

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE - *claimant*

**CASE NO.**  
UD258/2009  
RP226/2009

against

EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M Gilvarry

Members: Mr D Morrison  
Ms R Kerrigan

heard this claim at Letterkenny on 25th June 2009, 1st October 2009 and 2nd October 2009

#### **Representation:**

Claimant(s): Mr. Seamus Gunn, McCloughan Gunn & Co, Solicitors, The Mall, Ramelton,  
Letterkenny, Co Donegal

Respondent(s): Mr. Anthony Kerr BL instructed by:  
Ms Lorraine Williams and Mr Charles Wallace, Chief State Solicitors Office,  
State and European, Litigation Section, Ormond House, Little Ship St, Dublin 2

The determination of the Tribunal was as follows: -

#### **Respondent's Case:**

A Higher Executive Officer (HEO) in the Civilian Employee Section gave evidence. A letter dated November 25<sup>th</sup> 2008 from the claimant to a local Minister, stating there were differences between himself and the claimant, was put to the witness. He stated there were no differences between them but admitted he had received a call from the claimant in the past regarding alleged bullying by a colleague against him.

In July 2008 he received notification from the Athlone barracks, which had been informed by the Barracks Foreman of Works (BFW), that the claimant was absent. He wrote to the claimant on July 15<sup>th</sup> 2008 informing him he was to attend a disciplinary meeting on July 29<sup>th</sup> 2008 in Athlone, as he had been absent without cause on two occasions within a 12-month period, which was a serious breach in the terms of his employment. These periods were September 27<sup>th</sup> 2007 to October 18<sup>th</sup> 2007 and June 16<sup>th</sup> 2008 to July 1<sup>st</sup> 2008. A medical certificate was submitted into evidence stating

the claimant was fit to return from a period of sick leave on June 16<sup>th</sup> 2008. The claimant failed to attend the meeting. The witness emailed a friend and counterpart in another government Department to ask his advice on the matter. The following day he wrote to the claimant informing him the department would make a decision as to whether disciplinary action should be taken and what form that would be.

On August 8<sup>th</sup> 2008 he wrote to his Assistant Principal, the Human Resources Manager and the Assistant Secretary of his department informing them of the matter. At the time there was no knowledge that on budget day, October 14<sup>th</sup> 2008, the closure of the barracks would be announced.

On August 13<sup>th</sup> 2008 he wrote to the claimant again seeking an explanation for his absences without cause and informing him if he did not reply by September 5<sup>th</sup> 2008 a recommendation would be made to the Minister to dismiss him. This deadline was further extended September 19<sup>th</sup>. When the witness was informed that the claimant had returned to work he requested to meet him.

A meeting was held in Athlone on October 20<sup>th</sup> 2008. The Commandant also attended. The claimant was asked if he required a representative, he replied that he was happy to continue alone. He was again reminded his job was in jeopardy. The meeting broke for 5 minutes and resumed for an hour. The witness and the Commandant discussed the matter at length and it was decided to recommend to the Minister to dismiss the claimant.

The Commandant of the barracks gave evidence that he spoke to the claimant in 2007 regarding his absence, from 27 September 2007 to 18<sup>th</sup> October 2007, after a period of annual leave. The Commandant recommended to the HEO that the claimant be disciplined, but on that occasion he was told that no disciplinary sanction would be issued to the claimant.

The Commandant agreed with the previous witness's account of the meeting of the 20<sup>th</sup> October 2008. The claimant had given very short answers and did not fully engage in the process. The claimant had no medical certificate for his continued absence after the 16<sup>th</sup> June 2008.

The Commandant contended that sanctions other than dismissal were considered, but were considered inappropriate, as the claimant did not acknowledge his wrongdoing or indicate that it would not happen again. The claimant did not make a plea for his job or for favourable consideration.

During cross-examination the witness stated that it was always necessary to seek prior permission before taking annual leave. At the barracks where the claimant worked written applications were not required in the case of a few days leave. The witness could not understand how the claimant considered that there would be no problem taking unauthorised leave considering their conversation in November 2007. The claimant gave no explanation for why he did not contact anyone during his absence.

The witness contended that other sanctions, such as warnings or suspension with or without pay, were considered. They did not consider transfer or demotion a possibility in this case. When the witness met the claimant in November 2008 he told him that it was not necessary for him to attend work during his notice period. The claimant was paid his notice in advance.

The Barrack Foreman of Works gave evidence that he commenced that role in 2006 and retired in February 2009. He kept a record of all leave and forwarded the leave sheet to Athlone every week. Normally employees sought leave in advance, but occasionally might phone and ask for a couple of days leave. He would check if the employee had the leave allowance available. Normally the leave

was granted. He could not recall the claimant contacting him to ask to take leave between the 16<sup>th</sup> June and 1<sup>st</sup> July 2008.

After the claimant's 2007 absence the witness advised him to write an explanation of his absence. He gave him a table to sit at and an envelope to post the letter.

In 2008, upon receiving the letter of the 15<sup>th</sup> July 2008, the claimant told the witness that he did not intend going to the disciplinary meeting as it was up to them to come and see him. The claimant said he wasn't getting paid for the time off so 'what was the big deal?' The witness asked him to reconsider, but the claimant did not respond. He did not recall the claimant saying he was taking the time as annual leave. The witness had no further involvement.

The witness stated that it wasn't his experience that staff would be offered to assign days off as sick leave. He agreed that a couple of individuals had a high rate of sick leave other than the claimant and that they had qualified for the voluntary early retirement scheme.

The claimant did not contact the witness prior to the 16<sup>th</sup> July 2008 seeking annual leave or self-certified sick leave.

### **Claimant's Case:**

The claimant's case was that while he had had discussions with the current and previous commandants about absenteeism he had never been given a warning. He met the current commandant in late 2007 concerning the late return from a holiday in Canada, due to his father-in-law's illness. The claimant had not contacted the barracks to say that he would be returning late. On his return he was asked to provide a written explanation for his absence, which he did. Previous meetings occurred when the commandant came to the barracks and spoke to a number of employees individually, including the claimant, about absenteeism.

The claimant contended that the procedure at the barracks of granting annual leave to civilian employees was slack, and that he did not specify the length of time he would be away for. The claimant contended that it was normal to take a couple of days off and have it put down as sick leave.

In 2008 the claimant went on certified sick leave due to back pain from 1<sup>st</sup> April 2008 until 15<sup>th</sup> June 2008. The claimant provided a certificate dated 13<sup>th</sup> June 2008, stating that he was fit to return to work on Monday 16<sup>th</sup> June 2008. The claimant decided not to return on the 16<sup>th</sup> June as he continued to feel unwell and decided he would take the time as annual leave, however, he not contact anyone in work to let them know this. The claimant returned to work on 1<sup>st</sup> July 2008 and was told by the BFW that he had been marked absent for the previous two weeks. The claimant decided that, as he had been marked absent and was not paid for the two weeks, he would keep his annual leave and use it later, which he did.

The claimant was asked to attend a disciplinary meeting on 29<sup>th</sup> July 2008. The claimant decided not to attend the meeting, as it was in Athlone and he hadn't been paid for the two weeks. He told the BFW that they could come to him if they wanted to speak to him, and that he had nothing more to say other than what he had said to the BFW, which was that he hadn't felt well enough to return and decided to take more time off. He understood that his job was in jeopardy as this was stated in the letter inviting him to the meeting.

In 2005 the claimant was concerned for a colleague who told him he was suicidal due to being bullied by another member of staff. The claimant phoned the personnel department and spoke to the HEO, who said he would look into it. However, the claimant considered that nothing was done about it as the staff member remained in his place. The colleague remained in his employment. The claimant believed that HEO had a vendetta against him due to his phone call in 2005 and this

was the reason that he was dismissed.

The claimant was called to a further meeting in Athlone on October 2008, which he attended alone. The claimant agreed that he told HEO and the Commandant that he did not know why he had taken the extra time off or why he had not phoned.

The claimant was issued with eight weeks' notice on 28<sup>th</sup> November 2008. He met the Commandant who told him that he was being dismissed and that he would not be required to work out his eight weeks' notice. The claimant decided that he would come in to work for his notice period. When the BFW told staff that HEO and the Commandant were coming to the barracks on 8<sup>th</sup> January 2009, to discuss the voluntary early retirement scheme being offered, he told the claimant that he didn't think it involved the claimant and so he didn't attend on that day. The claimant worked the rest of his notice until his employment ceased on 23<sup>rd</sup> January 2009. The claimant contends that the dismissal was unfair and that if any other disciplinary sanction had been applied he would have been eligible for voluntary early retirement scheme on offer. Evidence of loss was given.

**Determination:**

In this case the circumstances leading to the claimant's dismissal were not to a large degree, in dispute. The claimant felt that there was animus or ill will directed towards him by HEO, and felt that this was the reason behind his dismissal. The Tribunal preferred the evidence of the HEO in this regard, and accepted that he had no animosity towards the claimant, and that there were no grounds for the claimant's allegations to the contrary.

While the claimant's absence from work without authority was unacceptable, and his conduct leading up to his dismissal was very unwise and merited disciplinary sanction, The Tribunal considers that the dismissal was unfair, as it was excessive to impose a penalty of dismissal on the claimant for what was effectively his first offence under the disciplinary code.

Both parties accepted that in the event of the Tribunal finding in favour of the Claimant, that the appropriate remedy was compensation, and that the loss involved was the claimant's loss in being unable to avail of the voluntary early retirement scheme. Bearing in mind the claimant still retains the right to his lump sum at 65 years of age and to payment of pension from that age, the Tribunal measures the claimant's loss at €34,000.00.

However, while the Tribunal considers the dismissal unfair, the claimant through his conduct contributed to his own dismissal and the Tribunal assesses that contribution at 20% and accordingly awards the claimant €27,200.00 (twenty-seven thousand, two hundred euro).

The Tribunal finds that there is no case for redundancy and dismisses the claim under the Redundancy Payments Acts, 1967 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)