EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**
Employee UD339/2006

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes B.L.

Members: Mr M. Murphy
Mr O. Nulty

heard this claim at Drogheda on 31st January 2007

Representation:

Claimant(s) : Mr. Andrew Butler, Hayes McGrath, Solicitors, 91 Lower Baggot Street, Dublin 2

Respondent(s) : Mr. David Farrell, Ir/Hr Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

One of the two joint Managing Directors and person in charge of transport and warehousing gave evidence. He explained that the claimant was employed as a charge hand working on the docks unloading ships.

On January 23rd 2006 the witness drove to the claimant's home to take over from his brother, the other joint Managing Director, to observe the claimant. The claimant had contacted his Supervisor the previous evening to say that he was not available for work the following day, as he had to bring his sister to the doctor. The witness observed the claimant putting his golf clubs in his car and drive away. The witness proceeded to the golf club and established that the claimant had paid a green fee for that day. The witness walked out to the second tee at around 11 a.m. He met the claimant and a friend, greeted them and told them to enjoy their game, the claimant was astonished. The witness left but later returned to the golf club at around 3 p.m. The claimant's car was still parked there.

He explained that the claimant had been observed that day as there had been a number of days over a thirteen month period that the claimant had said that he could not attend work as he had to bring

his sister to the hospital or doctor. He said that his brother asked his advice on what to do about the situation. The witness replied that, in his opinion, there was no alternative but to dismiss the claimant. The witness had not attended the disciplinary hearing.

On cross-examination the witness explained that his brother, the Supervisor and himself had spoken to the claimant in the past about taking leave. When asked, the witness explained that due to the nature of the job, work could be called off if a ship did not make a tide. Staff would be told on Friday was the schedule was for the following week and the Supervisor would text the staff on Sunday evening to confirm whether they were required or not.

When put to him, he said that he had not seen the doctor's letter of January 26th 2006 stating the claimant's sister's appointment had been re-scheduled. He explained that his brother dealt with staff and the claimant's dismissal. When asked, the witness explained that the claimant had been given compassionate leave for January 23rd 2006.

The second joint Managing Director gave evidence. He said that he had known the claimant for over thirty years. The claimant worked as a banks man with many years of experience. He explained that the claimant, along with four other staff, worked on annualised hours and received a weekly salary. This was a twenty-four hour week and overtime, if required. Staff could work six days on and a week off, depending on the workload. This advantaged both the employer and the employees as work was done quicker and staff had more time off.

In November 2004 employees were called into work but the claimant did not attend. He spoke to him some days later. The claimant explained that he had a very ill sister who needed him to look after her. The claimant said that he had taken his sister to a speech therapist in Dublin. The witness said that he found this unusual, as the day the claimant had not attended work was a Sunday. The claimant was paid compassionate leave for that day. He explained that normally if a staff member did not turn in for work it would be classed as annual leave.

In October 2005 a private investigator was engaged to watch the claimant's movements, as he was absent on compassionate leave once or twice a month. The witness had also observed, by accident, the claimant, dressed in a golf jumper, when he was supposed to be looking after his sister while on compassionate leave. Staff members had also been commenting to the witness that "the sun was shining and where was the claimant", when he was not at work. The staff were fed up with the claimant's absences. The witness said that he had been aware the claimant was an avid golf player.

On January 11th 2006 the claimant texted his Supervisor stating he would not be attending work. The Supervisor forwarded the text to the witness. The claimant's house was again observed. It appeared one of the claimant's sisters left the house on foot and the second sister was picked up by van. The claimant's car remained in the driveway even though he had texted he could not work.

On January 23rd 2006 the witness observed the house from 7 a.m. His brother arrived at 9.30 a.m. When an Order of Malta van arrived and picked up the claimant's sister, it was agreed the witness would follow it to the day care centre.

The following day the witness told the claimant he wanted him to attend a meeting. The claimant arrived with his union secretary. The claimant was informed that he was suspended with pay due to allegations of gross misconduct. The claimant requested this in writing and was sent it the following day. The meeting reconvened on January 26th 2006 as a disciplinary meeting. Again the meeting was adjourned as the witness wanted to consider the matter; this had been going on for

some time. The meeting reconvened on February 1st 2006 and the claimant's absences were discussed. Two doctor's letters were produced concerning January 11th and January 23rd 2006. In respect of January 11th the doctor stated that he had attended with his sister. In respect of January 23rd the doctor stated that the claimant's sister's appointment had to be re-scheduled and was not cancelled in error. Having considered the matter at great length, it was decided the claimant was to be dismissed. A letter of dismissal was sent on February 7th 2006.

On cross-examination the witness said that he had originally asked the claimant to come and work for his company. When asked why he had not spoken to the claimant before, he said that he had ignored the slagging from staff and trusted the claimant was telling the truth.

The witness explained that the dock had been reorganised in 2001. This change was carried out in conjunction with the union. The claimant had mentioned he wanted more time off. The claimant was given an extra payment as charge hand and annualised hours were introduced.

When asked, the witness explained that an employee had been dismissed in the past. He was notified of the matter and was informed he was under review. After long investigation it was discovered that this person was holding down a second job when he should had been working forthe respondent. He was dismissed when absolute proof had been acquired. The witness said thatthe claimant's case was a different matter. He had been trusted and let his employer down. Whenput to him, the witness stated that if the appointment on January 23rd 2006 had been cancelled, theclaimant should have attended work.

When shown, the witness said it was the first time he had seen a doctor's note, dated February 3rd 2006, relating to the claimant's two sisters. It explained of a date in October 2005 when the claimant's sister was unwilling to attend the surgery. No specific date in October 2005 was mentioned.

When put to him, the witness explained that there was a right to appeal a decision of discipline, as per the conditions of employment, but as he was the highest member of management he felt the claimant could appeal to a third party such as a Rights Commissioner or the Employment Appeals Tribunal.

Claimant's Case:

The claimant gave evidence of loss. He explained that he had two sisters who had two different medical conditions.

He agreed that he had played golf on the day in question, January 23rd 2006. His sister was scheduled to attend her doctor and required assistance. However, she changed her mind, she haddone this in the past and her mind could not be changed. The claimant assumed he would be stopped a day's annual leave. He had a letter from the doctor dated January 24th 2006 to explainthe circumstances.

The claimant stated that he had brought his sister to her doctor on January 11th 2006 and had a doctor's note dated January 27th 2006 to prove it. He also stated that the doctor's letter dated February 3rd 2006 was also a fair reflection of what had occurred in October 2005.

On cross-examination the claimant again stated his sister had changed her mind on January 23rd. When put to him about the doctor's letter stating it was their fault that day, he said that he could not

say who cancelled the appointment. He said that he had not been told the previous Friday that he was attend work on Monday. He had texted his Supervisor on the Sunday to say he would not be attending work.

When put to him, the claimant said that one sister was picked up by van on February 11th but that he had brought his other sister to the doctor that day.

When asked by the Tribunal why the doctor's letter of January 24th stated that the claimant was not able to attend work, the claimant said he had just asked for the letter and did not know why the doctor had said it. He had not been scheduled to work on January 23rd.

A former colleague and then branch secretary of the union gave evidence. He said that he had been told, by the respondent's second witness, that the Supervisor had told the staff on Friday 20th that they would be required for work on the following Monday. The Supervisor agreed. The witness interviewed the men involved and was informed that the Supervisor had not been there at all. Some had received texts on Sunday evening to work the following day. The witness stated that the minutes of the meeting submitted to the Tribunal were incomplete.

Determination:

The Respondent is a stevedoring company. The Claimant was employed as a docker. He commenced employment in April 2001 and was dismissed on 7th February 2006. He was paid €645 per week. The fact of dismissal was not in dispute.

The Claimant has a sister. He assists her by bringing her to frequent medical appointments, as she is unable to attend by herself. The Respondent was very understanding of his frequent absences for this purpose. The Respondent's joint managing directors began to become suspicious, however, in late 2005, when the Claimant's colleagues quipped during some of his absences that he was probably on the golf course again.

On the 22nd January 2006, the Claimant sent a text message to his foreman to say that he would not be at work the following day. The Tribunal is satisfied that he was properly scheduled for work on the 23rd January 2006. It was decided to see what the Claimant did for the day. One of the joint managing directors, MO'R, saw the Claimant put his golf clubs into his car. He later saw the car in the car park of a local golf club and saw the Claimant's name in the green fee book. He subsequently saw the Claimant on the golf course.

In consequence of the Claimant having been playing golf when he was scheduled for work, disciplinary hearings were held. The Claimant was represented at these meetings by trade union officials. At the conclusion of the hearings a decision was taken to dismiss the Claimant for gross misconduct.

It is of note that the Respondent's disciplinary procedure provides that an employee "may appeal to the managing director (or other appropriate person) if a decision is taken to dismiss" such employee. The Claimant, having been dismissed, was not provided with the option of an appeal.

The Tribunal is satisfied that the disciplinary process, insofar as it was conducted, was conducted fairly. The Tribunal is also satisfied that, in circumstances where an employer has facilitated an employee in caring for an ill family member by allowing him, often at short notice, to take days off, taking advantage of such an arrangement by playing golf is conduct capable of amounting to gross

misconduct.

However, the Respondent was in breach of its own disciplinary procedure in failing to provide the Claimant with an appeal against dismissal. Given that both joint managing directors were involved in the decision to dismiss the Claimant, they could not have heard the appeal. However, little thought appears to have been given as to who might constitute an "appropriate person". Certainly the Tribunal itself is not such an "appropriate person" as was suggested, the Tribunal not being part of an internal disciplinary procedure. The Tribunal accepts that the smaller the company the more difficult it can be to find such an "appropriate person". Nonetheless, the fact remains that the Respondent itself explicitly provided for the option of an appeal in its disciplinary procedure and did not, in the event, provide it.

The Tribunal has previously held that the failure to provide for an appeal can constitute an unfairness. The Tribunal is now satisfied that, having explicitly provided for an appeal, it was unfair of the Respondent not to have one.

The Tribunal is satisfied that this procedural unfairness renders this dismissal unfair. However, the Tribunal is also satisfied that the Claimant substantially contributed to his own dismissal. The Tribunal is satisfied that compensation is the appropriate remedy and, pursuant to the terms of the Unfair Dismissals Acts, 1977 to 2001, awards to the Claimant compensation in the amount of €1,000.00 as being just and equitable in all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)