EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD93/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes BL

Members: Mr. J. Walsh
Ms. K. Warnock

heard this claim in Navan on 1 February and 16 April 2007

Representation:

Claimant : Mr. Manus McClafferty, Maguire McClafferty, Solicitors,
8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent : Mr Alex White BL instructed by
Arthur O'Hagan, Solicitors, Charlemont Exchange, Charlemont Street, Dublin 8

The determination of the Tribunal was as follows:

The Claimant was employed as the caretaker of the Respondent National School. The school caters for approximately 640 children. The Claimant's employment began in September 1999 and it ended on the 14th December 2005. He had been sent a letter, dated the 15th November 2005,notifying him of his dismissal.

In the summer of 2004 there was an incident between the Claimant and the school principal, JH, which resulted in the Board of Management (hereinafter "BOM") giving the Claimant a final written warning.

The Claimant's dismissal arose out of matters that occurred in the autumn of 2005. He intended to travel with some friends to the Breeders' Cup horse race in New York. He informed JH of this in early September and wrote to the BOM to ask for leave. It appears that his trip was booked before this request was made.

In respect of annual leave, the Claimant's contract provided, inter alia:

> "You will be required to take at least (10) working days between July 1st and August 31st annually. Your annual leave must be taken during normal school holiday times and at the Spring mid-term break, Easter, October mid-term and Christmas. The final decision in allocating annual leave dates rest with the Board of Management" (sic).

The Claimant's intended travel dates did not fall within any of the contractually-mentioned periods.

The BOM refused the Claimant's application for annual leave. It felt that, in a school of its size, the teachers could not be expected to cover for an absent caretaker for a week and that there was insufficient time in which to get Garda clearance for a replacement. The BOM communicated this decision to the Claimant by letter dated the 20th September 2005.

In early October, the Claimant told JH that his brother-in-law, a taxi-driver, had Garda clearance and could cover for him. The Garda clearance concerned was to allow the brother-in-law to work as a taxi-driver. The BOM again considered the matter. It was decided that, as a taxi-driver's Garda clearance did not cover working with children, the Claimant's brother-in-law would not be a suitable replacement. The Claimant's request was again refused. He was informed of this decision by letter dated the 17th October 2005. He was told in this letter:

> "You are therefore expected to be present for work on these days."

The Claimant was due to travel on the 25th October, although he told the Tribunal that, upon receipt of the letter dated the 17th October, he had resigned himself to not going.

On the 20th October the Claimant delivered a doctor's certificate from his general practitioner. It stated that he was unfit for work from the 19th October until the 2nd November 2005 because he was suffering from a "stress-related problem".

On the 21st October the Claimant attended his dentist who performed an upper molar extraction. The Claimant returned to the dentist on the 24th October complaining of pain in the area of the extraction site. The dentist noted bruising and gave him a certificate. This certificate stated:

> "To whom it may concern. This is to confirm that Martin Barry attended this surgery today for treatment and in my opinion will be unfit for work for 7 days."

This certificate was not given to the BOM until the 4th November.

The BOM had, on the 17th October, refused the Claimant's application for annual leave for the period from the 25th to the 28th October inclusive. On the 20th October they received a doctor's certificate covering the period from the 19th October to the 2nd November. The BOM decided that the Claimant should be independently medically examined. A letter, dated the 21st October, was personally delivered by DG, the Chairman of the BOM. The letter requested that the Claimant attend for medical examination on the morning of the 28th October. DG told the Tribunal that the Claimant's car was in the driveway and that a television set was on in the house but that no-one answered. Therefore, DG put the letter into the letterbox. The Claimant denied having received this letter. He said that it was collected by his wife who put it on her side of the dressing table rather than his side. She then left the country and went to Calcutta. She did not tell him about the letter until the 3rd November. The Tribunal does not accept this explanation.

The Claimant then decided that because he was off work anyway, there was no-one else at home

and that, as he had tickets, he might as well go on the trip to New York. He might as well recuperate there as at home.

On his return to his employment on the 3rd November he confirmed to DG and JH that he had gone to New York. This was reported to the BOM who decide to suspend him, on full pay, pending an investigation.

The Claimant attended a meeting of the BOM on 14th November. He was accompanied by his solicitor. At the conclusion of the meeting the BOM decided that it did not accept the Claimant's explanations and that it had lost trust and confidence in him. Accordingly, it was decided to dismiss him.

Under his contract of employment the Claimant had a right of appeal to the Chairman of the BOM, or to another appropriate person. In this instance the Chairman of the BOM had been involved in the disciplinary process and could not, therefore, reasonably have heard an appeal. It was suggested on the Claimant's behalf that his former solicitor had written to the BOM seeking to exercise the Claimant's right of appeal. There was a copy of such a letter on the former solicitor's file. DG told the Tribunal that he had no recollection of having received such a letter and that there was no copy of such a letter on the BOM's file. The only evidence before the Tribunal was that a letter of appeal had been drafted. There was no evidence that such a letter was ever sent. The Tribunal cannot conclude that the Claimant in fact exercised his right of appeal.

When dismissing an employee, an employer must act reasonably and fairly. The Tribunal must be satisfied that the employer so acted. It is not the function of the Tribunal to insert itself into the role of the employer and determine what it would have done in the circumstances. Nor is it the function of the Tribunal to determine the innocence or guilt of the employee who is accused of misconduct. The test for the Tribunal is whether the employer had a genuine belief based on reasonable grounds arising from a fair investigation that the employee was guilty of the alleged misconduct and that dismissal was a fair and reasonable sanction.

An employer must consider the evidence that it has and that it can reasonably gather. Where an employee is asked for an explanation of his conduct, an explanation should be given. There is little point in an employee being reticent during the disciplinary process and forthcoming before the Tribunal. If an explanation is not given to the employer, the employee is depriving himself of an opportunity of exculpation.

In this case the Claimant sought to rely on two bland medical certificates where the circumstances pointed to his having gone to New York in defiance of the BOM. The Claimant had booked a trip before seeking leave. Three days after having been reminded that he was expected to be at work he submitted a bland GP's certificate which covered the period of his intended holiday. He then ignored a letter asking him to attend a medical examination and went on his holiday. It was not unreasonable for the BOM to conclude that the Claimant had determined to make his trip. When this was suggested to him, a second, equally bland, certificate from a dentist was furnished. It did not put the matter any further. It was suggested on the Claimant's behalf that the BOM should have contacted the GP and the dentist so as to further investigate the matter. This is an unrealistic proposition. Firstly, if there was more for the BOM to know it was for the Claimant to tell them. Secondly, it is unlikely that either a doctor or a dentist would breach a patient's confidentiality and discuss matters with that patient's employer.

In light of what the Respondent knew and had been told, the Tribunal is satisfied that it acted fairly

in dismissing the claimant. Therefore this claim, under the Unfair Dismissals Acts, 1977 to 2001, is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This __________________________

(Sgd.) __________________________
(CHAIRMAN)