

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYER

CASE NO.  
UD265/2011

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

EMPLOYEE  
under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. G. Andrews  
Ms. S. Kelly

heard this case in Limerick on 21 March 2013

Representation:

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Appellant(s):

Ms. Muireann McEnery instructed by  
Ms Laura Murnaghan, Peninsula Business Services (Ireland) Limited,  
Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

Respondent(s):

Mr. Gerard Kennedy, S.I.P.T.U.,  
4 Church Street, St John's  
Square, Limerick

The determination of the Tribunal was as follows:-

This case came to the Tribunal as an employer appeal under the Unfair Dismissals Acts, 1977 to 2007, against Rights Commissioner Recommendation r-094288-ud-10/pob.

The representative of the employee (hereafter referred to as EEX) submitted that, under unfair dismissals legislation, the onus was on a dismissing employer to justify a dismissal with regard to the substantive issue and the correctness of procedures. It was contended that there was a presumption of innocence but that, though the employer (hereafter referred to as ERX) had investigated all circumstances, statements had not been challenged. ERX had presumed guilt. ES (a former employee of ERX) could have confirmed that EEX had permission for his practice with regard to clocking. However, ERX's investigating officer could not confirm who had tried to phone ES. The letter of dismissal was by someone who had not been involved. It was argued that ERX's procedures had been seriously lacking and that the Rights Commissioner had been

correct in finding that there had been an unfair dismissal. It was requested that the Tribunal confirm this.

ERX's representative submitted that procedures had been followed in the investigation and that there could be a subsequent disciplinary process. Statements were given to EEX who did not challenge them. ES had left in 2007 and a written warning was sent in 2008. Letters were signed on behalf of ERX when the relevant person (e.g. NH) was not available to sign. EEX was given the opportunity to have a representative. ERX was obliged to adhere to its own handbook. It was contended that ERX was not incorrect in having an available employee sign for an unavailable one and that EEX had been fairly dismissed.

The Tribunal listened to sworn testimony from witnesses for the appellant company (ERX) and from the dismissed employee (EEX). The Tribunal was satisfied that EEX had been guilty of leaving his place of employment at earlier times than those recorded for him. Also, the Tribunal was not satisfied that it had been acceptable that EEX had given the impression of having been asleep on duty despite his airport security role. EEX, in effect, endorsed all that a supervisor (PD) had said about EEX's lack of alertness on the morning of Saturday 3 April 2010.

It was clear that EEX had received a first and final warning about leaving early in 2008 and yet he repeated this in 2010. ERX saw the combination of the two offences (falsifying documents and sleeping on the job) as gross misconduct.

The Rights Commissioner found for EEX on procedural points. However, the Tribunal does not see the fact that employer documentation was signed by one person on behalf of another as having been a major point. It might have been sloppy but dismissal was warranted. The Tribunal heard that EEX had had family issues but it was not established that these had not been going on over a period of time. It is not uncommon for people to have external issues which impact on their lives.

EEX conceded that he might have portrayed an image whereby someone observing him might have thought him to have been asleep. However, the Tribunal is of the view that all security people at an airport had to be alert and that EEX had looked to have been in dereliction of his duty such that there might have been grounds for summary dismissal. The Tribunal does not endorse the Rights Commissioner's finding that ERX was guilty of breaching procedures and, therefore, liable to pay compensation of ten thousand euro.

The Tribunal considered GOB to have been a very fair witness for ERX who listened to EEX's points. It was felt that it would have been easier if points raised at the Tribunal hearing had been raised at the appeal stage rather than subsequently.

Finding that there had been a fair dismissal, the Tribunal is unanimous in overturning Rights Commissioner Recommendation r-094288-ud-10/pob and allowing the employer appeal under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)