

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD567/2007

MN116/2008

Against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr M. McGarry

heard this claim at Castlebar on 27th May 2008
2nd September 2008
3rd September 2008

Representation:

Claimant:

Mr Pat Flannery, SIPTU, Forster Court, Galway

Respondent(s) :

Ms. Margaret Pilkington, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

The director of services gave evidence on behalf of the respondent. The respondent operates a residential, respite and day services for adults with intellectual disabilities. The director of services confirmed the course of the claimant's employment with the respondent for the Tribunal.

The claimant commenced employment with the organisation as a temporary staff nurse in May 2001. The claimant's continuing absences caused concerns for his employers and he was referred to an Occupational Health Specialist whom he saw in November 2003. At this stage he was certified unfit for work for a month due to a hiatus hernia and post-traumatic stress disorder.

He was declared fit for work in January 2004 and returned to work. The director of services met with the claimant on his return to discuss what supports management could put in place to support him. At this meeting the claimant informed him that the post-traumatic stress disorder was as a result of when he had worked with the North Western Health Board (NWHB), Sligo Services, but the claimant would not discuss the details with him.

Following this meeting he had checked the claimant's personnel file and there was no record of the claimant's period of employment with the NWHB. He wrote to the claimant on the 9th March 2003 requesting information in respect of his position with the NWHB and also any agency work in England since March 2000. Within this letter he requested to meet the claimant on the 15th March 2004 to follow up on the support offered.

The claimant replied on the 11th March 2004 by letter saying for a number of legal reasons he would not be able to supply him with the information required and that he would not be available to meet with him on the 15th March 2004.

The claimant was out of work at this period. The director of services wrote to the claimant on the 12th March 2004 outlining that they had a duty of care to their clients and it was essential that they validated all employees previous work records. He requested the information again and asked the claimant for a convenient date to meet with him to discuss supports to improve his attendance. The claimant replied on the 16th March by letter informing him that there were High Court proceedings pending relating to the matter of his employment with the NWHB and he was seeking legal advice before agreeing to meet with him.

He wrote to the claimant on the 7th April 2004 saying that it was unacceptable for him to refuse to meet with his employer to discuss his attendances at work and asked for the information in respect of his employment with the NWHB. Adding that failure to meet with request may result in disciplinary proceeding being invoked.

He consulted with senior management and HR and considered disciplinary proceedings at this stage. He rang the claimant asking him to meet with him on the 21st April 2004 but the claimant refused. He wrote to the claimant on the 20th April saying that until the claimant met with him, he would not be rostered for duty. On receipt of this letter the claimant attended the meeting on the 21st April 2004.

The director of services, the assistant programme director, the claimant and the union branch secretary attended this meeting. The claimant's work attendance was discussed and he acknowledged that the claimant's attendance had improved since he last met with him. The claimant gave details of his previous employment but not his reason for leaving and reiterated that because of legal reasons he could not do so. His solicitor was unavailable at that time and he would have to seek legal advice. At the end of this meeting the claimant was asked to furnish the respondent with the reason for leaving and the person he reported to while working with the NWHB. On foot of this meeting he wrote to the NWHB for a reference in respect of the claimant.

On the 4th May 2004 the claimant provided details of the duration of his employment, and the manager who he reported to in the NWHB, stating that he was summarily dismissed from this employment. He also supplied details regarding his agency work in England.

Shortly after this the claimant went on sick leave from the 7th May 2004 until the 3rd October 2004.

The reference was received from the NWHB, which stated that the claimant had left their employment on his own instigation and they would not re employ, or recommend the claimant to another employer. The director of services sought clarification from HR and his line manager as to how to proceed.

He wrote to the claimant on the 29th September 2004 outlining the respondent's concerns, saying that the claimant would not be rostered for duty till the matter was investigated. He invited the claimant along with a representative of his choice to the investigation meeting scheduled to take place on the 4th October 2004. The claimant responded by letter on the 2nd October 2004 reiterating that all matters in relation to his tenure of employment with the NWHB were the subject of High Court proceedings, so he could not meet to discuss this with him. On foot of this letter he referred the matter on to HR for investigation.

The director of services confirmed that the HR officer wrote to the claimant on the 26th November 2004 informing him that he was off duty on full pay pending a full investigation of the matter referring the claimant to the terms of reference governing the investigation and also the grievance and disciplinary procedures. A letter dated the 2nd of December 2004 from the claimant's solicitor was received in response to this. This letter explained that it was not possible for the claimant to take part in the investigation due to the pending High Court proceedings.

On the 18th January 2005 the respondent's solicitors wrote to the claimant's solicitors stating that the respondent was not aware of the claimant's previous employment with the NWHB till February 2004 and putting them on notice that the investigation would proceed as set out in the Terms of Reference. The director of services explained that in the course of the meeting of the 21st April 2004 the claimant had said that it was not in his interest to disclose the fact that he had been employed by NWHB at the interview stage.

He confirmed that a letter was received from the claimant's solicitor in response to the above, in which it states that it was not accepted that the respondent was not aware of the claimant's previous employment with the NWHB. At this stage the director of services clarified that neither he nor any of his management team had any knowledge of the claimant's employment with the NWHB before February 2004. A letter issued from the respondents solicitor to the claimant's solicitors on the 26th January 2005 informing them that the investigation would proceed as planned. Another letter issued to the claimant's solicitors informing them that the investigation had commenced and requesting that the claimant attend for an interview on the 10th February 2004. A response dated the 3rd February 2005 was received from the claimant's solicitors stating that the claimant would not be attending the interview for reasons as set out previously.

On the 25th April 2005 the director of services wrote to the general manager outlining the investigation committee's findings and advising him that a disciplinary hearing be convened to determine the appropriate sanction for the claimant.

The director of services confirmed that a letter issued to the claimant on the 5th August 2006 from the regional manager stating that the claimant was not present at the disciplinary hearing of the same date. The disciplinary hearing found that there were four findings of misconduct and the results were to be forwarded to an assistant national director who held responsibility for stage 4 disciplinary decisions, which could include dismissal. The assistant national director communicated his decision to the claimant on the 6th December 2005 advising the claimant that his employment would be terminated on the 31st December 2005, however allowing the claimant to appeal the decision to the national director.

The claimant appealed this decision by letter informing the national director of his medical problems. On the 26th June 2006 the national director issued a letter to the respondents addressed to the claimant informing him that the allegation against him were proven but the original sanction was overturned and that the following sanctions would be imposed.

1. "That you are no longer entitled to avail of the sick leave provisions having regard to your unacceptable attendance record"
2. That you be issued with a final written warning to the effect that if you refuse to obey lawful and reasonable directions of management your employment may be terminated."

Also that the claimant was being referred to the Occupational Health Unit and depending on the outcome of this report he would be rostered for duty.

On the 30th June 2006 the claimant wrote to the acting director of services requesting that she refer him to the Occupational Health Department and also requesting a transfer from Mayo to HSE services in Sligo town. The director of services saw this letter on his return from annual leave. He outlined that at this time there were no arrangements for transfers within the HSE.

A letter of the 17th July 2006 to the acting director of services from the claimant was read into evidence, in which the claimant thanked her for granting him annual leave as per their telephone conversation of same date. The director of services explained that the acting director of services replied to this letter on the 18th August 2006 refuting granting his annual leave and requesting that the claimant in writing outline his unavailability to meet with management from the 30th August to 14th September and formally request his annual leave for this period. The claimant replied to this letter on the 20th August 2006 advising them that he would be out of the country from the 30th August 2006 to the 14th September 2006.

The claimant had been advised that the report from the Occupational Health Department was imminent and he would need to be available to meet with management. On the 24th August the programme director wrote to the claimant informing him that his request for annual leave was not approved, also advising him that an appointment would be set for a return to work meeting week commencing 28th August 2006. On the 25th August 2006 the claimant was informed by letter that his return to work meeting would take place on the 29th August 2006 at which he would be formally issued with his final written warning.

The claimant's union representative then contacted the management by phone and letter to say he would not be available to attend this meeting with the claimant and requested that the meeting be postponed. He was informed that the meeting would go ahead as scheduled. The claimant did not attend the meeting and as a result of this the director of services issued a letter requesting him to attend a disciplinary hearing on the 30th August 2006 at 10.00am. Two members of his staff handdelivered this letter to the claimant's home, during the course of the hearing there was contested evidence about the delivering of this letter by both parties. The claimant later submitted a letter of formal complaint regarding the delivery of this letter. The claimant replied on the same day by fax requesting that this meeting be postponed to a mutually acceptable time and venue. A second letter dated 29th August 2006 from the claimant delivered by mail in which he stated that he had passed the entire matter over to his union representative.

The director of services said he wrote to the general manager on the 30th August 2006 outlining the current disciplinary action involving the claimant. In this letter he explained

that one of the sanctions imposed on the claimant resulting from his previous disciplinary proceedings was that he had to comply with all reasonable requests from management which included attending meetings when requested. As the claimant had not attended the back to work meeting or the following disciplinary hearing, he recommended that the claimant be suspended without pay till further considerations of this situation were made. The director of services explained following the receipt of his letter the general manager passed the matter up to management and approval of the claimant's suspension without pay was not forthcoming.

On the 19th September 2006 the director of services wrote to the claimant outlining the findings made against him in the disciplinary procedures and reiterated the sanction imposed on him by the national director, requesting him to attend a return to work meeting on the 27th September 2006. The claimant replied on the 21st September requesting HSE staff transport to this meeting, as he was unable to drive due to ongoing medical problems. In response to this he wrote to the claimant informing him that management were not responsible for the organisation of attendance of staff at their workplace.

The return to work meeting took place on the 27th September 2006, in attendance were the claimant, his union representative, programme director and the director of services. At this meeting he read to the claimant the letter of the 19th September 2006 informing him of his final written warning. The claimant was rostered to work from 30th September 2006 and his hours were set out up to the 9th October 2006. It was explained to the claimant he would be returning to work with a full annual leave entitlement and leave was also allocated. At this meeting the claimant also withdrew his complaint regarding the hand delivery of the letter to his house.

The claimant returned to work as planned on the 30th September 2006, but only for a short period, he was absent on the 6th October and on the 17th October 2006 he went home sick. This was the last day the claimant attended work. The director of services explained that the claimant wrote to him on the 18th October 2006 invoking the grievance procedure as his original request for a transfer to Sligo within the HSE was turned down. He replied the next day setting up a grievance meeting for Wednesday 22nd October 2006.

On the 22nd October the claimant wrote to him again in which he stated that the Occupational Health doctor's report had made his return to duty conditional on him travelling by public transport, with a colleague or his wife, and as none of these were available he advised him that he would be unable to attend work until further notice. He replied to the claimant the following day stating that the Doctor had attached no conditions for the claimant's return to work and raising his concerns about his re-emerging absenteeism and that he had made himself unavailable to work. Within this letter he directed the claimant to attend for rostered duty on the 25th October and if he failed to do so the disciplinary procedure would be invoked. The claimant replied on the 24th October stating that he had written to the Doctor and stating that he the director of service had failed to acknowledge his eye problems and in which he invoked the grievance procedure.

The director of services explained that the occupational health doctor's original report had stated that the claimant was fit to return to his duties without restriction and could not support his request to transfer to Sligo because of his eye problems. On receipt of this letter from the claimant he wrote to the Local Health office manager outlining the claimant's attendance and stating that in his opinion the claimant had contravened the sanctions imposed on him in his final warning letter and recommended that he be suspended without pay till the matter was considered further. He explained that the Local Health office manager wrote to the assistant national director backing him

up and recommending the claimant's suspension.

A letter issued to the claimant on the 31st October 2006 from the assistant national director notifying him to attend a disciplinary hearing on the 15th November 2006, which was later rescheduled to the 29th November as the claimant's union representative was not available.

The minutes of the disciplinary were read in to evidence, the assistant national director HSE West, the HR manager, the claimant and his union representative attended. At this meeting the claimant said he considered that he had not been issued with a formal final written warning, the director of services explained that he had furnished the claimant with this letter at his back to work meeting,

The claimant grievance meeting in relation to the refusal of his transfer request to Sligo took place on the 19th October 2006. He along with the HR manager, the claimant and his union representative attended this meeting. At this meeting the claimant's union representative advised management that the claimant had difficulties in getting to work, that they had a GPs letter confirming same, and that the claimant had a disability and would consider referring his case to the Equality Tribunal. He also requested on the claimant's behalf another referral to the Occupational Health Unit and advised that they would not be attending the disciplinary hearing on the 15th November till all the claimant's issues were dealt with. The director of services explained that there was no transfer policy in place to facilitate the claimant's request, that he could apply by open competition to Sligo and that management would co-operate with any third party referral. He wrote to the claimant on the 10th November outlining the findings of the grievance meeting and confirming that the claimant would be referred to the Occupational Health Department.

The claimant was certified fully fit to carry out his duties by the Occupational Health Physician by letter on the 13th November 2006. The assistant national director HSE West wrote to the claimant on the 14th December 2006 informing him that he was dismissed from his employment outlining that he could appeal to a Dismissals Appeal Committee within fourteen days. The claimant's union submitted an appeal letter on his behalf in which they stated that the claimant was on certified sick leave at the time of the disciplinary hearing. The director of services said they were not processing these certificates they received during the disciplinary procedures. The Dismissals Appeal Committee upheld the decision to dismiss the claimant. The claimant submitted an Ad Misericordiam Appeal to the CEO who in turn upheld the original dismissal.

The director of services felt that the claimant was the architect of his own misfortune as he was given every opportunity and support to enable him to return to work.

Under cross examination the director of services confirmed that the claimant was employed as a temporary staff nurse but had accrued rights under the Part-time workers acts and was treated as full time permanent in relation to pensions, sick leave and annual leave. The claimant was referred to the Occupational Health Department in 2003 but cancelled the first two appointments. He reiterated that the first time he became aware of the claimant's previous employment with the NWHB was when he met with him in early 2004. He felt the claimant had a duty to disclose this employment and he as director of services had a duty of service to his clients to obtain the information surrounding this. He was sympathetic to the claimant's situation when he applied for the transfer, however there was no transfer policy in place.

When asked if the disciplinary procedure superseded the grievance procedure, as the claimant's representative said that the claimant's grievance procedure has still yet to be finalised, he replied by

saying he had no choice to invoke the disciplinary procedure and the decision to dismiss the claimant was taken at a higher level.

Next to give evidence on behalf of the respondent was the programme director who had been employed in this position since 1988. She was on the claimant's interview panel and confirmed that the claimant did not disclose his previous employment with the NWHB at this interview or on his curriculum vitae. She had contacted the NWHB for a reference in relation to the claimant when the director of services informed her of the previous employment.

She explained that the claimant had rang her on the 17th August 2006 in relation to holidays and she had told him that he would have to request these holidays, and was taken aback to receive a letter from the claimant thanking her for granting him annual leave. She responded to this letter in writing advising him that they were waiting on the report from the Occupational Health Department and that it would be unlikely that annual leave would be available to him at this time. The claimant replied by letter informing her that he would be out of the country from the 30th August to the 14th September 2006. She also had a phone conversation with him, in which he told her he was taking annual leave whether she liked it or not. She never received a formal written request for this leave from the claimant.

She informed the claimant by letter of the 24th August 2007 that his leave would not be granted.

The claimant's representative had made contact with her in relation to the claimant's return to work meeting on the 29th August 06, saying that he would be unavailable to accompany the claimant to this meeting and asking that it be re scheduled. A number of communications regarding this was exchanged between both parties. The claimant did not turn up for the back to work meeting on the 29th August 2006. As a result of this on the same day she along with a colleague was asked to hand deliver the notice of Disciplinary meeting to take place on the 30th August 2006 to the claimant's house. At the hearing there was contradictory evidence taken in relation to the delivery of this letter.

She had attended the claimant's return to work meeting and confirmed the minutes of same were correct.

Under cross-examination the programme manager was asked what the policy was in relation to annual leave while suspended with pay. She explained that there was no written policy in place, annual leave was accrued for the claimant within this period and it was not her gift to release the claimant from his responsibility to be available to meet with management.

Next to give evidence on behalf of the respondent was the assistant national director for the HSE West. He has been employed with the respondent since 1981 and is in his current role since 4th September 2006, which is when, he became involved in the claimant's case.

He considered the director of services letter of the 30th August 2008 in which he had recommended that the claimant be suspended without pay in the context of the final written warning and had disagreed with this recommendation.

Then on November 29th 2006 he had presided over the disciplinary hearing. He confirmed that the minutes of the meeting previously entered in evidence were accurate. At this meeting he referred to the sanctions imposed on the claimant as a result of his previous disciplinary procedures in his final written warning. This had been issued to the claimant but despite this at the meeting the claimant

had interjected saying he had not been issued with this final written warning. The claimant's union representative raised the issue of the provision of sick leave entitlements; in response he explained that the provisions of sick leave entitlements are discretionary.

The claimant took issue with the Occupational Health Department's report, he explained that the Occupational Health Department are an independent body of the HSE and their reports are accepted as such. He confirmed that the claimant as been certified fit for work but had continued to be absent. The claimant's union representative raised the issue of the grievance procedure and that the claimant was appealing this to the Equality Tribunal and suggested that the disciplinary procedures were premature because of this. The assistant national director said there is no provision in the process to stop one procedure while waiting for the other to finish.

The claimant had failed to perform his duties at work by not attending as a result of this he issued the claimant with a letter of dismissal on the 14th December 2006 allowing the claimant to appeal to the Dismissal Appeals Committee.

Under cross-examination he confirmed that the claimant was certified fit for work and that the claimant's transport difficulties were not the respondents problem. He said the grievance and disciplinary procedures were separate issues. He accepted that they had an obligation as employers to make allowances for employees with disabilities, but that the claimant had been certified fit to work.

Claimant's Case

The claimant gave evidence that he had worked with the HSE West three times over the course of his career before commencing with the NWHB in June 2000. He explained this employment was terminated on the 29th June 2000. During this employment he was working in a hostel in Sligo town when a drunken patient became aggressive and had come after him with a kitchen knife. He called the Gardai who arrested the patient and his manager sent him home after the incident. He had been off work since this incident up to around the 14th July 2000 when he met his manager who summarily dismissed him. He engaged a solicitor in the spring of 2002 and a High Court summons issued in 2003. The HSE West settled this case in July 2006, copy of agreement was submitted to Tribunal.

He was interviewed for a position with the respondent at which he did not disclose his previous employment with the NWHB. The reason being that he had previously applied for a health board job and was successful at the interview stage but did not receive an offer of employment.

He had no difficulties when he commenced employment with the respondent; he had received a fixed term contract in May 2001 and another in May 2004 and since then had received no other contract. He maintained that the director of services's predecessor had known about his difficulties in the NWHB. At the return to work meeting he had with the director of services in early 2004 he said he was referring to previous employment with the NWHB not his service in 2000. The director of services pursued this matter with him and as there were High Court proceedings in relation to this he felt that all matters should be directed through his solicitor.

In relation to his sick leave with the respondent, he explained he was diagnosed with post-traumatic stress disorder after the incident in Sligo this was compounded by the fact that his position had been terminated, in 2002 he had received an operation and since then has been on medication for

stomach problems. In early 2005 his visual impairment was diagnosed and this had resulted in over twenty visits to hospital.

As directed he attended the Occupational Health Department on 14th August 2006 he maintained he met with the doctor for about five minutes and that no medical exam of any sort took place. The doctor had told him he had reports sent to him from Sligo Hospital in relation to his eyes and ears conditions.

In relation to his request for annual leave in August 2007 he explained that a late honeymoon had been gifted to his wife and him, he had contacted the respondent a few weeks before hand and had spoken to the programme director who said he could have the annual leave. He requested a transfer to Sligo in July 2006 because he had been away from work for two years at the direction of his employers and during this time his eyesight and hearing had deteriorated and he had no colleagues to travel to work with. He received a reply telling him that there was no transfer policy in place.

When he returned to work in late September 2006, accompanied by his union representative he met with the director of services and the programme manager. At this meeting he was allocated a unit and informed who his immediate supervisor would be. He explained that his vision can change on a day-to-day basis and on the 17th October 2006 while in work he had difficulty with his vision. He spoke with his immediate supervisor who agreed that he should go and see the local doctor who gave him a sick cert which he passed on to his supervisor.

He invoked the grievance procedure in relation to his request for transfer but the outcome was that he was told there was no transfer policy in place and advised to apply for open competitions. At the disciplinary hearing he raised this issue again, he was dissatisfied with the Occupational Health Department's report and forwarded on certificates to them from his doctor and his wife's. He did not attend the Occupational Health Department after August 2006 so disagreed with their letter of the 13th November 2006 saying he was fit for work. He has made an application to the Equality Tribunal in relation to his transfer.

He outlined his difficulties in getting to work, he could not drive because of his eyesight, there was no public transport, no colleagues travelling in the same direction and his wife was not fit to drive. He was trying to get a relative to give him a lift he wrote to management to explained his difficulties, but management's view that it was his problem. He submitted a medical cert from his GP to management which outlined these transport difficulties.

Payment from the respondent ceased in November 2006 and he has not worked since then.

Under cross-examination he accepted that in the normal run of things and employee is obliged to turn up for work. He had omitted ten days of his employment from the curriculum vitae he had furnished the respondent on his application for staff nurse. He accepted that his employers had a duty to their vulnerable clients to ensure quality care and would have cause for concern if an employee had omitted employment details in their application. He stated that his standard of quality care had never been in question after three years when the respondent started making inquiries, and he had a duty to co-operate with the employer in normal circumstances but because of the advice given to him he could not.

He gave the respondent hand written details to the director of services but had omitted the details of his dismissal because of legal advice and refused to meet with him to discuss it. He explained that the reference received from the NWHB damaged him, if it had been before 2003 he might have

refuted it with his employer but because there were High Court proceedings at the time he could not. It put him in a difficult situation and he self protected himself with his curriculum vitae. It was put to him that his answer to the position was that the respondent should continue to employ him while he awaited the High Court outcome, he said he would not put it that way but reiterated that he had commenced employment with the respondent in May 2001 and had no problems till this issue arose in 2004. He did not give an account of the knife attack to the respondent in 2004. He did not accept that the respondent had not known of his previous service with the NWHB in 2000.

He did not attend the first investigation meeting in 2005 as he felt it would not be fair and impartial, as his previous experience with the Health service had been bad. He was surprised that he was dismissed at the end of this investigation and appealed to a national director and his dismissal was overturned. As part of his dismissal being overturned conditions were attached that he had to adhere to, he stated that to the best of his knowledge he did not avail of sick leave provisions and he tried to follow the second term in which he had to “obey lawful and reasonable directions of management” as best as he could.

It was put to him that in August 2006 he had been on full pay for two years and had not done a days work, this he said was a decision of the respondents. In explanation of his request for annual leave, while on suspension he was not aware of protocols for leave, he rang the programme manager and his recollection of that phone call and his understanding was that she had granted him annual leave. On receipt of the letter from the programme director requesting a letter from him to request this annual leave he replied by letter respectfully advising her he would be out of the country from 30th August to 14th September and would be happy for her to mark this time as annual leave. He also advised her that he would be available to meet with management up to this time and thereafter.

He did not attend his back to work meeting on the 29th August, as his union representative was not available to accompany him.

He wrote to the director of services on the 22nd October 2006 advising him that he would be unable to safely attend work until further notice, and said that Occupational Health Department had made his return to duty conditional upon him travelling to work by public transport, with a colleague, or with his wife. The Occupational Health Department’s report was put to him and he was asked as to where this was stated, he replied he did not accept anything in the report, he disputed the contents saying the doctor did refer to travel being difficult for him. He had made a request for his employer to provide him with transport but it was refused, he was aware of staff transport while working in another facility for the HSE in the 1980s. He felt that employers had an obligation to people with disabilities. He would have reported for duty if he was able to.

Since his dismissal he was in receipt of an invalidity benefit.

Determination

The Tribunal considers that the HSE acted reasonably and with best practise through out the course of the claimant’s employment. The respondent was fully entitled to enquire in to the circumstances leading to the claimant’s summary dismissal by the North Western Health Board. The claimant could easily have given sufficient details to satisfy the respondent without in any way prejudicing his High Court claim. Furthermore the claimant’s failure to disclose this employment in his initial

application, interview and curriculum vitae raised the employers concerns further.

The Tribunal accepts that the claimant pursued a claim against the North Western Health Board, which resulted in a settlement in his favour albeit without an admission of liability. In the circumstances while the initial decision to dismiss was justifiable, the decision of the National Director Primary to revoke the dismissal on strict conditions was more than fair to the claimant.

Unfortunately the claimant did not take full advantage of the opportunity given to him by this decision.

The Tribunal notes that the claimant took unauthorised annual leave and refused to attend a back to work meeting and disciplinary meeting in August 2006, but ultimately the Respondent took no action over this.

The claimant then refused to attend a back to work meeting on the 27th September 2006 unless transport was provided for him, but ultimately relented and attended this meeting on this date. He was given his final written warning and rostered for work commencing 30th September 2006. Prior to this the claimant had made a written request for a transfer to Sligo services which was initially refused and the claimant invoked a grievance procedure in respect of this refusal and a grievance meeting was set up for the 3rd November 2006.

The claimant returned to duty on the 30th September 2006 and was recorded on uncertified sick leave on the 6th October and left work sick on 17th October up to and including October 20th. Apparently all or part of this absence was certified. The claimant was due back on the 22nd October but faxed his employer on that date stating that he was unable to attend work until further notice due to his inability to obtain transport. CM sent the claimant a registered letter on the 23rd October directing him to return to work and threatening disciplinary procedures if he refused. By his reply he effectively refused to return to work and invoked the grievance procedure in respect of his medical problems and transport difficulties.

The claimant was suspended without pay and a disciplinary procedure commenced. A disciplinary hearing was held on the 29th November attended by the claimant and his union representative, convened by the Assistant National Director and a full hearing took place. On the 14th December 2006 the Assistant National Director communicated his decision to dismiss, this was confirmed on appeal and further at ad misericordiam appeal.

The claimant's grievance application was unsuccessful after a grievance meeting on the 12th November and he was notified of his further options, which included a referral to the Equality Tribunal. The Tribunal notes the claimant decided to refer his grievances to the Equality Tribunal and there was no evidence that this was done prior to his dismissal. The claimant argued that the disciplinary procedure should not have been completed pending the termination of his referral to the Equality Tribunal.

The Tribunal does not accept this proposition as the grievance and disciplinary procedures are clearly separate. The Tribunal notes that the claimant did not opt to bring a claim in relation to his dismissal to the Equality Tribunal.

The Tribunal noted the medical evidence produced and was satisfied the claimant was certified fit for all duties and the medical certificates of the claimant's doctors did not contradict this. The claimant therefore had no valid reason not to attend work as directed by his superiors and was in

clear breach of the terms of the written warning administered to him. In all circumstances the decision to dismiss was completely justified and the Tribunal dismisses the claimant's claim under both Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)