EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.
Employer UD273/2007

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

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Ó Riordain BL

Members: Mr J. Browne
Mr A. Butler

heard this appeal at Wexford on 13th March and 24th June 2008

Representation:

Appellant: Mr Tom Mallon B L instructed by Ms.Gill Woods,
Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

Respondent : Ms. Ger Malone, S I P T U, Wexford Branch, North Main Street, Wexford

This case came before the Tribunal by way of an employer appealing against the recommendation of a rights commissioner reference r-043424-ud-06/TB

The determination of the Tribunal was as follows:

Appellant's Case

The appellant's head office is at Dublin airport and the events in this case occurred in the southeast particularly in its Rosslare hotel from November 2005 to February 2006. The hotel has since been sold and staff made redundant. The general manager at the time of these events gave evidence.

It was the standard practice that most of the staff at that hotel were laid-off for the winter months. The respondent who held the position as head chef at that hotel was a well-established and long-term employee was one of a small group of 8 out of the 80 staff who was retained on a permanent basis and carried out a variety of work in the hotel over the winter. The newly appointed general manager met informally with the respondent in the middle of November 2005 and discussed the respondent's possible workload for the lay-off period. The hotel was due to undergo

some refurbishments and had "lots of work" available.. However instead of an expected formal meeting between the manager and the head chef to further explore that issue the hotel received a series of three medical certificates stating that the respondent was unfit to attend work from 22 November 2005 to early February 2006. Acting on its sick leave policy the appellant continued to remunerate the respondent for that period on the basis of the claimant returning his social welfare sick leave payment to the hotel.

In January 2006 the general manager indicated in his evidence that he heard that the respondent was gainfully employed at Waterford Institute of Technology. That report prompted him to visit that establishment on 27 January 2006. There the witness met the hotel's head chef dressed in his working clothes where they exchanged small talk. The two men parted confirming they would see each other the following Monday morning for a pre-arranged meeting at the hotel to discuss menus and revised procedures with the sous chef for the coming year. That morning the witness outlined to the respondent that a "very serious matter had to be discussed" and he requested him to attend a newly arranged meeting with the hotel accountant and himself. The head chef was invited to have a representative in attendance. When he enquired as to the nature of this meeting the witness replied that he was not at liberty to comment.

At the outset of the meeting the witness told the respondent, who was unaccompanied, that he had provided the hotel with a medical certificate declaring him unfit for work yet he appeared to be working at the institute the previous week. The respondent told him that this was "true unfortunately".. The general manager told him that the issue was being treated as a very serious disciplinary matter which could lead to his dismissal and enquired if the respondent had anything additional to offer, but there was no further response. Following a short break the witness informed the respondent that he was now being suspended on full pay while an investigation into this affair proceeded.

A further meeting was held by the general manager and accountant with the respondent on 6th February to which the respondent had been asked in writing to bring his representative. The respondent attended on his own. The general manager read the minutes of the first meeting and said that the issue was being treated as a serious disciplinary matter and that disciplinary action, up to and including dismissal would have to be considered. The respondent asked if the company had reached a conclusion and the general manager said that no decision was taken prior to this meeting. He asked the respondent if he had anything additional to say in relation to the matter but the respondent did not offer any further comment. The general manager informed the respondent that he remained on suspension; that he would bring head office up to date and that a decision would be taken. He subsequently wrote to the respondent on 7 February notifying him of his dismissal with immediate effect and advising him of his right to appeal.
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The former accountant at the hotel gave evidence. He said he was familiar with the respondent. While he was aware that the head chef did some work outside of the hotel he did not know it was with the Waterford Institute of Technology until a short time before this episode. As part of his human resources role the witness attended the meetings with the general manager and respondent in relation to this case and wanted to "tease out" any possible mitigating factors. The witness accepted that a formal contract of employment never issued to the respondent and that there was "no real restriction" preventing the head chef from working elsewhere. However all staff were given a copy of a company handbook and he "would have" referred to the codes contained in that handbook in this case. That code did not form part of the contents at the meetings he attended with the respondent.

A former general manager with the hotel gave evidence. In February 2000 he, along with accountant had met with the respondent who was on sick leave at the time and asked him whether he was working at the Waterford Institute of Technology. The respondent explained that he had he had been doing some CERT related work before Christmas and had been involved in some competition related activity but that he was not working elsewhere "as he was not mad". The former General Manager subsequently wrote to the respondent on 29 February 2000 formally confirming that he was not in paid employment elsewhere while on sick leave from the hotel. The witness indicated that he had no problem with the respondent working elsewhere provided that it did not interfere with his hotel work but working while on paid sick leave was unacceptable. He indicated that he had been consulted by the present general manager about this incident.

The Executive Chairman and acting Chief Executive of the Great Southern Group gave evidence of the appeal process. The respondent had written informally to him initially but he had to process matters within procedures and could not enter into correspondence. The Chairman had a number of meetings with the respondent and his union representative and there were exchanges of correspondence between them and a letter had been submitted by the respondent's medical doctor. Copies of the documentation including the reports of meetings were given to the Tribunal. The case put forward by the respondent and his representative had been fully considered by him and he wrote to the respondent on 9th June 2006 confirming the decision to dismiss. This letter indicated his belief that, in all the circumstances, the respondent's behaviour in submitting medical certificates to the hotel while on sick leave, while at the same time discharging his duties at Waterford IT constituted gross misconduct such as to destroy the trust and confidence which the company must have in order to retain the respondent in employment.
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Respondent's Case

As head chef for over thirty years at the Rosslare hotel the respondent was responsible for the overall food preparation and operations there. For most of that time the witness was involved in the training and development of students and staff and acted as a course tutor on formal courses. He commenced work as a lecturer on the topics of food and beverage on a very limited basis at the Waterford Institute of Technology. It was well known in the region that he worked there on a part-time basis and never kept that fact hidden from the appellant and there was never a question of a conflict of jobs. While the hotel had remained open in winter time prior to November 2005 the witness was aware it was due to close that winter and spoke to the general manager about this.

The respondent was treated for a serious illness in 1996 and was out of work for six weeks due to that ailment. He was still under medical review when he experienced two serious choking incidents in November 2005. He was being medically attended to when the hotel ceased public operations that month and did not directly speak to the general manager about his situation at the time despite an attempt to do so. He had submitted medical certificates to his employer in the Great Southern Hotel for the period from the 22nd November 2005 until the 6th February 2006 and received his normal salary during this absence. He travelled to Britain with his daughter for one week from the 28th November 2005 until the 3rd December 2005 and had worked intermittently in Waterford I.T. from November 2005 until the end of January 2006 on a part-time basis.

The respondent said that he had been treated unfairly. He had been employed for 30 years with the

company. He had an excellent record and never received a warning. It was common knowledge that he was doing part time lecturing with the Waterford IT and this had also been beneficial to the hotel over the years especially in relation to CERT related courses. He was unable to do work which involved lifting or bending and his medical advisor had recommended that he resume lecturing. He did not expect that this would give rise to any difficulties and he was shocked at the abrupt way he was dealt with in the meeting with the general manager. The procedures followed were fatally flawed. He had not been given prior warning of what was involved in the first meeting and had no time to bring a representative with him. He was not aware that he was at risk of dismissal and he believed that the decision to dismiss him was taken in head office without him having an opportunity to directly state his case. The decision to dismiss was extremely harsh and the loss of his entitlement to redundancy was not justified. He believed that the Rights Commissioner's recommendation should be upheld.

Under cross-examination the respondent confirmed that he had only given Waterford I.T. one medical certificate for the period from the 28th November 2005 until the 3rd December 2005. He had been paid by Waterford I.T. for the holiday period at Christmas 2005 and had not given any medical certificate to Waterford I.T. in January 2006. He confirmed that he had not discussed with his doctor the possibility of light working duties being made available to him in the Great Southern Hotel nor had he asked the hotel management if there was light working duties available to him. He agreed that when he was rehabilitating from a previous illness in 1996 that the Great Southern Hotel had facilitated him and he was of the opinion that they would have facilitated him during this period of illness had he sought this. He agreed that he had replied that he was not mad when questioned by the hotel management previously about working elsewhere while on sick leave from the Great Southern Hotel.

The next witness gave evidence that he is the respondents G.P. and has been since 1989. The respondent had suffered a serious illness in 1996 that required surgery. The surgery was extremely successful but there was always a concern that the illness may re-occur. In November 2005 the respondent attended the G.P. who referred him to a consultant surgeon at Wexford General Hospital. A full investigation was carried out and his condition was found to be unrelated to his previous illness. He was treated for this illness and was advised that he would be unfit for heavy work for approximately three months. Specifically he was advised that he would be unfit to bend, stoop, lift or carry heavy weights for this period.

The G.P gave further evidence that the respondent attended his practice on the 4th January 2006 and asked him if he could return to his lecturing duties in Waterford I.T. on a part-time basis of 5 hours per week. The G.P. agreed to allow the respondent return to his lecturing duties provided there was no physical activity such as bending or lifting involved. He knew that the respondent was frustrated from prolonged inactivity and he considered that the lecturing would be beneficial to his state of mind. It was agreed between the G.P and the consultant surgeon that the respondent was totally unfit to carry out his duties as head chef in the Great Southern Hotel from early November 2005 until early February 2006. On approximately the 2nd March 2006 the G.P declared the respondent fit to resume his duties as head chef in the Great Southern Hotel. The witness had expressed his medical opinion in writing to the Rights Commissioner on 2 March 2007.

Under cross-examination the witness confirmed that he was happy for the respondent to return to his lecturing duties on the 4th January 2006 as it was part of his rehabilitation process. He confirmed that the respondent had not made him aware that there was light work available to him in the Great Southern Hotel. He agreed that if the respondent was fit to lecture he was fit to perform clerical like deskwork duties but it was his understanding that if the respondent was to return to

work in the hotel it would have been as head chef.

Determination

The issue raised for the Tribunal to decide in this appeal is whether the respondent employee was fairly or unfairly dismissed and, if the latter, whether, as recommended by the Rights Commissioner, the appropriate remedy is reinstatement.

The Tribunal process is by law a de novo hearing and evidence on oath was taken over two days on behalf of the appellant from the then General Manager of the hotel, the Area Accountant in the hotel, a former General Manager and from the Chairman of the Group. The respondent gave evidence on his own behalf and called one witness, i.e. his medical doctor. The respective position of both parties is set out in the evidence.

The issue of entitlement to redundancy payment is not an issue which the Tribunal can take into account in determining whether the respondent was fairly or unfairly dismissed.

One central fact has never been in dispute in the dismissal and appeal process. The respondent was working as a part time lecturer in the Waterford IT while on certified sick leave from the hotel during the period from 22nd November, 2005 until 6th February, 2006. During the period of his sick absence the respondent claimed social welfare allowance and, in accordance with normal practice in the hotel group, he forwarded his allowance to the hotel and the hotel paid his salary. The respondent was one of eight permanent staff retained and paid by the hotel over the winter while the remaining eighty or so staff were left go, as the hotel closed each year during the slack winter period. The permanent staff traditionally carried out a range of what might be described as care and maintenance duties and preparatory work for the next season while the hotel was closed.

The appellant company accepted in their evidence that, although they were not aware of it, they had no difficulty with the respondent working part time in Waterford IT at the same time as he was working in the hotel, provided that it did not conflict with the discharge of his full time duties in the hotel. It was, however, totally unacceptable in their view for the respondent employee to be working in the Waterford IT while sick and being paid by the hotel while a range of light duties could have been discharged by him in the hotel if, as indicated by his medical doctor, he was fit for light work. This, they said, was the basis of their decision to suspend and, following an appeal, to ultimately dismiss the respondent. Such behaviour was identified as gross misconduct in the company disciplinary procedure for which an employee could potentially be dismissed without notice.

There were a number of especially relevant matters relating to the substantive case for dismissal which were outlined in the evidence and cross examination at the Tribunal hearing. The respondent employee, in his appeal to the Chairman of the Group and at the Tribunal hearing, placed great emphasis on the fact that his medical doctor advised him on 4th January, 2006 to resume his part time lecturing duties, which involved no physical activity such as bending and lifting, while awaiting a return to full health. There is, however, another side to the coin in that the doctor, in cross examination, indicated his understanding that the only work available in the hotel was as a Head Chef, which would be unsuitable health wise, and that it would have been equally acceptable for the respondent to carry out light duties, such as office work or work in preparing menus, on a part time basis in the hotel, if such were available. While there was no agreement about the type of work which the respondent might do during the winter season, as the respondent went on sick leave

before a formal meeting to agree the matter was finalised, the respondent accepted in cross examination that he had no reason to believe that the hotel would not accommodate him with light part time work if he told them of his medical advice.

The appellant's reliance on his doctor's advice of 4th January, 2006 would have been more persuasive but for the fact that, as indicated in his evidence and cross examination, he had already carried out part time lecturing in December 2005 shortly after his going on paid sick leave from the hotel. The reality revealed in evidence and cross examination was that the respondent, allowing for times when lecturing was not required due to the Christmas break or exam related breaks or his one week sick cert, worked his full part time roster with the Waterford IT, except for the week he spent in England with his daughter, while out sick on pay from the hotel. His part time work with the Waterford IT did not flow from or was not related solely to his doctor's advice of 4th January 2006. He was in remunerated employment with Waterford IT throughout his period of sick leave from thehotel.

The appellant also accepted in his evidence and cross examination that when the issue of paid work in the WIT while on sick leave from the hotel was raised with him by the then General Manager in February 2000 he indicated that it would "be mad" for him to be doing this by which he meant that he accepted that it would be seriously wrong for him to be in remunerated employment while on sick leave, claiming social welfare allowance and being paid by the hotel. The hotel accepted at the time that he had not been on paid work for the Waterford IT and confirmed this in a letter to him. This constituted a strong marker at that stage that paid work in the Waterford IT while out sick and being paid was totally unacceptable and this was fully understood by the respondent employee.

The combined effect of this evidence inevitably leads the Tribunal to conclude that the respondent employee was fully aware in advance of the grave problems with what he proposed to do and, notwithstanding this, he proceeded to work part time with the Waterford IT while on sick leave and while claiming social welfare and receiving pay from the hotel. This is clearly a matter, which under the company's disciplinary procedure and under normal industrial relations procedures constituted gross misconduct for which dismissal is a not unexpected outcome.

The issue then remains as to whether there are any procedural or other matters (apart from the medical advice), which would render the dismissal unfair or suggest that the penalty of dismissal is disproportionate to the matter complained of. The Tribunal has very carefully considered these matters and has come to the following conclusions.

The respondent employee and his trade union representative, as indicated in the evidence, raised serious issues in relation to the suspension and disciplinary process to which, undoubtedly, weight has to be attached by the Tribunal. It would certainly have been better, in dealing with an employee of the respondent's standing if he had been given more advance information about the initial suspension meeting and if a greater length of time was taken up with ensuring that procedural matters were fully explained at the meeting which led to the dismissal and that there be no possible question of ambiguity about the deciding authority. On the other hand, the respondent was told at the initial meeting of the allegations against him and that the offence complained of was potentially a dismissal one. He was also advised in advance of the second meeting of his entitlement to be accompanied by a trade union official and he chose not to avail of this important safeguard. He admitted the matter complained of but offered no explanation or defence and the meetings were, therefore, of brief duration.

What is, however, equally clear to the Tribunal is that all the matters raised by the respondent were

considered at the lengthy appeal process conducted by the Group Chairman and that the confirmation of the dismissal was only taken after the respondent and his trade union representative were given every opportunity to fully outline their concerns with the procedures followed and to set out their doctor's advice and make a submission in regard to proportionality and mitigation.

One further procedural matter not adverted to by the respondent was the fact that the initial contact at the WIT, the suspension meeting and the dismissal meeting all involved the General Manager in a lead role. In a situation of reduced staffing in the hotel this involvement of the General Manager is understandable and, in a situation where the respondent always acknowledged his part time work and chose not to be represented and reserved his explanation until the appeal, the potentially negative effect of this is diminished. The Tribunal, as previously indicated, is satisfied that the appeal was conducted in a manner which allowed a substantive case to be made by the respondent employee and his trade union representative before a final decision on dismissal was taken. The fact that the respondent always acknowledged his part time work while on sick leave meant, in practice, that the focus had moved to issues of explanation and mitigation.

It may well be that the members of the Tribunal would wish to have seen a lesser sanction than dismissal imposed, especially given the seniority of the employee and the fact that he had been unwell, but they are conscious that the role of the Tribunal is prescribed by law and the Tribunal is in no doubt but that dismissal is well within the range of penalties imposed by reasonable employers for working for remuneration elsewhere while on sick leave, claiming social welfare allowance and being paid at the same time by the principal employer.

The Tribunal in all the circumstances allows the appeal and upsets the Rights Commissioner's Recommendation and determines that the dismissal of the respondent was not an unfair dismissal under the Unfair Dismissal Acts, 1977 to 2001.

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Employment Appeals Tribunal

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(CHAIRMAN)

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Employment Appeals Tribunal

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