EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: **CASE NO.**
Employer UD420/2008

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

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. B. O'Carroll
Dr. A. Clune

heard this appeal at Galway on 10th December 2008

Representation:

Appellant(s): Mr. John Brennan, IBEC, West Regional Office, Ross House, Victoria Place, Galway

Respondent(s): Mr. Con Crowley B.L. instructed by Mr. Bryan C. Brophy, Sandys & Brophy, Solicitors, 6 Sea Road, Galway

This case came before the Tribunal by way of an appeal by the employer (*hereinafter referred to as the appellant*) against rights commissioner recommendation r-055780-ud-07 dated 11 April 2008.

The determination of the Tribunal was as follows:-

Appellant's case:

Dr., an occupational physician operates independently between employers and employees to give medical opinions. He confirmed that he examined the respondent on three occasions, 26 October 2006, 31 January 2007 and 7 June 2007. The medical examinations had resulted from the respondent being involved in a car accident, which had rendered him unconscious and had hospitalised him for three days. The injuries that the respondent had suffered as a result of the car accident included a fracture to his collarbone, neck strain and a fracture to his right eye socket. Because of the injuries, the respondent had complained of a blurring of his vision, confusion and dizziness.

Following the first medical examination, Dr. assessed that the respondent was totally unfit to return to work. On the fact that the respondent was attending an ophthalmology specialist because of his blurred vision and confusion, Dr. asked the respondent for a copy of that medical report. However, he never received a copy of same.

Dr.'s opinion after completion of the second medical examination was that the respondent remained unfit to return to work particularly because of his blurring of eyesight, double vision and disorientation. The respondent was still attending the ophthalmology specialist because of the fracture to his eye socket. At the second examination, Dr. requested copies of the ophthalmologist's medical report so as to be better able to assess the respondent's suitability for work.

During the final medical examination with Dr., it emerged that the respondent had missed one of the medical appointments with the ophthalmology specialist. Dr. impressed on the respondent the need for him to get the ophthalmology specialist's medical report, once same had been completed. Dr. also gave his medical opinion to the respondent that he remained unfit to return to work.

Following a discussion with the respondent's managing director (*hereinafter referred to as J*) and in reply to a request from him, Dr. wrote to J on 6 November 2007 detailing his medical opinion of the respondent. From memory, J had asked for the opinion because he wanted to know the fitness of the respondent to return to work. The opinion, tendered by letter on 6 November 2007 had been based on the last medical assessment conducted by Dr. on the respondent on 7 June 2007 and on nothing else. His assessment in November 2007 had been that the respondent was still not fit to return to work.

The respondent had been employed as a general operative with duties to include baggage handling, security, fire fighter, and Dr. confirmed that his job had certainly been a demanding one. As part of the examination, Dr. conducted three pre-medical tests to check for strength co-ordination.

At the last medical examination in June 2007, the respondent had said that he was improving and getting better. He was doing exercises such as cycling, swimming and going to the gym. Nonetheless, Dr. had assessed that the respondent remained unfit to return to work but, in his medical report, he recommended that the respondent's condition be reviewed in a further three months. Dr. confirmed that he did not review the medical reports of the ophthalmology specialist.

In cross-examination, Dr. confirmed that he had assessed the respondent to decide on his fitness to return to work. The medical opinion that he gave J in November 2007 had been based on his last medical examination of the respondent in June 2007. As well as the respondent's optical condition, if his double vision and dizziness had also not improved, the respondent would have remained unfit to return to his general duties.

In his last medical report, Dr. had recommended that the respondent be reviewed again in a further three months and this view had not changed. He was employed to offer medical advice and he expected that this advice would be followed.

The financial controller (*hereinafter referred to as L*) explained that she has been employed for eight years with the appellant and was involved in the monthly accounts and payroll. In her evidence, a record of the respondent's basic salary, overtime, out-of-hours overtime, bank holidaypay and allowances for 2005 and 2006 were opened to the Tribunal, and were a matter of fact. Thefigures for 2006 related to the period from January of that year up to the date of the respondent'saccident in April. The figures for overtime, out-of-hours overtime, bank

holiday pay and allowances were subject to fluctuation. L confirmed that the appellant operates a sick-pay policy,which was dependent on an employee's service with the company.

In cross-examination, L confirmed that the respondent's gross salary included overtime, out-of-hours overtime, bank holiday pay and allowances but these extras were not guaranteed, going forward and are contingent on working. The out-of-hours overtime – which might occur when the appellant was requested to remain open beyond its normal closing hour on 11.00pm – had reduced significantly in 2007.

When put to L that 33% of the respondent's gross salary in 2006 amounted to his overtime, she explained that the appellant's average overtime going forward for all employees at the respondent's grade amounted to 9% for 2005, 5% for 2006, 4% for 2007 and 3% for 2008. Despite receiving 33% of his gross salary as overtime in 2006, had the respondent been fit to return to work, he would had received less overtime because of the overall reductions in recent years. L confirmed that today, overtime does not exist.

The appellant's business increased between 2001 and 2005 and extra staff were recruited between 2005 and into 2007. This extra staff had an impact on overtime. No one had been made redundant but people had left of their own volition. Twenty one to twenty two people had been employed at the respondent's grade but this number is now down to nineteen. Redundancy negotiations were currently ongoing but no formal redundancy package had been agreed.

The aerodrome manager (*hereinafter referred to as G*) had twenty years service with the appellant. He had responsibility for the operations management of the fire services and for ramp operations. Eight line managers report to G and one of those was the respondent's manager (*hereinafter referred to as P*).

G confirmed that the respondent had been involved in a car accident in April 2006 and has not worked for the appellant since that time. The respondent had been employed as a general operator and was part of a team that provided fire-fighting services. The appellant would be unable to operate without a full complement of fire fighters. If anyone on the team was unavailable, a replacement had to be found in order to comply with regulations and for the appellant to operate. Compliance with the regulations was paramount and regular fire fighters cannot be used as a substitute for someone's unavailability. Fire fighters are highly trained by the appellant. When someone was unavailable, employees are rotated to provide cover. Because of the unavailability of the respondent, with the goodwill of staff, teams had been moved around and overtime had been implemented to provide cover on the roster.

G had met the respondent casually in the airport when he called to submit his weekly medical certificates. However, there had been no formal meeting. G had sent the respondent to Dr. for themedical examinations and had read the medical reports to ensure if the respondent could return medically fit to carry out his functions. The last medical report that he had received was from June2007 and the respondent had been medically unfit to return to work at that time. Of foot of this lastmedical report, G wrote to the respondent on 3 July 2007 terminating his employment with the appellant and enclosing the respondent's P45 form. (*A copy of this letter was opened to theTribunal*). In hindsight, A accepted that this letter was abrupt and could have been "written better".

After consulting with the respondent's manager, G made an "operational decision" to dismiss the respondent based on being short of staff. Because of the respondent's inability to return to work over a considerable period of time, a decision was made to recruit a replacement to fill this

vacancy. G could offer no reason as to why the appellant had not made personal contact with the respondent.

G confirmed that the respondent had been a member of the union. He also confirmed that an appeals process was contained within the appellant's grievance procedures. Such an appeal would be made to the managing director. To his knowledge, the respondent made no appeal.

G explained that the appellant had suffered a downturn in business. The category of fire fighters was down from six to five, the fire-fighting teams had been reduced by two and scheduled flights into the airport were down from sixteen to four. The redundancy package was being negotiated because of this downturn.

G concluded his direct evidence by confirming again that the abrupt letter terminating the respondent's employment could, with hindsight, have been "written better".

In cross-examination, G accepted that he could have met the respondent any week when he was submitting his sick certificates or he could have written to the respondent so as to advise him that his job was under threat. When put to him that following the submission of the last sick certificate, the respondent had returned home to find the letter of 3 July 2007 waiting for him terminating his employment, G agreed that this had been offensive.

G contended that as the respondent had been a shop steward, he would have represented others in the company and so would have been aware of the appellant's appeal procedures. He accepted that the letter of 3 July was not done properly and that he had not informed the respondent of the appeals procedures.

Dr. was employed by the appellant following the respondent's car accident to provide information in relation to the respondent's fitness to return to work. G had not waited the three months for a further medical review of the respondent as recommended in the medical report of 7 June 2007, but had made an operational decision. He had made this operational decision because the company were down in team numbers due to the absence to the respondent and his medical certificates were opened ended.

Replying to the Tribunal, G accepted that his letter of 3 July 2007 to the respondent contained no reasons as to why his employment was being terminated, and in hindsight, the letter could have been written better. However, the respondent could have contacted him to discover the reason for the termination of employment. G had asked P, to request the respondent come and see him. As the respondent had not come, G had made an operational decision. Despite the optimistic medical reports and the recommendation of a further medical review in three months, G had made the operational decision because others had to be rostered to cover the respondent's absence. Following the termination of the respondent's employment, a replacement had been recruited.

The managing director – J – had been in the service of the appellant since March 2007. He became aware of the termination of the employment of the respondent in July 2007. The termination of employment had been an operational decision made be the aerodrome manager. He had not received an internal appeal against this termination of employment from the respondent and first became aware of the termination on receipt of correspondence from the Labour Relations Commission. Within that correspondence was a reference that the respondent was fit to return to work, and this was the first time J became aware of the respondent's fitness to return.

The appellant had not objected to the Labour Relations Commission hearing and mediating in the

complaint of the respondent. On 19 September, J wrote to the respondent inviting him to a meeting. A reply dated 28 September was received from the respondent's legal representative requesting that all communications be directed through them. On 5 October, J wrote again, but thistime through the respondent's legal representative, offering the respondent his job back subject tohim being medically fit to return to work. The reply dated 1 November received from the respondent's legal representative advised that they were not permitting their client to undergo a further formal medical examination as letter dated 3 July 2007 had terminated their client's employment and the matter had now been referred to the Employment Appeals Tribunal. (*Copiesof all of these letters were opened to the Tribunal*).

On receipt of the letter of 1 November from the respondent's legal representative denying a further medical examination, J contacted Dr. for an update of the respondent's medical condition. The doctor's reply had been based on the previous medical examinations. The respondent had made a statement in his correspondence to the Labour Relations Commission that he was medically fit to return to work and J wanted the matter progressed. In line with normal practice, J had wanted a medical assessment of the respondent conducted by a medical doctor to confirm the respondent's fitness to return to work. J never received a medical certificate from the respondent confirming his fitness to return to work and only ever saw reference made to it in his correspondence to the Labour Relations Commission. The purpose of contacting Dr. was to establish the respondent's position in relation to his medical fitness to return to work based on the medical examination conducted by the doctor on the respondent in June 2007.

In cross-examination, J agreed that the letter of 3 July 2007, which dismissed the respondent, could have been done differently and there could have been better communication. He had no personal relationship with the respondent and G was effectively the respondent's boss who makes all day-to-day operational decisions, which was the norm. J did not accept however that the letter of 3 July, which had terminated the respondent's employment, had severely fractured the relationship between G and the respondent.

In the letter of 28 September, the respondent's legal representative had asked the appellant to identify issues and proposals the appellant wished to address with the respondent so as same could be considered. J contended that he had done this in his letter of 5 October when it was proposed that the respondent attend the company's medical doctor for a formal medical examination. On foot of a qualified independent medial assessment of being medically fit to return to work, the respondent would had been able to return. Dr. never received any medical reports of the respondent's other specialists. J confirmed that the appellant had never written to the respondent seeking these other medical reports but Dr., employed as a consultant on behalf of the appellant, had asked for them but had never received them. G had received Dr.'s own medial reports. J also confirmed that the respondent had submitted medical certificates while out sick, as he was obliged to do.

The appellant had not waited a further three months as recommended in Dr.'s final medical report to conduct another medial assessment of the respondent, but had made an operational decision on foot of the third medical report. J was aware that medical reports were expensive and confirmed that payment was not offered for them despite the respondent being in receipt of social welfare and not being able to afford them himself.

Replying to the Tribunal, J contended that the appellant had communicated with the respondent by sending him to a specialist to assess his medical fitness to return to work. The decision not to wait the recommended three months for a further medical assessment had been an operational decision. The urgency in making this operational decision had been because the company were facing in to a

second summer season without the respondent. The respondent had been out sick since April 2006. 2007 was their busiest year and August was their busiest month. There were candidates available to replace the respondent. In the view of J, the operational decision had been made due to the respondent's timeline of absence and the appellant's need to cover its services.

J confirmed that no medical certificate was received from the respondent certificating him as medically fit to return to work. Because of operational safety and the risks to the individual, colleagues and passengers in a challenging environment, it was not possible for the respondent to operate without being certified medically fit. Had the respondent failed to get certified as medically fit to return, there were no alternative positions available within the company because employees multi-task, all positions were filed, and the appellant only had finite resources.

Had the respondent been certified as medically fit to return to work, he world have been re-hired. It took six months to identify a suitable candidate to replace the respondent. This replacement was identified in November 2007. Had the respondent been medically fit to return to work, there would have been no vacancy and the respondent would have got his job back.

Respondent's case:

In his sworn evidence, the respondent confirmed that he commenced employment on 6 June 2001 after completing a period of three month's probation. He was trained to grade 1 fire fighter.

He had not been scheduled to work in April 2006, but had been scheduled to provide cover. He got a telephone call requiring him to come in to work and while on the way to work, he was involved in a car accident. As a result of the accident, the claimant sustained seat-belt injuries, neck strain, a broken collarbone and a broken eye socket. The appellant was made aware of the respondent's injuries and he attended his own doctor. He received five to six weeks' sick pay from the appellant. He submitted weekly sick certificates to the appellant. These were collected from the doctor and personally delivered to the airport by the respondent. While visiting the airport to submit his sick certificates, the respondent met with people who he knew there.

The respondent was referred to Dr. by the appellant and in conversation, Dr. had told the respondent that his condition was improving. However, because of his broken eye socket, the respondent suffered from double vision so visits to an ophthalmology specialist were required. As far as the respondent was aware, Dr. knew of his visits to the ophthalmology specialist. The respondent had missed one of his eye appointments in April. Because of the vomiting bug, he had been told to stay away from the hospital where the eye appointment was to be conducted.

Despite his efforts to recover from his injuries, the respondent was disappointed not to be able to return to work. However, he did not feel that his position was under threat, particularly in 2006 and by June 2007, his condition had much improved.

The respondent met G at the airport one week prior to his dismissal and they had exchanged pleasantries. The respondent had been there to submit his weekly sick certificate. They had spoken and G had asked if he – the respondent – was doing well, but his position at the airport was not discussed. The respondent had been aggasted and shocked to receive the letter of dismissal and did not know what to do. He had received no warnings, verbal or otherwise, that his position could be untenable or was under review, or because of his continuing absence his position might be terminated. He sought legal advice and his unfair dismissals claim was initiated.

The respondent did not consider that he had been the subject of a disciplinary process, nor had it

ever been introduced to him that the termination of his employment was part of a disciplinary procedure. He had no formal union training. He had not considered making an internal appeal against the decision to dismiss because he was not aware of the appeals process. He elected to exercise his right of appeal through the avenue of the rights commissioners service.

The respondent was invited to a meeting with J and G. He was not familiar with J and he was not very positive about such a meeting because, despite his injuries, G had not been very empathic with him on the couple of occasions that they had met during the early stages of his injuries. Also, the letter of dismissal from G had fragmented their relationship.

The respondent confirmed that he never received a medical report in relation to his eyes and that same did not exist. It had been his octomolist specialist who had told him that he was fit to return to work but at that stage, the appellant had dismissed him. On hearing that he had been dismissed, the ophthalmology specialist had said that he could surely appeal.

The respondent had financial obligations. He confirmed that out-of-hours overtime had been regular and he had made himself available for same. He also confirmed his earnings from 2005 from the appellant.

In cross-examination, the respondent confirmed that at the last medical examination with Dr., he had been told that he was not fully fit to return to work but was well on the way. The respondent was still suffering from some residual eye problems at that stage. He had missed an eye appointment in April. The respondent agreed that Dr. had asked for a copy of the eye report so as to be able to assess the respondent's fitness to return to work, but this had been mentioned in passing, and Dr. had not pushed for it. He also agreed that G had said that the eye report was important. However, no eye report or medical exists either from the ophthalmology specialist or from the respondent's doctor. It was only verbally that the respondent knew that his eye difficulties had been resolved. When put to the respondent that the first the appellant knew that he was medically fit to return to work was in the correspondence from the Labour Relations Commission, the respondent said that he had told P in August when he met him accidentally at a shopping centre. P therefore knew the position and he could have told G.

The respondent agreed that J had offered him the opportunity of re-engagement with the appellant, subject to a medical examination. When asked what was wrong with the request for this medical examination, the respondent explained that on 3 October, he had been injured in another car accident suffering a frozen shoulder and so he would not have passed such a medical examination. When pressed further as to why he had refused to undergo the medical examination in October or November, the respondent confirmed that it had been because of the injuries sustained in the second car accident and because of the breakdown in the relationship between himself and the appellant, and the latter was the real reason for not going for a further medical. It was submitted to the Tribunal that it had been the respondent's legal representative who had refused to have the respondent undergo this medical examination but this submission was countered with the argument that the legal representative had acted on the instruction of his client – the respondent.

The respondent confirmed that he had been a union shop steward in the past, had represented colleagues and workers and had met with union branch officials. It was put to the respondent that because of his union experience, he would have been familiar with internal appeals procedures. In reply, the respondent said that the letter of dismissal had not offered him an avenue of appeal. He had first contacted C.I.C. who had advised him to seek legal representation and when he subsequently went to his union, they declined to represent him because of the involvement of a legal representative. The respondent confirmed that he had not lodged an internal appeal against

his dismissal.

The respondent had no issues such as bullying or harassment with G prior to his dismissal. Their relationship had fractured following the letter terminating his employment.

The respondent was examined on his financial loss to date. He agreed with his earning figures for 2005 and 2006, which were presented to the Tribunal by L. The respondent had been in receipt of disability allowance and since August 2008, he has been on job seekers allowance. He had attempted to secure alternative employment in places where he had previously worked but without success.

Replying to the Tribunal, the respondent said that he had he had not really told the appellant about the second accident, the result of which would have prevented him passing the medical examination because his position had been filled and he did not have a job to return to.

Closing statements:

Counsel for the respondent stated that, effectively, the basis of the appellant's appeal was on the excessiveness of the award made to the respondent by the rights commissioner. However, it was for the appellant to satisfy the Tribunal as to the reasonableness of its actions.

The respondent was aware of his avenues of appeal and was not debarred from the avenue of the Labour Relations Commission or the Employment Appeals Tribunal. The dismissal had been traumatic for the respondent and the appellant should have notified him of the internal appeals procedures. The appellant cannot now rely on the ground that the respondent did not exercise an internal procedure to justify their actions.

It was unfortunate that the respondent was involved in a second car accident, which resulted in him sustaining further, though minor injuries.

The appellant had acknowledged that they had not handled the dismissal of the respondent well and that the letter terminating his employment could have read better. The respondent had been on disability from April 2006. He had been submitting weekly sick certificates and had gone for medical examinations. The medical reports had shown that the respondent was making a recovery and so he should have been allowed back to work once medically fit. Accordingly, the Tribunal must make an adequate financial award to the respondent.

The appellant's representative stated that if the respondent had successfully passed his medical examination certifying fit to return to work, he would have been re-hired. However, no medical evidence was produced to show that the respondent was medically fit to return to work, except the evidence of a conversation.

There were shortcomings in the way the matter was handled by the appellant. However, in looking to the remedy of compensation, the Tribunal must look to the contribution made by the respondent and the efforts he made to mitigate his loss.

The appellant's representative contended that the respondent rejected a request to have his medical fitness to return to work assessed because of the second car accident. However, it was unreasonable of him to turn down this request. His involvement in this second accident had only now come to light before the Tribunal and the keeping of this information to himself was not the actions of a reasonable person. The appellant had tried to mend fences by their offer to have the

respondent return to work.

Citing the case of O'Meara –v– AIPB (Nenagh) Limited (*Ud1099/1993*), the appellant's representative highlighted that the respondent had been on disability until August 2008 and so was not fit or to return to work. To have suffered financial loss, a person must have been fit and available to work and the respondent was not fit or available until August 2008. Accordingly, if theTribunal were to find that the appellant had unfairly dismissed the respondent, a nil award shouldbe made on the two grounds of mitigation and disability.

Determination:

Having carefully considered all of the evidence adduced, the Tribunal is of the view that the appellant did not follow any procedures in effecting the dismissal of the respondent. The respondent's dismissal was effected while the further medical review, which had been proposed by the occupational physical who had been engaged by the appellant, was still pending. This proposed medical review of the respondent never actually took place. The dismissal was effected in circumstances where the respondent was not informed of the reasons for his dismissal, nor was any appeals procedure against this dismissal decision afforded to him. The tenor of the applicant's evidence was that an operational decision had been made to dismiss the respondent. For these reasons, the Tribunal is of the view that the lack of procedures in terminating the respondent's employment makes the dismissal of the respondent unfair.

The Tribunal feels that as the respondent was not medically fit and available to return to work until August 2008, he did not suffer significant financial loss. In this respect, the provisions of the case of O'Meara –v– A.I.B.P. (Nenagh) Limited were of some assistance to the Tribunal.

Considering all the factors, the Tribunal feels that the decision to effect the respondent's dismissal was vitiated by procedural unfairness. In the light of his unavailability to return to work until August 2008, the Tribunal varies the recommendation of the rights commissioners, and awards the respondent compensation in the sum of €12,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)