

## **EMPLOYMENT APPEALS TRIBUNAL**

APPEAL(S) OF:  
EMPLOYER – appellant

CASE NO.  
UD49/2010

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

EMPLOYEE – respondent

v  
EMPLOYER

under

### **UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms M Levey BL

Members: Mr R Prole  
Mr S O'Donnell

heard this appeal at Dublin on 12th April 2010

Representation:

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Appellant(s): In person

Respondent(s): Ms Barbara Mebtouche  
Triana, Independent Advice & Information Bureau  
13 Store Street, Dublin 1

This case came before the Tribunal by way of an employer appealing the recommendation of a Rights Commissioner ref: (r-069769-ud-08/EH).

The determination of the Tribunal was as follows:

Appellant's Case:

The general manager of the respondent company, a hotel, gave evidence that the respondent (hereafter referred to as the employee) was dismissed for abusing the company annual leave policy.

The employee submitted a holiday request form requesting 21 days holidays. This was refused, as 16 days was the maximum allowed at any given time. The employee amended his request to 16 days and this was granted.

Shortly before the employee was expected to return from his holidays the hotel received a fax, on August 13<sup>th</sup> 2008, from the airline the employee was flying with. It stated that the employee's flight had been cancelled and that the next available flight was five days later, the date the employee had originally requested to return on. The general manager believed that this was too much of a coincidence. When the employee returned the general manager called him to a meeting and told him he was dismissed.

The general manager contended that the company's policy was set out in the employee handbook which was available to staff in the kitchen of the hotel. The general manager did not produce the employee handbook or the employee's contract of employment.

During cross-examination the general manager stated that there had been no investigation as there was no need. He did not advise the employee that he could bring a representative with him to the meeting or that he could appeal the decision.

The head chef gave evidence that he told the employee about the maximum holiday period he could take when he originally applied for 21 days leave. The employee re-submitted his application and asked him what the penalty was for exceeding the 16 days. The head chef told him that the penalty was dismissal. When the employee did not return to work as scheduled the head chef and general manager made a joint decision to dismiss him.

During cross-examination the witness gave evidence that he had not received the fax personally, but he had received a phone call from a representative of the airline who told him that the employee's flight had been cancelled. He tried to phone the number back, but he could not get through and believed that the number had been disconnected. The decision to dismiss was made on the 13<sup>th</sup> August 2008, prior to the employee's return.

#### Respondent's Case:

The employee gave evidence that when he found out that his flight had been cancelled he asked the airline to phone and fax his employer.

During cross-examination the employee agreed that he had asked what the penalty was for exceeding 16 days leave. He did not book a different flight as it was August and therefore too expensive. He was also paying to bring his sister to Ireland for a holiday. He did not go to another airport as the nearest was 400 kilometres away. He did not ring the hotel himself. The airline phoned for him and told him that everything was fine.

#### Determination:

Evidence was given by the general manager regarding the employee's application for holidays and what he had been told about the length of time he could take. He also gave evidence that on the day the employee returned he met him and dismissed him for not returning on the date he was due to return. The general manager conceded that the company received a fax from the airline prior to the employee returning stating that his flight had been cancelled.

Even if it was too coincidental that the employee did not return until the date he had originally requested he was not afforded an opportunity to explain the situation. The employer deemed his absence as a deliberate act, rather than it being caused by the absence of a flight, and the decision to

dismiss was made on the day the employee was due back and before he had an opportunity to state his case.

The Tribunal finds that the dismissal was procedurally unfair, but varies the amount of compensation awarded by the Rights Commissioner (ref: r-069769-ud-08/EH) under the Unfair Dismissals Acts, 1977 to 2007, to €2,500.00 (two thousand five hundred euro) on the evidence that the employee was out of work for six weeks after the dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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