EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE - *Appellant*	UD1434/2010

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

EMPLOYER
- *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. B. Kealy
Mr M. O'Reilly

heard this appeal at Dublin on 28th November 2011
and 30th January 2012

Representation:

Appelant; Mr. Ger Kennedy, Siptu, 4 Church Street, St John's Square, Limerick
Mr. Karl Byrne, Siptu, Electronics & Engineering Branch, 35 Lower Gardiner Street, Dublin 1

Respondent: Mr. David Farrell, IR/HR Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This appeal came before the Tribunal by way of an appeal from an employee against a Rights Commissioner's Recommendation reference number r-083856-ud-09/GC

The appellant was employed as a tyre examiner/fitter with the respondent company. He worked on a contract for a bus company from 1981 and the respondent company took over this contract in 2008. The appellant transferred to the respondent as a result of this. During his employment the appellant was never subject to any disciplinary procedures until he was informed on 9th July 2009 that he was being disciplined for non attendance at work. The appellant attended a disciplinary hearing on 13th July 2009. He was informed on 15th July 2009 that he was being dismissed.

The claimant appealed his dismissal and an appeal hearing took place on the 11th August 2009. On 17th August 2009 the claimant was informed that the decision regarding his dismissal was being upheld.

The determination of the Tribunal was as follows:-

The Tribunal has carefully considered the evidence adduced in the course of this two day hearing. This matter comes before the Tribunal by way of the appellant appealing against a recommendation of the Rights Commissioner dated the 13th May 2010.

The appellant had been dismissed summarily for gross misconduct on the 15th July 2009.

The appellant had been found by his employer to have fraudulently represented that he was working overtime hours when he had, in fact, not been present on the premises. It was common case between the parties that the appellant and his co-worker (Mr. R.) were both tyre fitters and operated out of the Donnybrook garage. The practice in this and two other garages was that when one man took his holidays the second man would provide the extra cover required for the holiday period. The employees therefore had four weeks in every year wherein they would work a double shift and be paid overtime. The policy was not to call in a third party fitter. The work remained within the two man team.

In June of 2009 Mr. J.R. took his annual two week holiday and the appellant in accordance with the practice aforesaid took over the double shift. This effectively meant that the appellant should have worked from 7:30am to 10:30pm as against the two men working side by side from 7:30am to 3:30pm.

As it happened the appellant's immediate supervisor (CC) was in and out of the garage on a few occasions over the particular two week period and noticed the appellant was absent. CC did notphone the appellant to see where he was but it does seem that the appellant was not on the premisesat the given times.

CC noted that the appellant had put in claims for the full over-time period which would attach to the working of a double shift. CC formed the view that this was an incorrect interpretation of how the double shift should be operating.

The appellant was notified on the 9th of June that the overtime claims were inappropriate and that an investigation would have to be conducted into this matter.

The appellant was subsequently called into an investigative meeting on the 13th July. The meeting appeared to be headed up by Mr. AD, the most senior manager present. However, there can be little doubt that CC was very involved in conducting the meeting and the Tribunal must have regard to the optics of the accusator now acting as investigator.

There can be little doubt that the handwritten/typed notes taken at the meeting of the 13th July demonstrate that the appellant was excusing his absence by reason of personal and domestic difficulties. However, the question of how the double shift operated with reference to custom and practice was also raised through the meeting. The Tribunal does note that the same explanation does not appear to have been given to this issue as subsequently.

By the 15th July the appellant was called into a further meeting. The appellant was not given a copy of the notes from the previous meeting of the 13th and the appellant was immediately notified that he was being dismissed for gross misconduct. Again it is noted that CC actually made the decision both orally and subsequently in written confirmation of the 20th and so it seems that accusatory turned investigator turns into decision maker and ultimately the sanction giver.

Reference was made in the notes to discussions held between the 13th and 15th of July however the Tribunal has no evidence of the nature of these discussions nor does it seem that anybody else was interviewed with regard to the issue of custom and practice which had been raised.

The Tribunal notes that the appellant may not have realised the seriousness of the situation. No evidence was adduced to suggest that the appellant was formally on written notice that his job was at risk should he be found guilty of the allegation complained of. When attending the meeting of the 13th of July the appellant used the fact of his personal domestic situation as having given rise to his absence from the work place. The Tribunal believes that the appellant believed that the frank outlining of his personal circumstances would be met with some leniency by his employer. It was in these circumstances that the appellant failed to place significant weight to what was his belief in how the custom and practice in fact operated.

It was only at the 15th of July meeting, when the appellant was notified of his termination of employment, that the appellant approached the matter with more emphasis placed on the issue of custom and practice.

The Tribunal recognises that the meeting of the 15th of July must have come as a complete shock to the appellant who had an unblemished 28 years of service with the company and its predecessor. The Tribunal accepts that the appellant, rightly or wrongly, may well have felt that he was not in line for a summary dismissal and a lesser sanction could only apply.

Some emphasis was placed on the fact that the custom and practice issue was only raised at the appeal and the Tribunal accepts this is unusual. However, there can be no doubt that very little investigation was carried out even at this late stage to assess what other employees believed in relation to the custom and practice carried forward from the previous employer company and this was a deficit in the company's process.

Having carefully considered all the evidence the Tribunal finds that the employer's investigative and disciplinary procedures were somewhat lacking.

In saying this the appellant accepted that he did abandon his position without notifying his line manager that he was leaving and the Tribunal finds that no workplace can operate in this way. In these circumstances the appellant had contributed to what became his downfall.

The Tribunal varies the Rights Commissioner Recommendation ref: r-083856-ud-09/GC and awards the appellant the sum of €45,000.00 compensation under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)