EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO. UD679/2011

EMPLOYEE *(claimant)*

Against

EMPLOYER (*respondent)*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr F. Moloney
Mr G. Whyte

heard this claim at Dublin on 7th September 2012 and 30th November 2012

Representation:

Claimant(s) : Mr. Stephen O'Sullivan B.L. instructed by Máire Teahan & Co, Solicitors, Main Street, Rathcoole, Co. Dublin

Respondent(s) : Mr. David Farrell, Ir/Hr Executive, Ibec, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

At the commencement of the hearing it was agreed that the named respondent was the correct respondent in this matter.

Background

The claimant was a winch man/operator for the respondent for a period of 12 years. The claimant was dismissed in October 2010 as a result of an alleged fraudulent sick leave claim. Both parties made detailed submissions to the hearing relying upon various legal authorities.

Respondent's case

Giving evidence, the Chief Crewman, DO'C, stated that each crew work a 24hr shift starting at 1pm. Each crew consists of 8 staff per shift. The winch operator guides the pilot over the particular target and the winch man goes down the wire and deals with the casualty. The claimant was a Flight Safety Officer for 6 months during the course of his employment with the respondent and resigned from that position.

The claimant was rostered for duty on 14/15th September 2010 but reported as being unwell and unable to attend his shift. The Chief Crewman was informed by a third party that the claimant gave a lecture on crew resort management in a particular hospital during his sick leave. DO'C asked HR to investigate the matter. The claimant admitted he had attempted to get a colleague to mislead the company on the matter.

The minutes of the investigation and disciplinary meetings were opened to the Tribunal. When questioned as to what the word 'document' referred to in the second paragraph of the disciplinary minutes, DO'C indicated it may be a reference to a medical document or the document clarifying the minutes of the investigation meeting.

Staff are normally facilitated as regards external activities with at least 10 days prior notice. The claimant did not attempt to get cover in this case. The claimant went to the doctor after the presentation was made.

A letter of dismissal was issued to the claimant on 18th October 2010 outlining the reasons for his dismissal and this was opened to the Tribunal.

In cross-examination DO'C explained the fact that the claimant had attempted to get a colleague to lie was an issue of gross misconduct. He said the claimant's medical cert was not available on the first day of hearing. The medical evidence was irrelevant as the claimant went to the doctor after he made the hospital presentation. DO'C denied the claimant was targeted as a result of raising issues in a memo dated 30th June 2008.

In reply to the Tribunal, DO'C stated that the claimant texted on 14th September 2010 in relation to his non-appearance for duty.

The Senior Air Crewman, AG, gave evidence on behalf of the respondent. He attended the investigation meeting and was only aware at that meeting that the claimant attended the doctor on 15th September 2010. The claimant was contacted on 10th September 2010 in relation to giving the presentation and made no effort to get his shift covered. It would not have been difficult to get cover had the claimant endeavoured to do so. The claimant had stated he had done nothing wrong as he was sick. The witness could not comment on the qualifications of the claimant's wife.

In cross-examination, AG stated he was not sure if the medical cert had been passed on. No weight was put on the sick cert as it had been obtained retrospectively. The claimant had agreed to attend the presentation and after the event consulted his doctor. After the claimant texted in sick, the crewman rang around and got someone to cover. AG was surprised the claimant was dismissed under these circumstances.

On re-examination, AG stated that he recommended that a disciplinary hearing should take place but had no input into the final decision. AG is the claimant's direct Supervisor and was

not aware of the claimant’s engagement on 15th September 2010.

The HR Manager stated alternative sanctions were considered and ruled out, based on the fact that the claimant had plenty of opportunity to contact the respondent to arrange cover as he knew about the presentation from the 10th September 2010. Another crucial factor was the fact that the claimant asked a colleague to lie on his behalf.

Under cross-examination, the HR Manager indicated that the examples of gross misconduct were a non-exhaustive list. The course being undertaken by the claimant at the time was 40% sponsored by the respondent. The witness stated the respondent did not dispute the medical evidence forwarded by the claimant. He agreed it could be possible that the claimant was not well enough to work his shift but could still carry out a presentation. The claimant could have informed the respondent that he was out sick but still performing a presentation. The decision to dismiss the claimant was based on the facts from the 10th September onwards.

On re-examination the HR Manager stated that a letter issued in 2009 to the claimant in connection with sick leave, did not have a bearing on the decision to dismiss him.

In reply to the Tribunal, the witness indicated that it was the aggregate effect of events outlined from the 10th September that had a bearing on the dismissal and these were considered gross misconduct by the respondent as outlined in the dismissal letter of 28th October 2010.

The MD of the respondent company stated he carried out the appeal hearing with input from Human Resources and was not directly involved in the case until after the dismissal. He upheld the dismissal decision by letter dated 5th January 2010, which was opened to the Tribunal. He told the Tribunal the claimant had time to come forward for permission to ensure cover for 15th September, 2010. That, combined with the fact that the claimant asked a colleague to mislead the respondent by stating he was asked to cover for the claimant, meant there was an irrecoverable break down of trust with the claimant.

Under cross-examination, the MD told the Tribunal that he was not consulted as regards the dismissal decision. The gross misconduct list was not an exhaustive list. There was not as much emphasis put on the medical evidence as was displayed during the hearing. The claimant was not dismissed as a result of sickness – the decision was not about the medical evidence.

The MD confirmed that the claimant has since been replaced.

Claimant’s case

The claimant told the Tribunal that he worked for the respondent as a winch man/operator for twelve years. He was Flight Safety Officer with the respondent company for approx. one year in 2008. In 2009 an issue was raised in relation to his sick leave record of which 11 days out 26 days were as a result of a thumb injury at work.

In June/July 2010, the claimant developed a skin rash and felt he had been bitten. The rash was re-occurring and the claimant felt very tired and had trouble sleeping. On 10th September 2010 he agreed to give a talk in a particular hospital scheduled for 15th September 2010. The claimant was aware that he was rostered for a 24hr shift on 14th September and had intended to arrange cover over the weekend. Over the weekend the claimant found that he was very tired and had a rash on and off. He texted the respondent giving notice of sick leave for 14th/15th September as

per normal procedure. The claimant tried to get a doctor's appointment on the afternoon of 14th September but was told the surgery could not see him until the following day.

The following day, on 15th September, the claimant gave the lecture in the hospital as arranged. The doctor he met during the lecture was a family friend and he stopped to say hello to him. Later that day the claimant returned to the GP surgery and was examined by a doctor and was diagnosed as having severe urticarial. He was prescribed to commence steroids on a reducing dose and was told he was fit to fly for his next shift on 16th September. The claimant returned to work on 16th September and was unfit for work again on 26th September 2010. As the GP surgery was closed on the Sunday, he went to hospital and was diagnosed with sinus trouble and was put on a double dose of antibiotics.

The claimant stated that he approached a colleague, PO on 28th/29th September in relation to his cover. He said that it was a stupid thing to do. He was under pressure at the time at home. His options for alternative employment were slim, as the respondent company operate the search and rescue in Ireland for the state.

Under cross-examination, the claimant stated that he did not try to get cover for his shift on 14th /15th September. He said he should have arranged cover or cancelled the lecture.

The claimant gave evidence pertaining to loss and his efforts to mitigate the loss.

The Occupational Physician gave evidence on behalf of the claimant, stating that he examined the claimant at his request on 8th March 2012. He stated that the claimant had a sick cert stating that he was fit to work but unfit to fly. He explained that this would not be unusual given the nature of employment. Although the witness did not examine the claimant at the time in question, he would have concerns, based on the history given, of the claimant performing his duties as winch man.

The GP stated that although she was not in the surgery on 14th September 2010, it is possible that the claimant may have tried unsuccessfully for an appointment. The locum at the time examined the claimant on 15th September but is no longer working in Ireland. Although the witness did not have the surgery records at the hearing, she explained that the claimant had urticaria, which showed symptoms of tiredness and a bad rash. The claimant was prescribed steroids on 15th September 2010.

Under cross-examination, the GP stated that it would be reasonable not to fly on a high dose of steroids.

Determination

The Tribunal considered the evidence in this case and noted that the claimant had known of the lecture in sufficient time before the date on which the lecture was to be given. It was a reasonable expectation on behalf of the employer to require the claimant to inform them of the lecture he was to give because it would have required his absence from his shift on the day in question. His inability to perform his function with the employer due to sickness only arose subsequent to the date he was booked for the lecture. In the circumstances the employer acted reasonably in suspecting that the claimant did not attend work due to his commitment to give the lecture. Added to this of course was his attempt to have a co-worker confirm a lie on his

behalf. The Tribunal determines that the employer acted reasonably in this case and find that the claimant was fairly dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This ______________________

(Sgd.) ______________________
(CHAIRMAN)