EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.

EMPLOYEE UD1902/2009

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. W. O'Carroll
Mr. A. Butler

heard this claim at Ennis on 24th February 2010
and 20th May 2010

Representation:

Claimant(s): Ms. Mary O'Donnell, S.I.P.T.U., Shannon Industrial Estate, Shannon, Co Clare

Respondent(s): Mr. Niall Beirne BL instructed by Mr. John Dunne, Matheson Ormsby Prentice, Solicitors, 70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:-

Summary of the Evidence

The respondent is involved in the aviation business. It overhauls and repairs engine parts. It had around 185 employees. In 1997 the claimant joined the respondent. He worked as a repair processor on one of the respondent's combustion teams doing a number of tasks in the repair ofengines. The combustion teams work a two-cycle shift, the day shift runs from 7.30am to 4.00 pmand the evening shift from 4.00pm to 11.00 pomp Monday to Thursday with a slight variation inthese hours on Fridays and both shifts include a 30 minute paid lunch break. The supervisor (SV)of these two ten-men teams only works during the day and finishes around 5.00 p.m. or 6.00 p.m.The respondent's case is that the claimant was taking extended unauthorised and unrecorded lunchbreaks.

The respondent has a sign-in log at reception, which employees must sign when entering or leaving the premises. This log is used to establish evacuation in any fire emergency. There is also a clock-in system by swipe card on the shop floor.

Most employees have their meal break in the canteen; employees wishing to go home or leave the plant during the break must notify their manager/team leader and must sign the log at reception. There are two main entry and exit points: one at the front of the plant and one at the side as well as fire emergency exits which latter should only to be used for emergencies; however according to the claimant's supervisor (SV) employees would occasionally use the emergency exit to enter and exit the premises. The car parks are at the front and side of the plant. The claimant was on the safety committee. The respondent takes health and safety very seriously.

In late June 2008 two processors informed SV in confidence that for quite some time the claimant had been leaving during the evening shift and sometimes remaining away for more than one or two hours. SV did not deal with the complaint himself because the claimant was part of a small team, he did not know if the complaint was based on fact, he wanted to keep a workable environment and he was not sure how to proceed so he informed the HR manager (HRM). It was HRM's evidence that SV informed her that an employee on one of the combustion teams was leaving work without the authorisation, that he believed that it might be the claimant and that he might be using the a fire exit door to leave and return. HRM undertook to look into it.

HRM examined the respondent's clock-in system and then the logs at reception but found no evidence supporting the allegation. Over the following several weeks she looked at the footage onthe respondent's security cameras, first examining those on the front and side doors, later those onthe gates and then in the side car park. Eventually she observed that, during the night shift, the claimant was leaving in one car and returning in another and that he was using the fire exit for theteam at the back end of the facility even though his team was stationed mid-floor. The claimant wasonly taking the extended breaks during the night shift. HRM had completed this by mid-August. She did not call in the claimant at that stage because footage of the claimant coming in and goingout of the premises was grainy and she did not know for sure if it was the claimant. By end of Julyshe knew that the pattern was persistent and she wanted to get back up information. The claimanthad not recorded these absences in the log at reception or on the clock in system and accordingly hehad been paid in respect of those hours.

In or around 21 August HRM engaged the services of a private investigator (PI) to clarify what was happening. PI observed the claimant between 1 to 5 September 2008 and submitted his report to the respondent in November 2008. The report corroborated HRM's findings. The CCTV footage showed that between 9 June and 3 October 2008 the claimant's unauthorised absences amounted to 34 hours and 19 minutes. HRM was on holidays for two weeks in October. In November she received PI's report. She gave the IT manager the dates and times of the absences and asked him to put the information together in disc form. On 10 December HRM received the surveillance DVD from PI and on 11 December she received the DVD from the IT manager.

SV had a performance review meeting with the claimant in September 2008 in which the claimant was given a rating of "excellent" for timekeeping. HRM signed the performance review form although aware of the claimant's unauthorised absences. It was the respondent's evidence that therehad been little communication between SV and HRM about the problem between June and the dateof the review. The claimant's absences were not addressed during the meeting. SV's position was that the review covered the year 28 March 2007 to 27 March 2008, that he only had access to theclock-in records and he did not have the findings of the investigation available to him at the time ofthe review although had made some enquiries of HRM as to it.

HRM and the respondent's operations manager (OM) met with the claimant and his shop steward

(TU) on 12 December 2008, notified him of its findings, informed them that it was invoking its disciplinary procedures and suspended him on pay. In a letter of even date to the claimant HRM informed him that the respondent considered these matters to be of the utmost seriousness, that a disciplinary meeting would be held on 18 December and that it could result in a disciplinary sanction up to and including dismissal. Copies of the evidence collected by the respondent were enclosed with the letter.

The same people were in attendance at the disciplinary meeting on 18 December 2008. The claimant read from a prepared statement. There was a dispute between the parties as to whether the claimant had apologised for his wrongdoing and whether he had offered to reimburse the respondent the money. The claimant did not dispute that he had been leaving the respondent's premises but offered the explanation that he had had to go home to help with his family. He had not asked for the time off because he had been refused parental leave in May 2007, when he needed time off to help at home because of his mother-in-law's illness and the birth of their second baby in July 2007. The respondent's position was that while it did not suit it to accede to the claimant's request for every Friday off in August and September in 2007 it had offered him a number of alternatives at the time such as decreasing the block leave from periods of six to four weeks, taking annual leave days as needed, using banked flexitime or going into negative flexitime but the claimant did not opt for any of these. The respondent's notes of the disciplinary meeting state: "[The claimant] said he took no time off work due to his personal problem. There was chaos at home and everything was getting on top of him." The claimant drew attention to his hitherto flexibility with the company including working in Germany, doing overtime, working on training projects and training others and asked the respondent to take these into consideration. In his statement he explained that the reason for driving two different cars was that his wife drove the more comfortable one and when it was available to him he used it.

When HRM questioned the reason for his two-and-three-quarter hour absence on 21 August 2008, an evening when his soccer team had a match, and he had returned to the plant with a towel over his shoulders, the claimant could not remember the occasion. The claimant agreed at the disciplinary hearing that SV was accommodating as regards time off and had accommodated him in the past.

TU raised issue with the respondent's using CCTV to monitor an employee. The respondent's position is that the respondent does not generally use it for such purpose but it had wanted to find out what had happening on the night shift. On the rare occasions when it had been used by the respondent it was to monitor employees in relation to personal injuries claims against the company.

HRM attributed the long delay in confronting the claimant about his wrongdoing to the large amount of data she had to build up, scrutinising hours of footage for absences which were occurring every second week while the claimant was on the late shift. She wanted to ascertain whether the unauthorised absences were short lived or part of an ongoing pattern. The respondent did not know whether the absences had been occurring before June.

Following the disciplinary hearing the respondent considered the matter. It noted that the claimant was taking the unauthorised extended absences during the late shift, which was unsupervised. The respondent and SV had been accommodating and flexible in respect of the claimant's requests for changes in shift hours and time off and accordingly it did not find his reason for taking unauthorised extended breaks satisfactory. In accepting payment for hours not worked, the claimant was defrauding the company, which behaviour amounted to gross misconduct warranting dismissal and the respondent had lost its trust in the claimant. By letter of 15 January 2009 the claimant was

notified of his dismissal. HRM's evidence to the Tribunal was that the main reasons for her decision to dismiss the claimant were: the claimant's failure to give a satisfactory reason for his failure to ask for the time off, his failure to apologise or show any remorse or contrition for his behaviour as well as his failure to offer to compensate the respondent for the monies paid to him in respect of hours not worked as. The respondent's position was that it would have shown leniency had the wrongdoing occurred over a short period of time.

The claimant appealed to a committee consisting of three members of management. The financial controller (FC) was the claimant's choice on the committee. The claimant's representative, an official (OU) from his trade union, did not allow him to speak at the appeal hearing and she answered on his behalf. The grounds of appeal were that the punishment was too harsh, procedures were defective in that the process took too long and that the issue had not been addressed during the claimant's performance review. The committee felt that in light of the detail and complexity involved in the information gathering that it was understandable that the investigation took so long. The committee found it acceptable that the misconduct was not addressed at the claimant's annual review because HRM had not confirmed it to SV by the time of the review. The committee found dismissal to be an appropriate sanction as the respondent had lost trust in the claimant. FC's evidence was that not being able to talk to the claimant during the appeal hearing was frustrating.

There was a dispute between the parties as to whether the claimant had apologised at the disciplinary hearing for his wrongdoing and whether he had offered to reimburse the respondent themoney. TU's evidence to the Tribunal was that when the claimant first told him about the problemon 12 December 2008 he advised him to apologise. The claimant prepared a written statement forthe disciplinary hearing. The claimant showed him the statement before the disciplinary hearing andhe read it out at the meeting. In the statement the claimant apologised and offered to reimburse therespondent. It had not been a very comfortable position for TU to have to listen to the statementbeing read out. There was no opportunity to read this statement at the appeal hearing. The statementwas produced in evidence.

It was TU's evidence that there is a good relationship between the trade union and the respondent; it is a relationship of mutual respect. Problems with employees are quickly resolved. The agreed procedures give employees a fair say and employees going off line are kept in track. TU felt the respondent took a different approach in this case and permitted the claimant to drift along, allowing a major problem to develop and hiring a P.I. to monitor an employee was also a new departure in this case. Break times are not strictly complied with in the respondent but memos are issued. This was the first time TU had to deal with systematic abuse. They were given ample opportunity at the meeting to state their case. TU was very disappointed with the appeal hearing. There were no terms of reference regarding the appeal.

The claimant only gave evidence on his financial loss to the Tribunal

Determination

The respondent was informed of the claimant's alleged unauthorised absences in late June 2008 and it first raised the issue with him on 12 December 2008 when he was invited to attend a disciplinary hearing on 18 December. The Tribunal notes that the respondent's CCTV footage can be viewed six weeks back. It does not accept the respondent's excuse that gathering the relevant information was a complex process justifying its delay in dealing with the misconduct. The Tribunal finds that in failing to confront the claimant about his wrongdoing before mid December 2008 the respondent failed to promptly deal with the misconduct and rather tolerated it and allowed it to continue over a

protracted period. Further, neither HRM nor the claimant's supervisor (SV) raised the claimant's misconduct with him at the time of his annual performance review, which provides the opportunity for making suggestions for improvement in the employee's performance. The Tribunal finds that a reasonable employer would not summarily dismiss an employee for misconduct, which the employer itself had knowingly tolerated and allowed to continue for almost six months. Further, the Tribunal finds that the claimant in reading his statement at the disciplinary hearing on 18 December had apologised for his behaviour and offered to compensate the respondent. In the circumstances the Tribunal finds the sanction of dismissal was disproportionate. Accordingly, the dismissal is unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds.

In taking unauthorised leave the claimant was involved in deliberate wrongdoing. Flexibility as regards his attendance had previously been afforded to him and he had no good reason for not seeking further accommodation on the matter. He was a member of the safety committee and must have been aware of the importance for the respondent of having a true record of the employees present on the premises in the event of an emergency. For these reasons the Tribunal finds that the claimant contributed substantially to his dismissal. Taking this contribution into account the Tribunal awards the claimant the sum of €9,000.00 as just and equitable compensation under the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)