EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE – *claimant* UD2256/2009

against
EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell
Members: Mr. J. Browne
Mr. F. Dorgan

heard this appeal at Carlow on 13th January 2011 and 4th May 2011

Representation:

Appellant: Ms. Michelle Treacy of O'Flaherty & Brown Solicitors,
Greenville, Athy Road, Carlow

Respondent: Ms. Mairéad McKenna B.L. instructed by Ms. Felicity Smith of the respondent.

The determination of the Tribunal was as follows:

The fact of dismissal was not in dispute.

Respondent's Case:

The Store Manager gave evidence. He has been employed by the respondent for 12 years. He has 190 staff in the store.

The claimant was employed as a general assistant who worked nights. He performed all duties around the store such as handling deliveries, shelving and looking after customers. When he started the claimant received an induction on all aspects of the job. In particular he validated and signed a copy of the absence policy. The absence policy provides that a member of staff who is unable to attend work must phone in. Three days self certified sick leave are allowed, then a medical certificate is required. The respondent operates a sick pay scheme. The scheme is a benefit and not a right. The scheme allows paid sick leave for up to 6 weeks.

The claimant breached the absence policy on five occasions between August 2003 and October 2006. On 26th October 2006 the Store Manager gave the claimant a first written warning in respect of his failure to arrive for work on 22nd October 2006 and his failure to contact the store as required by established policy. The claimant did not appeal the sanction. A first written warning remains on an employees file for a period of 6 months.

The Store Manager again gave the claimant a first written warning on 13th July 2007 because he had been absent for 9 days over the previous 4 months. The claimant was warned that if he again breached company policy he would be subject to more serious disciplinary action. The claimant did not appeal the first written warning.

The claimant had issues with alcohol and the Store Manager tried to support him in dealing with his difficulties. The Store Manager had a good working relationship with the claimant.

On 21st July 2007 the claimant came to the store before he was due to start work and told the Duty Manager that he could not come to work that night due to personal problems. The claimant left the store and was seen on CCTV engaging in inappropriate conduct in front of the store in front of customers. The Store Manager viewed this incident as serious misconduct and felt that dismissal would have been justified. The Store Manager sought advice from human resources. However, the Store Manager was sympathetic towards the claimant and decided to stop short of dismissing him. The claimant accepted that he was guilty of wrongdoing and was grateful not to be dismissed. On 26th July 2007 the Store Manager gave the claimant a final written warning and a six-month suspension from the sick pay scheme. The claimant did not appeal the sanction. The final written warning would stay on the claimant's file for one year.

On 12th June 2008 the Store Manager met the claimant, who was accompanied by his union representative, to discuss his general performance and his absences. There was a trend of absences on Fridays. The claimant was asked for an explanation. The claimant was given the opportunity to work day shifts instead of night shifts. The claimant did not take up the offer. The claimant was paid on Thursdays. The claimant's union representative acknowledged that the company was very supportive of the claimant. A second meeting was held on 24th June 2008. This was a disciplinary meeting. The Store Manager issued his decision on 2nd July 2008 that the claimant was suspended for two weeks without pay. The claimant was also given the opportunity to take two weeks paid leave. The claimant did not appeal the sanction.

The claimant was due to return to work on 12th August 2008. Two hours before his shift started the claimant came to the store and purchased alcohol. He would be unable to come to work because he had a family death to deal with. The Store Manager with the Personnel Manager met the claimant and his shop steward on 29th July 2008. The Store Manager suspended the claimant from the sick pay scheme for 12 months on 13th August 2008. The sanction was not appealed.

On 11th February 2009 the claimant was rostered to work but he did not turn in. The claimant's absence was investigated at a meeting on 12th February 2009. The claimant said that he was due holidays. The Store Manager said he would make a decision. The claimant was verbally abusive. He overturned his chair and left the meeting.

As far as the Store Manager was concerned this incident was "the straw that broke the camel's back". The meeting was an investigation meeting and not a disciplinary meeting. The claimant was to give his version of why he was absent. The claimant had been given every opportunity to sort out his problems. The Store Manager regarded this as a serious incident. The claimant was suspended on full pay.

The Store Manager investigated the matter. The claimant said that he was not on the roster for Wednesday, 11th February 2009. Following from his investigation the Store Manager was satisfied that the claimant was on the roster. Hand written amendments are sometimes made to a roster. The roster is used for payroll. The Store Manager validated the roster with members of staff.

At the meeting the chair had been overturned in one moment of tantrum. The Store Manager felt that dismissal was the appropriate sanction. There was already a live final written warning on the claimant's file. The Store Manager had stopped short of dismissing the claimant before. The Store Manager had been more than lenient towards the claimant but there are 190 employees in the store and the Store Manager cannot be seen to accept that kind of verbal abuse. The claimant was informed of his dismissal by letter dated 9th April 2009. The claimant appealed the decision. Eightmonths after his dismissal the claimant was barred from the store.

The group HR manager gave evidence. She conducted the appeal hearing. She met the claimant and his representative on 19th August 2009. The claimant maintained that he had not been rostered to work on the 11th February 2009. He also said that not all witnesses were heard.

The group HR manager re-investigated the claimant's absence. She spoke to seven members ofstaff. Three refused to talk to her. She concluded that the claimant has used expletives towards theStore Manager and overturned a chair. She considered the use of abusive language to be seriousmisconduct and grounds for dismissal. Everyone the group HR manager spoke to said the claimanthad been rostered. The group HR manager did not give copies of the statements she collected during her re-investigation to the claimant. She confirmed the decision to dismiss by letter to theclaimant's union representative on 2nd November 2009.

An employee at the store gave evidence. She was at the meeting on 12th February 2009. The Store Manager asked the claimant why he failed to turn up. The claimant got up and standing beside the chair he turned it over in a fit of temper. She took photographs of the chair.

<u>Claimant's Case:</u>

The claimant gave evidence that he was employed for some six years with the respondent company. He acknowledged that there were historical difficulties during his employment relating to his problem with alcohol and other personal difficulties.

The claimant was not rostered to work on Wednesday, 11th February or Thursday, 12th February 2009 as he had requested these days off from Mr. W, one of the night crew managers. However, when the claimant was working on Tuesday, 10th February he was approached by another night crew manager (Mr. S) who asked the claimant if he would be willing to work an extra night that week. The claimant agreed, provided that this was reflected on the roster, as he wanted to ensure he was paid for the work. It was agreed between them that the claimant would work on Thursday night. The night crew manager showed the claimant the roster when he had made the change and the claimant was rostered to work on Thursday but not on Wednesday.

On Thursday, 12th February 2009 the claimant attended a union meeting with some of his colleagues at a hotel. The claimant thought it was a joke when some of his colleagues mentioned to him that he was marked as absent on the roster for Wednesday night.
That day the claimant attended at the store to collect his wages and he observed on the roster that his name had been crossed out and marked absent for the Wednesday night shift. The claimant went to the Store Manager's office to confront the issue and to outline to the Store Manager that clearly a mistake had been made. The Store Manager did say he would look into the matter but the claimant was still concerned as it was clear that the Store Manager considered the claimant to have been absent from work. As he left the Store Manager's office the claimant met the Personnel

Manager and he also raised the issue with her but she paid little heed to what he said.

The claimant attended for work that evening. Mr. S, the night crew manager, approached the claimant and said that he had made a genuine mistake and that he would rectify the matter. The claimant was satisfied with this as Mr. S assured the claimant that he would address the matter with the Store Manager. During the shift, Mr. S approached the claimant on several occasions to apologise and to assure the claimant that he would rectify the matter. Another employee (Mr. E) was present and witnessed the interaction.

On Friday morning, 13th February 2009, Mr. S was called to the office but was only in the office for a very brief time. When the claimant finished his shift he was asked to attend a meeting in the office. Mr. E accompanied the claimant to this meeting as a union representative.

Both the Personnel Manager and the Store Manager were present in the office. The claimant recalled that the office was very small. The Store Manager questioned the claimant as to why he had been absent. The claimant stated that he was "badgered" and harassed at this meeting. The Store Manager wanted an explanation as to why the claimant was absent but he did not want to hear what the claimant had to say about Mr. S. It was clear to the claimant that the Store Manager considered his reply to be unsatisfactory.

The claimant admits he used foul language at the end of this meeting. He was the first to leave the office and when he did, none of the chairs were overturned. The claimant denied that Mr. E had to restrain him at this meeting. The Store Manager subsequently informed the claimant that he was suspended with pay for two weeks pending an investigation. Due to the annual leave commitments of both the Store Manager and the claimant's union representative the claimant was on suspension for some five weeks, as the investigation did not take place immediately.

The claimant confirmed attending a meeting with his union representative as part of the investigation process and he put his case forward. Management were aware around that time that employees had raised an issue through their union concerning rosters not being put up in a timely fashion. In addition rosters were often changed "with the stroke of a pen".

The claimant was aware that Mr. S was interviewed as part of the investigation process but the claimant was not present for that interview. The claimant believed that not all of his witnesses were properly interviewed, as they were not given sufficient notice of the interview.

Letter dated 9th April 2009 informed the claimant that he was dismissed on grounds of serious misconduct for breach of the absence policy and for threatening and abusive behaviour. The claimant appealed this decision but was unsuccessful. Letter dated 2nd November 2009 informed him of this. The claimant was not satisfied that all of his relevant witnesses were interviewed during the appeal process.

The claimant linked his dismissal to another issue relating to when he had spoken on a radio programme some months earlier concerning the issue of pay cuts.

Over Christmas 2009, the claimant was in the respondent's store with his wife. The Store Manager requested that the security officer remove the claimant from the store. Until this occurred the claimant had been unaware that he was barred from the store.

The claimant gave evidence pertaining to loss.

During cross-examination it was put to the claimant that the Store Manager was compassionate in how he had dealt with the claimant's difficulties and absenteeism up until the time of 11th February 2009. The claimant accepted this but stated that he had not had any absences during the ten months from the time he sought treatment up to the time of his dismissal.

It was put to the claimant that when the respondent interviewed Mr. S he did not confirm the claimant's version of events. The claimant accepted that Mr. S had denied the allegations but stated that this was because Mr. S had told the claimant and another employee, that he feared the Store Manager. Mr. S has since left the employment of the respondent company and is no longer resident in Ireland.

It was put to the claimant that he had overturned a chair during the meeting on 13th February 2009. The claimant stated he did not overturn the chair and he believed this to be a "set-up".

Mr. E gave evidence that he has been employed by the respondent as a general assistant since 2003. On the morning of 11th February 2009 he examined the roster to see who was not working that night, as he needed to secure a lift to the union meeting the following morning. He saw that the claimant was not working and asked him for a lift to the meeting.

Mr. E also witnessed the conversation between the claimant and Mr. S when Mr. S asked the claimant to work on Thursday, 12th February and the claimant had agreed and handed Mr. S a pen to change the roster.

In his capacity as a union representative Mr. E was also present at the meeting on Friday, 13th February 2009. The claimant's explanation of why he was not working on Wednesday was notaccepted. It was a highly charged meeting and it was clear to Mr. E that the Store Manager haddecided that the claimant was absent on Wednesday, 11th February 2011. The claimant did use foullanguage as he left the meeting but he did not overturn a chair.

On Friday, 13th February 2009 Mr. S had told Mr. E that he had made a mistake on the roster but was fearful of telling the Store Manager. After they had discussed the matter Mr. S assured Mr. E that he would rectify the matter. During the investigation process Mr. E informed the Store Manager of this conversation and he also outlined how he had first come to check that the claimant was not rostered for Wednesday, 11th February 2009.

Giving evidence Mr. B stated that the respondent has employed him since 2005. On 11th February 2011, Mr. B was working on the checkout when another employee informed him that the claimant was absent. Mr. B went and checked the roster, as he knew the claimant to be off that night as he was giving some of his colleagues a lift to the union meeting the following morning. When Mr. B examined the roster at 1am on Wednesday, 11th February the claimant was not on the roster for that night.

As part of the investigation process Mr. B was contacted on a Saturday to attend for an interview the following Monday. As he was away from home on annual leave he could not attend for the interview.

As part of the appeals process Mr. B was told at 11pm to attend for an interview the following morning at 9am, having just finished work at 8am. He did not attend for the interview due to the

short notice and unsuitability of the time of the meeting.

Giving evidence Mr. C stated that the claimant had obliged him with a lift to the union meeting. This had come about by Mr. C checking the roster, observing that the claimant was not working on Wednesday, 11th February and requesting to travel with the claimant to the union meeting.

Mr. C met with the Store Manager as part of the investigation process. As part of the appeals process he was asked to attend a further meeting. He contacted the Regional Development Manager and informed her that the time of the meeting was unsuitable due to family commitments and therefore he would be unable to attend. He was not contacted any further in relation to this matter.

Determination:

The Claimant was dismissed for the reasons set out in the letter of dismissal issued by the Employer and dated the 9th of April 2009 namely:-

- For breach of the Employer's Absence Policy

  and

- For abusive and threatening behaviour.

The Tribunal was faced with a conflict of evidence on a number of significant matters.

A number of witnesses that might have brought some clarity to the issues were not available, however, the Tribunal accepts that the attendance of at least one of those potential witnesses was not within the control of either party. The content of some interview notes was disputed and it was noted by the Tribunal that a number of those interviewed had not signed the contemporaneous notes to vouch for their accuracy.

It was common case that the Claimant suffered from alcoholism and that, until February 2009, the Employer had been supportive. There had been a history of absenteeism until mid 2008. It was also accepted by the Claimant that he used a foul expletive at the meeting of the 13th February 2009.

The issue of absenteeism seemed to have come to a head in mid 2008. The Claimant was given a first written warning on the 13th of July 2007 and shortly thereafter a final written warning on the 26th July 2007.

On the 27th of June 2008 a further final written warning was given and the Claimant was suspended for two weeks. A suspension from the Company's sick pay scheme for a 12-month period followed.

It appears that around this time, with the knowledge of his Employer, the Claimant sought and pursued treatment for Alcoholism with Aiseiri. His attendance record seems to have improved from this point onward. There was a meeting with the Claimant on the 1st October 2008 but this related to performance issues rather than to absenteeism. There was a certified absence for illness from 12th January 2009 to 18th January 2009.

The Claimant's Terms of Employment provided for the issue of work rosters four weeks in advance, however, it was clarified to the Tribunal that, while prepared one month in advance, the rosters were at the time often issued days or even hours in advance and were subject to variation. The whole issue relating to rosters was a source of concern for the union.

The Tribunal is satisfied that there was confusion surrounding the work roster for the 11th February 2009. The Tribunal is further satisfied that the Claimant believed that he was not rostered for the 11th February and he was consistent on this issue throughout the process. The Tribunal is of the opinion that a reasonable Employer would have concluded that the Claimant believed he was not rostered for the 11th February. The Tribunal believes that the Employer was unduly influenced by the Claimant's historic poor attendance record, which had improved considerably since 2008 when the Claimant appears to have taken a significant step to address his personal difficulties.

With the exception of agreement as to the foul language used by the Claimant at the brief meeting of the 13th of February 2009, there was a conflict in the evidence as to what precisely occurred at that meeting. While foul language is never acceptable in the workplace, it might have been wiser had the meeting taken place other than at a time when the Claimant was coming off a long night shift.

The Tribunal is unanimously of the opinion that, irrespective of which version of the meeting of the 13th of February 2009 is the correct one, the Employer did not act reasonably in applying the ultimate sanction of dismissal on this occasion.

For the reasons stated it is the decision of the Tribunal that the Claimant was unfairly dismissed.

The Claimant has sought compensation from the Tribunal. A Claimant before the Tribunal must be in a position to show that he has acted reasonably in his efforts to mitigate his losses. The Claimant registered with FAS on the 7th of May 2009 and has since been in receipt of Job Seekers Allowance. The Tribunal heard evidence of sporadic efforts to secure work independent of FAS, however, the Claimant acknowledged that he might have been more vigorous in his pursuit of alternative employment. Instead he appears to have concentrated on voluntary work with his local Soccer Club, which is very laudable in itself.

Having considered all matters the Tribunal awards the Claimant the sum of €12,000 by way of compensation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This __________________________

(Sgd.) __________________________
(CHAIRMAN)