

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER - **Appellant/Employer**

UD279/2011

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

EMPLOYEE
- **Respondent/Employee**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Ryan

Members: Ms J. Winters
Mr J. Dorney

heard this appeal at Dublin on 31 May
and 1 August 2012

Representation:

Appellant:

Respondent:
In person

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an employer appealing against the Recommendation of the Rights Commissioner reference r-085039-ud-09/MMG

For clarification purposes the appellant shall be referred to as the employer and the respondent as the employee

The employee had worked for the employer as a security guard since September 2007. At the time of the incident which led to his dismissal he was working at a pharmaceutical site (the site) where the employer is contracted to provide security services which include two security guards on a 24/7 basis.

The employer's position was that the site demands that guards on duty be trained in

the operation of certain aspects of its control systems. To this end the employer has a panel of some eight guards, including a supervisor (AS), who work on the site; there is also a reserve panel of another three guards who, whilst trained in the operation of the site, do not normally work there.

AS prepared the security roster for the site some four weeks ahead. It was common case that the employee approached AS sometime around the middle of August 2009 in order to request three consecutive days rostered off in September 2009. The employee's position was that he requested that those days be 13-15 September. The employer's position was that the request was for three days in mid-September. When the roster was issued the employee was rostered off for 14-16 September.

Around the beginning of September 2009 the employee approached AS with a view to being rostered off for Sunday 13 September in addition to the following three days. AS told the employee that this would require a swap being arranged with another guard and AS undertook to try and facilitate the employee in this regard. On 2 September 2009 the employee booked a flight for 13 September.

On 9 September 2009 AS met the employee and told him that it had not proved possible to arrange a swap for 13 September. It was at this point that AS became aware that the employee had booked a flight for 13 September. During the exchange between them the employee told AS that he was going to take the flight regardless of the fact that no cover for his shift had been arranged. AS warned the employee that failure to attend for his rostered shift could place his continued employment in jeopardy.

The employee made unsuccessful attempts to organise cover for 13 September through the employee's national control centre (the centre). He did not turn up for work on 13 September and, on being notified of the employee's failure to attend, AS, who had to cover for the employee, reported the incident to the centre.

On his return on 17 September 2009 the employee was summoned to an investigative meeting in the employer's head office in Dublin 1. At this meeting the employee was accompanied by his shop steward (UR), it was conducted by a human resource officer (RO) of the employer. After this meeting RO met the human resource co-ordinator (HR) and they decided that the investigation warranted the institution of disciplinary proceedings. It is common case that UR requested that the disciplinary hearing be conducted on the spot and that both HR and the employee agreed to this.

HR conducted the disciplinary hearing at which the employee was again accompanied by UR. The outcome of the disciplinary meeting was that the employee was informed of his dismissal for being absent without leave on 13 September 2009 and that in the circumstance this amounted to gross misconduct and he was being dismissed. He was advised of his right of appeal to the human resource manager (HM) of the employer.

It is again common case that UR requested that HM, who was available, conduct the appeal immediately. At the request of HR, who was reluctant to conduct the appeal so quickly after the disciplinary meeting, the employee signed a waiver in the following terms "I wish to appeal that the decision taken today to terminate my employment has been too harsh". HR conducted the appeal on 17 September 2009 and then spoke to AS, the contract manager for the site and staff in the centre. HM wrote to the employee advising of the rejection of

his appeal on 18 September 2009.

Determination:

Regardless of the consent of the employee in the process there are serious flaws in the procedure adopted by the employer in the disciplinary and appeal hearings conducted on 17 September 2009. Following the investigative meeting the employee was not given any written notification of the charge against him. The employer then proceeded to a disciplinary hearing, albeit at the request of the employee's representative and with the employee's acquiescence, in a very short time after the investigative meeting concluded. Following notification that the employee was to be dismissed the employer then proceeded to conduct the appeal in similar manner. No notes of either the investigative meeting or the disciplinary hearing were made available to the Tribunal, indeed HR told the Tribunal that she had no notes of the disciplinary hearing having relied on the notes of the investigative meeting. RO was not called to give evidence to the Tribunal. For all these reasons the Tribunal is satisfied that the dismissal was procedurally unfair.

There is no doubt but that on 9 September 2009 AS warned the employee of the possible consequences should he fail to turn up for work on 13 September 2009. The employee booked the flight for 13 September, a day he was rostered for work, on 2 September without any arrangement or approval in place for him to have that day off. Accordingly, the employee contributed to his dismissal. In all the circumstances the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)