and his duties had entailed delivering linen and packages within the

hotel. The claimant had been given a letter of appointment dated 9th February 1999. The claimant had also been given the employee handbook, which set forth the disciplinary procedures of the respondent. The employee handbook explained that a first warning remained in force for a period ofnine months, that a second warning remained in force for the same period and that an employee hadto have a representative present at all disciplinary hearings. If a third warning issued an employeewas suspended and then the matter was investigated. Handbooks and procedures were revised andgiven to the employees after the merger of the Jury's and Doyle's hotel groups.

The human resources manager gave evidence that although she was not the author of the personnel progress report on the claimant, the report reflected the fact that the claimant had left work early without permission. The claimant was asked not to let this happen again as it was considered to be a very serious matter and that it was regarded as an act of gross misconduct to leave the premises without permission. If a fire had occurred on the premises a roll call was to be undertaken and it was imperative that employees should be at their place of employment.

The human resources manager stated that the claimant had left the premises without permission on 2nd September 2003 and that this incident had been reported to the human resources manager. On 28th August 2003 the claimant told the human resources manager that the claimant had obtained permission to leave. The human resources manager asked the claimant who gave him permission to leave the premises and he told her that he had permission to leave early on Thursdays and further that he had obtained permission to leave at the time of the incident. The claimant said that Vicki, a co-worker had told Colette that they were leaving and from this he concluded that he was allowed to leave early too. The human resources manager told the claimant that he had left at 3.40pm and the claimant had said that he has left at 3.55pm. The human resources manager told the claimant that she had video proof of the time at which the claimant had left. The union representative for the claimant present at that meeting told the human resources manager that she could not use the video evidence as it was an invasion of privacy to do so. However, it was accepted that the claimant had not signed himself out. The human resources manager told the claimant that employees had permission to leave at 4pm and the human resources manager further told the claimant that it was gross misconduct to leave earlier than that without permission and not to do so again. When the human resources manager had commenced employment with the company she had made it her business to establish what the policy of the respondent was in relation to members of staff leaving early without permission.

The second witness for the respondent took over as accommodation manager in or about July 2003. A further disciplinary action arose in relation to the claimant's attendance record. The human resources manager had met the claimant and the accommodation manager in January 2004. There was a link between the claimant's absences on sick leave and his days off and he was absent one day a month. The claimant had received a verbal warning, which he said he would not accept. The claimant's union representative had been brought in and it was said that there was a pattern in regard to the absences but that it was a coincidence.

The human resources manager was asked in cross-examination if there had existed a practice in the workplace of people leaving early without permission and she responded that it was a practice with a couple of people. When cross-examined as to how widespread this practice was the human resources manager stated that she had to rely on the information that she had received from the heads of departments and that it was the accommodation manager who had brought the matter to her attention. Department heads had reminded staff about the requirement to sign out when leaving. The human resources manager was asked if she accepted that the claimant had permission to leave

at 4pm the human resources manager accepted that the claimant had permission to leave to go to the bank after 4pm on Thursdays. It was put to the human resources manager that the claimant had actually left at 3.55pm, to which the human resources manager responded that the accommodation manager had stated to her that the claimant had left at 3.40pm on that particular Thursday.

The Tribunal notes that it was the claimant's case that he had been absent from work on a number of days because of a grave personal matter affecting a close relative of the claimant. It was the claimant's case that he had been absent from work for certain days in order to be of assistance to his relative and that he had not given this reason for his absences initially as the relative was also an employee of the respondent and that his relative wished that the personal matter remain private. The claimant had not made management aware of the exceptional circumstances affecting his relative until the final appeal. It was only at the final appeal hearing conducted by the respondent that the general manager of the respondent was made aware by the claimant that the claimant's absenteeism had been, at least in part, related to a personal matter affecting a relative of the claimant. The claimant's case excusing his absences by reference to the personal difficulties of a relative was put in cross-examination to the human resources manager. It was the view of the human resources manager that for at least some of the days that the claimant claimed he was absent for this reason correlated with days when the relative had been present at work.

The human resources manager told the Tribunal that she was responsible for all human resources matters within the group and specifically within the hotel. On 13th December 2004 at around 2pm the claimant could not be located. Employees were not allowed to leave the hotel and from a health and safety aspect the respondent needed to know how many employees were on the premises. On 13th December 2004 the claimant left the premises and reappeared after thirty minutes and left again at 4pm. This was very serious and members of staff were expected to work for the hours that they were paid. In the event of an evacuation and from a health and safety perspective the company needed to know the whereabouts of employees. The claimant did not have permission to leave the premises but the colleague he was with had permission to leave the building. At a meeting with the claimant on 16th December the claimant admitted that he left the premises. Present at the meeting, which lasted for five minutes were Ms LB, the human resources manager, and the claimant. The claimant received a warning and appealed the severity. The human resources manager had no role in the appeal process. The general manager dealt with the matter at a meeting on 16th December. The human resources manager told the claimant he had seven days to appeal. The suspension was deferred until after the appeal. On 28th December 2004 she wrote to the claimant regarding the appeal. The claimant did not have a representative and another appeal date was organised, it was up to claimant to organise representation. On 24th January 2005 the appeal was heard and the human resources manager had no involvement in this. The claimant was suspended for three days and the human resources manager had no role in the appeal.

The human resources manager was informed on 17th February 2005 of an incident, which took place on 16th February 2005. A disciplinary meeting took place on 21st February 2005 at which allegations were put to the claimant. This meeting was adjourned and they reconvened on 1st March 2005 to discuss the investigation and to allow for consideration of all of the facts. Two employees were observed watching television, one of whom was the claimant. At the meeting on 2nd March 2005 she told the claimant that she was prepared to give him a decision. She explained to him that a letter of dismissal would follow this. The first time that issues of bullying and harassment came to light was after the meeting on 21st February 2005. There was a very clear bullying and harassment policy in the company. If the claimant had wished to pursue the matter there was a grievance procedure. She did not feel that the claimant was harassed or intimidated.

The claimant had watched television and this was not allowed during work hours. All house porters were assigned to certain floors. There was no record of the claimant's manager asking the claimant to go to this room. The hotel had six floors and a number of house assistants and house porters were employed on each floor. The company needed to know where its employees were located. This was not the first occasion that the claimant was not working when he ought to have been. Employees were assigned tasks by the management on a daily basis.

In cross-examination, the human resources manager stated that no minutes of the meeting of 2nd March 2005 had been recorded. The human resources manager had a note of the meeting of 21st February. Regarding the meeting on 18th February 2005 the human resources manager had prepared notes for herself and it was also her decision. The human resources manager denied reading out a seven-page statement. In an article to a newspaper the claimant had stated that the respondent had sacked a cleaner. When asked was it usual to suspend an employee pending an appeal she responded that yes it was her belief at the time that it was. This was the only case that she dealt with. The human resources manager denied ever screaming at an employee. The human resources manager had tried to facilitate the claimant by arranging an appeal for the third time. She had sent a letter to the claimant and explained the situation and then explained it again. The second meeting had to be cancelled. The human resources manager's recollection was that the claimant had a letter to rearrange the third meeting.

In answer to questions from the Tribunal the human resources manager stated that the claimant had been employed for six years in the hotel. The human resources manager had commenced in 2004 and prior to this the claimant had disciplinary issues with other human resources managers. When she met the claimant in October 2004 a supervisor brought issues to her attention. She explained the grievance procedure to the claimant. The human resources manager then became aware that the claimant had gone to the health and safety authority to complain about her. The human resources manager asked him what he meant as she had only spoken to him on issues of a disciplinary nature. She felt it appropriate to address it at the meeting. She explained the company grievance procedure and that was the first time that she became aware that the claimant had an issue with her. The first meeting, which was due to take place on 21st February 2005, was adjourned and on 22nd February 2005 the human resources manager received a telephone call from a reporter stating that a cleaner had been sacked. No member of staff had been dismissed at this point. The next day the claimant's trade union representative telephoned to inform her that the claimant had organised staff to go on an unofficial strike at the gates. The union representative asked the claimant to speak to her. She spoke to the claimant who told her that he was on an ongoing picket on the job. The human resources manager told him that was his business but that she would be very disappointed if staff participated in an unofficial action. She did not say that anyone would be sacked. Her concern was for the staff in the hotel.

The human resources manager explained to the claimant that his employment had ended and that as part of his terms and conditions of employment he was not to damage the company in any way. If there were any further damaging allegations the company would have to investigate them. The witness stated that she did not have a statement and that she had written notes. She wanted to be fair to both parties. She made notes for herself. The claimant requested a copy of her notes. The human resources manager told him that it was normal procedure to issue a letter. The next day the claimant came to the canteen and asked her for a copy of the statement. When she got to the human resources office she found that she had no keys to gain access and a letter was sent to the claimant by courier. When asked if there were any other disciplinary issues she stated that there had been one in October 2003, and another in January 2004. She met the claimant on 18th February 2005 and told him that there were issues that she would like to discuss. The shop steward could not attend the

meeting. She met the claimant on 21st February 2005, 1st March 2005 and again on 2nd March 2005 when the decision to dismiss the claimant was made. When asked why the claimant was not present for the full duration of the meeting on 1st March 2005 the human resources manager responded that two individuals were involved in the situation and that, in her view, it was not appropriate for them both to be in the room at the same time. When asked if the evidence of one was used against the other she said yes and that it was explained to the claimant what the previous person said and the claimant was then given an opportunity to respond.

The investigation concluded on 21st February 2005 when the information was received from both employees. More information was obtained and they again adjourned before a decision was reached. After the meeting on 1st March 2005 they met both employees and the statements differed. Numerous issues were discussed at the meeting on 1st March 2005. The normal procedure was to obtain all the facts and take time out to allow all the facts to be collected. At the meetings the claimant gave different answers to different questions in relation to watching television. The respondent had to take into account the fact that the answers were not always consistent and the respondent had to make a decision on the evidence, which it had heard. At the second disciplinary meeting the claimant admitted that he had walked off the job.

The human resources manager told the Tribunal that she had overall charge in the hotel since March 2003. She was involved in three appeals relating to the claimant. She dealt with the appeal on 30th January 2004. The claimant had an unacceptable level of absences in the period September to December 2003. It took four months to bring this matter to a conclusion. It was accepted that the claimant left the premises twice in one day and that he did not have permission to do so. The claimant was aware that it was not acceptable to leave the premises without permission. In the event of evacuation of the premises, rosters were used to establish what buildings were vacated andif a member of staff on duty did not report to the access point it was a very serious matter. It wasclear that the claimant was absent for twenty minutes to go to the bank. The claimant had left at3.05pm and returned at 3.30pm without his supervisor's permission.

The claimant's position allowed him certain flexibility and his job was to bring linen to all of the hotels floors. His performance could be monitored and if a porter was absent another porter undertook his duties. She carried out the appeal on 24th March 2005, which led to the claimant'sdismissal. The claimant could not accept the facts. The claimant picketed the respondent premiseson a number of occasions and this was irrelevant to what had happened. She was not sure if thisoccurred after the claimant's employment was terminated.

In cross-examination the human resources manager stated that in general that porters remained on the floors they were assigned to. Test evacuations were undertaken annually. It was accepted that the claimant watched television while on duty. The witness understood that the claimant and his colleague watched television. Having the television switched on was a distraction. The claimant had admitted that he had watched the television and it was an admission that misconduct had taken place. The human resources manager was aware that the claimant was quite friendly with his colleague and that this colleague asked the claimant for assistance. The claimant was not asked officially to be on that floor.

Ms JC attended a meeting on 1st March 2005 at which she took notes.

The accommodation manager told the Tribunal that she oversaw the cleaning of the hotel. She was not accused at any time of bullying or harassment by the claimant. This was the first time she had heard of bullying in relation to the claimant. Two house porters worked on a shift and their duties

included cleaning, dusting, and making beds and if a guest had a request they dealt with it. On 16th February 2005 the witness could not locate the claimant and he had left work for a period of time. The accommodation manager had a duty of care to all employees and needed to know where they were. If a staff member wanted to leave early they would seek permission from their supervisor. The witness attended a disciplinary hearing on 16th December. The accommodation manager was not involved in the appeal process. On 16th December she went to room 424 and the television was switched on. The claimant and a staff member were observed sitting on the bed. The accommodation manager made a remark to them "Is this where the party is?" The accommodationmanager wanted to see if she could get a response. The accommodation manager asked the claimantwhat he was doing in the room and he said that he was helping to make the bed. The accommodation manager was not happy at what she observed and she said that the television should not be switched on. She reported the incident to human resources. There was no reason forthe claimant to be on the 4th floor. Employees were aware that the television should not be switchedon and it was not professional.

The accommodation manager did not attend the meeting of 18th February 2005 as she was on two weeks holidays. There was no evidence that there was work carried out in the room. The witness took her job very seriously. She had no recollection or could not recall calling the claimant to her office on 16th December 2004. The accommodation manager was on the landing on a continuous basis as part of her duties. The accommodation manager checked sporadically on all of the staff under her control. On 13th December 2004 the accommodation manager looked for the claimant as she had a task for him to perform. The accommodation manager had the same involvement in his work as any other employee. All staff worked in the rooms with the doors open. The accommodation manager observed the claimant and a colleague watching snooker while on her way to check a room for a VIP guest.

In cross-examination the accommodation manager stated that she met the claimant and other employees on a regular basis and if problems arose she directed the staff on how to resolve the problems. The accommodation manager never found the claimant to be over flexible or over co-operative. In her experience it was not usual to leave the premises without permission. The claimant sat on a bed near the door. It was not permitted to have the television on, although it was permissible to have a radio on at low volume. She had no recollection of being called to a meeting on 16th December 2005. When asked if she checked the car park to establish if the claimant's car was there she responded that she would regularly use the car park to gain access to the apartment block in respect of which she had responsibility and that she was not looking at cars.

In answer to questions from the Tribunal the accommodation manager stated that there were no guests in the room at this time. The accommodation manager was not given a reason from the claimant as to why the television was on. On 13th December 2004 the accommodation manager was looking for the claimant as she had a task for him to perform. The accommodation manager observed the claimant and another member of staff watching snooker on television. The claimant'scolleague told the witness that the claimant had helped her make the bed. The accommodation manager did not expect to find anyone in the room. The accommodation manager had asked them"were they having a party?" The accommodation manager observed this from the doorway and could establish that no work was in progress and further the television was not turned off immediately.

The general manager of the hotel for approximately the past eighteen months told the Tribunal that he was present at the meeting of 2nd March 2005. It was true that the human resources manager used a document in delivering the decision to the claimant. The general manager was party to

certain meetings that the human resources manager conducted.

In cross-examination the general manager was asked about the meeting on 1st March 2005 and it was put that the claimant had been informed that the issue of the television incident was considered a minor offence and that the incident regarding the press was more serious, the general manager responded that the main focus related to the incident in the bedroom. In terms of these two issues the general manager believed that what was discussed related to the bedroom issue. When asked if any employee had been dismissed as a result of contacting the media the general manager responded that had not happened in his time. When asked why there were no formal minutes of the meeting of 2nd March 2005 the general manager responded that he could not recollect why that was the case. The general manager could not recollect the claimant asking for a copy of the statement. The general manager could not recall if the claimant was asked to leave the premises. He did say that if an issue transpired and someone needed to leave the premises they would be escorted off the premises. He did not deny that the claimant was asked to leave the premises. He did not think that the words "leave the premises" were said. The words that were used were that he was no longer an employee and that he had to leave the premises. He stated that the claimant's union representative was present when the claimant was dismissed.

The general manager for industrial relations in the Jury's Group told the Tribunal that it was not unusual to take a decision to suspend and each request was dealt with on its merits. If a decision to suspend were overturned then the employee would be compensated for loss of income. The appeal could take some time. In the event of an appeal and if the decision was upheld then it could go to the Labour Court or the Rights Commissioner. The decision taken by the union was to proceed with the appeal. The general manager could not recall an employee going to the media since 1987. The company policy was to protect employees.

In cross-examination the general manager stated that termination of employment was the last resort. The final written warning and suspension came within the same scope as the ultimate decision to dismiss. The general manager stated that the union representative had felt that the suspension should not be taking place. The practice had been to proceed with the suspension once the decision was made. He was aware of incidents where people were suspended for walking off the job. The general manager stated that as far as he was concerned suspension was different from the appeal process and suspension took effect immediately. He was aware of incidents where members of staff had been suspended without pay for walking off the job. To walk off the job was regarded as a termination of the employment relationship and the second aspect was claiming wages for hours not worked. The respondent took its fire evacuation procedures very seriously.

Claimant's Case

The first witness on behalf of the claimant, Ms AM, told the Tribunal that she had been shop steward at the time of the meeting on 16th December. The claimant had gone to the bank without permission, and she recalled when the claimant was suspended. She had listened to what Ms NW and the claimant had said and he was suspended for three days without pay and told to leave the premises straight away. She could not recall the claimant asking any questions.

The second witness on behalf of the claimant, Mr GC, told the Tribunal that he had been shop steward at the time of the incident and prior to that he had been assistant shop steward. Employees were allowed to cash cheques on Thursdays and to go to the bank. He had attended two meetings in total and it was not his place to discuss external issues. The human resources manager came in to

the meeting and had a prepared statement. The human resources manager asked the claimant did he understand everything and she told him that his position was terminated and he was asked to leave the premises. He represented employees from all departments and it could be on a daily basis or every two to three days. The claimant had a number of issues and he dealt with him more than any other employee. The issue in question was not a serious issue and he was there to see what he could do.

In cross-examination Mr GC stated that on 2nd September there was no formal outcome to the meeting. It was clearly stated that employees should not leave the premises. The company raised two issues; the more serious one was an external issue. Quite possibly it was raised at the outset. He understood that it was mentioned at the meeting that an employee leaving early was gross misconduct. On the day it was quite clear that the claimant was made aware of what was said. The witness stated that he believed it was gross misconduct. No one said anything about other problems. He said there was possibly another issue concerning the watching of television. At the meeting of 2 nd September gross misconduct was probably the term that was used. The witness was not present at the appeal hearing.

The claimant told the Tribunal that the respondent had employed him since 1999 as a house porter. He delivered linen to the hotel rooms and helped with the rooms. A porter could be assigned to any floor. There was a time when he had undertaken work on the entire six floors of the hotel for a period of eight months. He had reported to two general managers. When he first commenced employment with the respondent three people undertook the duties of porter. Three to four years ago he undertook the work of three people for eight months. The claimant recalled a meeting in September 2003 whereby he was informed that he left the premises early the day before which was a Thursday. The claimant was paid by cheque and he had reason to return to the hotel after 4pm. He said that he had permission to go to the bank on Thursday. He left at 3.55pm. The meeting took place over two days. The claimant had received a verbal warning on 7th January, and he needed to appeal that decision. He had a heated discussion with Ms MM and he had asked her for a copy of the documents. He had a close relative who was also employed by the respondent and this relative had a personal issue, which his relative did not want anyone to know about. This relative requested lighter duties. He went to the general manager and asked for a private meeting with her. The general manager told him that she would not speak to him without his representative. At the appeal hearing he was advised that the outcome of the appeal was upheld.

On 15th October 2004 he was called to the office and was informed that one of the housekeepers had seen him on the back stairs. The claimant told the human resources manager that he did not know what she was talking about. The human resources manager approached him on the landing and asked him what he was doing. He was informed that he needed a representative at this meeting. On 13th December 2004 the claimant had not commenced work until 8am and he went directly to the canteen. He brought a colleague to the bank at 2pm. He spoke to his supervisor about the Christmas party and she asked him to bring books upstairs for her. On 16th December 2004 he was invited to a meeting regarding going to the bank without permission. His colleague had permission to go to the bank but he did not have permission. He did not walk off the premises on 13th December 2004. He reiterated that his supervisor asked him to bring books upstairs on 13th December 2004 and as soon as he had completed that task he thought that he could go home. There was no discussion about when he could go. He received a final warning and three days suspension. The claimant stated that this was very harsh and that it was supposed to take effect immediately. The human resources manager asked him if he wanted to appeal and she told him that that he had two days in which to appeal. The next day he tried to contact his union representative. The claimant then commenced holidays. He returned from holidays at 10am on 3rd January 2005 and was

summoned to the office by the human resources manager. The human resources manager was very aggressive and she told him not to turn his back to her.

The claimant felt that he was been watched constantly. On 21st February the pest control company were in the hotel to spray beds. The beds that were to be sprayed were on the 5th 6th and 7th floor, He was asked to go to the 4th floor, if a room was occupied it could not be sprayed. Only certain rooms needed to be exterminated and all doors had to be closed. Members of staff were assigned to different floors. Beds were sprayed and everything had to be removed off the floor. He was on the fourth floor and the door leading to the bathroom was open. He knelt at the base of the bed and the television was behind him. When the accommodation manager came in she asked the claimant and his colleague "Is this where the party is?" The accommodation manager did not say very much. The accommodation manager asked who was winning the snooker and he said that he thought it was Stephen Hendry. His colleague sat on the bed and the accommodation manager walked out. The claimant knelt on the bed. The accommodation manager did not tell anyone to turn off the television.

On 1st March 2005 the claimant was summoned to a meeting and this took less than five minutes. He was summoned to another meeting on 2nd March 2005. The human resources manager said that she did not want to be interrupted; she told him that she was terminating his contract. She did not realise that he was paid by cheque and she told him that she wanted him off the premises when the meeting concluded. The next day he came in to collect his wages. He met the human resources manager in the canteen and he asked her for a statement. When he arrived at her office she did not have keys. She told him that she had to rewrite the statement. She gave the claimant his cheque and told him to leave the premises.

In cross-examination the claimant stated that he felt that he was being intimidated. He was absent for three days due to his relatives personal issue. He stated that one day of *force majeure* leave was rejected. He admitted that five days of his absence did not relate to his relatives personal issue. He did not accept that he was absent on sick leave more than most people. He felt that the decision to terminate his employment was harsh. When he went to Ms GD she told him he would need to have a representative at the meeting. The claimant agreed that he could have been advised on two different occasions prior to December 2004 not to leave work early. One of his colleagues in the hotel had a problem with car insurance and he told her that he would bring her to the bank. The claimant did not ask for permission to go to the bank. He was absent for twenty to twenty five minutes at the most. He told his supervisor that as soon as he had organised the books that he was going home for an hours sleep.

His supervisor asked him if he was going to the party that night and he said yes. He told her that he was going home for a sleep as soon as he had organised the books. He reiterated that as soon as he had put the books up he told her that he was going. He presumed that it was okay for him to leave. The party was due to start at 7pm or 8pm. That was the way the conversation ended and he went to the party. He felt that the final written warning, which he received, was very harsh. He was being summoned to the office and he felt that the company was out to get him. When asked if he was given seven days in which to appeal the decision he said that he was told to leave the premises. He was given two days to appeal the decision. His union representative telephoned him and told him that the company was being lenient because it was Christmas. The claimant felt he was being intimidated.

When asked at the appeal hearing on 14th January 2005 if it was usual for staff to leave the premises without permission he responded yes. He did not tell his supervisor that he was going home early.

His supervisor may or may not have told him to finish work at 3.30pm. It was put to him that no one had told him that he could leave early and that his leaving early without permission was not a unique occurrence. The claimant stated that he could be working on any floor if someone else did not report for work. His colleague had asked him to hold the mattress for her. He could recall part of the meeting of 2nd March 2005. When he went into the room he asked his colleague who was winning the snooker. He did not watch television and he could only see part of the television. He could not recall the score at the time and he could not now recollect it. He felt intimidated by the human resources manager and by the accommodation manager. The human resources manager was punishing him and it was like being back at school. He felt that he was being watched anywhere he went. The accommodation manager said that he was sitting on the bed. When asked if what the accommodation manager had said was incorrect he responded "anything to sack himself and his colleague". He could not remember why his colleague was sacked and why he was not sacked as both of them were involved in the issue. The claimant was given two options either resign or be sacked. When asked if he told the newspaper that he was sacked he responded that it was after the Irish Independent article. When asked if he was invited to a meeting on 21st February 2005 and if agrievance procedure was made available to him he responded that the human resources managerhad said something to that effect.

He had spoken to someone in the newspapers about bullying in the workplace. When asked if he had decided to put a protest on the gate he said no that he felt intimidated and harassed. He felt that it was appropriate conduct. He said that he was sacked and he did not tell the reporter that he was sacked suddenly. He told the reporter that he was sacked for watching television in a hotel room. He denied that he used the word "suddenly". The claimant did not agree with the decision to dismiss him. The day before he was dismissed the human resources manager told him that the issue was a minor one and the claimant maintained that the scene had been set before he went to the meeting. On the day that he went to the room the television was already switched on.

Since his dismissal he has not been able to work and he has been in receipt of disability benefit. He undertook casual work two nights a week and he deputised for people who were on holiday. He was in receipt of unemployment benefit until December and then sick in February. When asked by counsel for the respondent what he did from 1st April until October he stated that he was protesting and looking for a job. He ended the protest a week or two after 1st May. Also when asked if he was still picketing the hotel at the end of July he said that as soon as he obtained a job he ceased picketing. He had hoped to drive a taxi but when he went to the taxi office for clearance he had missed the deadline. He had not applied for any position in writing. He asked most people that he knew, approximately ten to twelve persons, if they knew about any available jobs and he telephoned three or four more to ask the same question. FAS has not tried to obtain a job for him.

Determination

The fact that the claimant had been dismissed by the respondent was not a matter in dispute between the parties and therefore the Tribunal finds that the claimant was dismissed.

The claimant was dismissed by the respondent for being away from his assigned place of work on 16th February 2005, albeit at another location within the respondent's premises. The claimant had been employed as a house porter in the respondent's hotel and had been assigned to work on certain floors of that hotel. On the date in question the claimant could not be found on any of the floors to which he had been assigned. After a brief search the claimant was found on a floor other than one assigned to him. At the disciplinary hearing which ultimately ensued, the claimant alleged that he had been asked by a colleague to assist her with the lifting of a mattress in the hotel bedroom

nwhich he was found. In any event, when the claimant was located he was allegedly found to besitting on a bed in the respondent's hotel watching snooker on the television. The substance of theallegation against the claimant was that he had absented himself from work and/or was not working.

The respondent conducted a disciplinary hearing in respect of the incident of 16th February 2005 on foot of which it decided to dismiss the claimant. The claimant was afforded the opportunity of an appeal and by letter dated 7th March 2005 the claimant availed of that opportunity. It appears to be a requirement of the respondent in relation to disciplinary matters that the employee the subject of disciplinary proceeding be accompanied by a representative. The representative at the appeal hearing held on 24th March 2005 was the same individual who has acted as the representative for the claimant before this Tribunal. The representative for the claimant stated at the appeal hearing of 24th March 2005 that the "basis of the appeal is because of the severity of the action." The representative went on to say, as is recorded in the note and concerning the accuracy of which there is no controversy, that "Yes they were watching TV and he was kneeling on the bed."

The argument as to severity was repeated before this Tribunal. The Tribunal notes that the claimant had been suspended for three days and placed on a final written warning arising out of another disciplinary matter in December 2004. It is well settled that an employer may not dismiss an employee for a single incident of minor misconduct. It is also well settled that where an employee is properly on a final warning any further act of misconduct can justify dismissal, even an act of minor misconduct. It was never contended by the respondent that the incident of 16th February 2005 was an act of gross misconduct. The Tribunal is satisfied that the respondent operated a progressive/staged disciplinary approach whose parameters had been made known to the claimant. In summary, where a first incident of minor misconduct is found, a first warning is issued and recorded. Where a second incident of minor misconduct is found a second warning is recorded and the employee receives a disciplinary suspension. Where a third incident of minor misconduct is found the employee is dismissed. It is a notable feature of the respondents staged disciplinary procedures that should there be no further difficulties on the issue for which the warning was recorded within a period of nine months then the warning is expunged. Therefore an employee who has received a warning at either the first or second stage will not progress to a further disciplinary level if the next disciplinary issue is of a different type or if of the same type, occurs later than nine months after the last disciplinary issue. The Tribunal rejects the argument advanced on behalf of the claimant on severity. The Tribunal is satisfied that the an employer is entitled to dismiss an employee who is on a final warning for any further act of misconduct, even an act of minor misconduct.

The claimant received his first warning arising out of a pattern of absenteeism. The claimant sought to excuse his absenteeism, at least in part, by reference to the personal difficulties of a relative. It appears that the respondent did not accept this excuse as being credible. The Tribunal applies the reasonableness test to the decision of the employer and does not seek to substitute its own view of the evidence before the employer. The claimant did not advise the respondent initially of the difficulty of the relative and the respondent cannot be expected to have regard to factors concealed from the respondent. The personal issue affecting the relative was first brought to the attention of the respondent at the appeal stage and the respondent is entitled to have regard to the tardiness of the excuse in assessing its credibility. The Tribunal is satisfied that the respondent had reasonably identified a pattern in the absences of the claimant, which in essence was that the claimant extended his time off with a sick day. It would be a remarkable coincidence for the needs of his relative to match this pattern. If there was a better explanation for the absences than the one given then it was for the claimant to make it, it is not for the respondent to eliminate all mere possible justifications.

The Tribunal finds that the issuing of a first warning by the respondent to the claimant was reasonable in all the circumstances.

The claimant received his second warning as a result of leaving the premises of the respondent on 13th December 2004 without permission, allegedly for the purpose of giving a colleague a lift to the bank. The Tribunal is satisfied that the respondent acted reasonably in issuing the second warning. Ultimately the claimant admitted that he had left the premises without permission. The Tribunal notes that it was not contended that the claimant did not leave to go to the bank to cash his own cheque. The Tribunal accepts that it is a significant act of misconduct to leave the workplace without permission. The respondent has a legitimate concern regarding health and safety issues. In the event of a fire rescuers may be placed at significant risk in attempting to locate within a burning building an employee erroneously believed to be left inside. The Tribunal rejects the argument against severity, as also advanced at this stage of the disciplinary process by the representative for the claimant. The respondent, in giving the claimant a second warning, consisting of a final written warning and three day period of suspension, was implementing the next stage in its staged disciplinary procedures.

The Tribunal notes that warnings lapse after a period of nine months. It was the standard practice of the respondent to regard the nine month period to commence after the finalisation of the appeal process. Had the claimant not appealed against the first warning then the nine months would have expired before the second incident occurred such that the claimant might only have received another first warning.

Ultimately the claimant was subjected to a disciplinary procedure arising out of the incident of 16th February 2005. The accommodation manager had witnessed the claimant sitting comfortably on a bed in a hotel room with a colleague and watching snooker on the television instead of working. The accommodation manager brought the incident to the attention of the human resources manager on the same date. On 18th February 2005 a brief meeting was held between the accommodation manager, the human resources manager and the deputy shop steward. Both the claimant and his colleague who had been involved in the incident were individually called to this meeting and advised that there would be a meeting about the incident on 21st February 2005. It then emerged that the accommodation manager was to go on holidays for a period of two weeks. It was to go ahead with the meeting of 21st February 2005 nonetheless. At the meeting of 21st February 2005 the claimant and his colleague were brought in separately and questioned. The human resources manager accepted that evidence from the colleague taken in the absence of the claimant at that meeting was taken into account in the making of the decision to dismiss the claimant. The Tribunal is of the view that it is perfectly reasonable for an employer to question an employee on an individual basis and without other employees being present as part of an investigation into an incident where the facts may be in dispute and for the purpose of establishing any inconsistencies in the versions of events being put forward by employees which might otherwise corroborate each other. However, a different standard applies to a disciplinary hearing where the employee is entitled to be made aware of all the evidence which is to be used against the employee. On 21st February 2005 the versions of events given by the claimant and his colleague, aside from certain other inconsistencies, corroborated each other on the main point, which was that the claimant was not sitting on the bed actively watching television as had been alleged by the accommodation manager, but that he had been kneeling on the bed in the course of his work and had merely become aware of the results of the snooker from the television which had been left on by another person. The accommodation manager was on holidays and did not give evidence in person at any hearing to which the claimant was present. A brief meeting was held on 1st March 2005 which appears to have been of minor significance. A further meeting was held on 2nd March 2005 which appears to have

consisted in essence of the human resources manager making her decision known. The oral decision was followed up by a letter dated 4th March 2005. The second paragraph of this letter merits quotation in full:
"Arising from this incident a full investigation was carried out which included meetings with you. At these meetings what was alleged was put to you and responses sought. On completion of the investigation, full consideration was given to all factors including your responses and a decision was then taken which you were then advised of. At each of your meeting, your union representative accompanied you."

The Tribunal finds that the respondent carried out an investigatory process and after having considered the information obtained announced a disciplinary decision without affording to the claimant what might properly be described as a disciplinary hearing. An employee the subject of a disciplinary decision must be afforded a fair disciplinary hearing. The claimant was not afforded a disciplinary hearing and therefore cannot be regarded as having been given a fair disciplinary hearing. The respondent appears to have made the error of conflating the investigatory process with the disciplinary process.

Insofar as the meeting of 21st February 2005 could be characterised as being a disciplinary hearing, the respondent reached its disciplinary decision on the basis of evidence obtained from the accommodation manager taken both before and after the meeting of 21st February 2005 and in the absence of the claimant in breach of the principle of procedural fairness referred to by the phrase *audi alteram partem*. Similarly, the evidence of inconsistency obtained from the other colleague on that date needed to be formally put in detail to the claimant in order to avoid a further breach of *audi alteram partem*. The decision maker must not just hear both sides of the case, but must allow the employee the subject of disciplinary proceeding to hear all the evidence against him which will form the basis of the decision.

The Tribunal applies the reasonableness test. A decision is unreasonable if it is one which no reasonable employer could have reached. Insofar as the meeting of 21st February 2005 could be characterised as a disciplinary hearing, the only evidence which the decision maker heard in the presence of the claimant was exculpatory on the main issue. To include the evidence of his colleague would be to include evidence which, notwithstanding certain inconsistencies, was corroborative of the claimant's position on the main issue. The sole witness against the claimant was not present. Where the only evidence given is a denial of an allegation, and supported by a corroboration of that denial by another witness, and in the absence of any evidence being given to support the allegation, then no reasonable employer can uphold the allegation.

The Tribunal is satisfied that the evidence given to it by the accommodation manager is credible and accurate. However, it is not for the Tribunal to substitute its view of events for the decision of the employer, but merely to assess the fairness and reasonableness of the decision made by the employer.

Having carefully considered all the evidence in this case the Tribunal holds that that the dismissal was unfair procedurally. However the Tribunal is not minded to award either of the primary remedies under the Unfair Dismissals Acts, 1977 to 2001, which are reinstatement and reengagement. The Tribunal instead awards compensation in a nil amount to the claimant under the Unfair Dismissals Acts, 1977 to 2001.

The Tribunal chooses not to award either of the primary remedies primarily out of regard for the

wishes of both of the parties for compensation.

The Tribunal finds that the claimant suffered no loss arising out of the dismissal. The claimant was dismissed on 30th March 2005. The claimant failed to make adequate efforts to mitigate loss. The claimant indicated that he intended to take out a taxi licence, but did not complete the application. Efforts to seek alternative employment were limited to asking a small number of individuals of his acquaintance if they were aware of any openings. The claimant did not apply for any actual vacancies himself. The claimant, through his representative, advised the Tribunal that the claimant had been available for work throughout the entire time since his dismissal, that statement turned out to be false, as the claimant had spent most of that time in receipt of Disability Allowance, and therefore unable to work. No explanation was forthcoming as to why the Tribunal had been misled in this way.

The Tribunal heard evidence that the claimant had made allegations of bullying and harassment against both the accommodation manager and human resources prior to his dismissal. Ultimately the claimant chose to give no evidence supporting those allegations. Throughout the hearing attempts were made by the representative for the claimant to make allegations of bullying and harassment against both the human resources manager and the accommodation manager. The allegations as made by the representative were wholly lacking in any detail. A careful and deliberate pattern emerged in which bullying and harassment was alleged on behalf of the claimant in circumstances which prevented the accommodation manager or the human resources manager from defending themselves. When the claimant came to give evidence himself, his representative chose not to lead any evidence supporting those allegations. When the accommodation manager and human resources managers were being cross-examined, the representative for the claimant refused to put any such allegations against the witness to that witness. Instead the allegations were made in the opening statement and in passing against one or other manager when cross-examining someone else. It was claimed that the Tribunal was being "legalistic" when it insisted that any allegations of bullying and harassment be put in cross-examination. The representative for the claimant purported to be unable to understand the importance of putting such allegation to the respective individuals in cross-examination or even how to do so, despite repeated and clear explanations given by the Tribunal. When the chairman of this division offered to put any such allegations to the affected persons the representative refused to give any detail of those allegations, thereby preventing the Tribunal from carrying out the cross-examination itself. A remarkable pattern of avoidance characterised the claimant and his representative's refusal to allow the managers any opportunity to defend themselves, too convoluted to describe exhaustively. The Tribunal was told initially that the allegations were against both, when the first was available for cross-examination the Tribunal was told the allegation was only against the second, when the second was available for cross-examination the Tribunal was told that a mistake had been made and that the allegation was against the first only. The Tribunal finds that the allegations of bullying and harassment against the human resources manager and the accommodation manager are wholly false and made maliciously by and on behalf of the claimant as part of an aggressive campaign of retaliation against those that inconvenienced him by their exercise of the normal supervisory functions. The Tribunal exercises its discretion in relation to any discretionary compensation by awarding a nil sum.

The Tribunal had considered imposing reengagement upon the parties, even against their wishes. Where a dismissal is unfair for a mere procedural defect, a reengaged employee may have his rights to procedural fairness vindicated by being returned to the workplace, where the employer may choose, at the employers discretion, to give the employee a new hearing, with such consequences as may ensue. In this case, the Tribunal considers it inappropriate to put this particular employer to

any further difficulty, in circumstances where compensation in a nil sum is the alternative.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)