

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE

**CASE NO.**  
UD1908/2010

- *claimant*

against  
EMPLOYER  
under

- *respondent*

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. C. Egan BL

Members: Mr. T. Gill  
Ms. H. Murphy

heard this appeal at Galway on 18<sup>th</sup> April 2012  
and 23<sup>rd</sup> July 2012  
and 24<sup>th</sup> July 2012

#### **Representation:**

Claimant(s):  
Respondent(s):

The determination of the Tribunal was as follows:-

#### **Background to Claimant's Case:**

The claimant commenced employment with the respondent as a Childcare Assistant in the respondent's crèche on 26<sup>th</sup> November 2007. The respondent had eight staff looking after thirty to forty children ranging in age between three months and twelve years. The claimant was engaged in a course to attain FETAC level 5 but had to cease studying due to illness.

In January 2009 the claimant approached her Staff Manager (SM) informing her that she was planning a trip to Australia, as her boyfriend's parents were planning a holiday in Australia for his 21<sup>st</sup> birthday. The claimant understood from her conversation with SM that there would not be a problem in getting this time off work. In February 2009 the claimant booked the tickets for the flight with a departure date of the 22<sup>nd</sup> September 2009 returning on the 29<sup>th</sup> October 2009, a period of twenty eight days. She subsequently informed SM of the dates and was told by SM that there was an excess of eight days over and above her twenty day

annual leave allocation and that SM would have to seek the Committee's approval for this. Her contract stated:

*“Annual Leave is a statutory entitlement that must be taken with the approval of the employer. The Leave Year shall run from 1<sup>st</sup> January to the 31<sup>st</sup> December. In addition to Public Holidays (9 in the year), you are entitled to statutory holiday pay. Annual Leave entitlement is based on 8% of the hours you work in the leave year, subject to a maximum of 4 working weeks in the annum.”*

The claimant submitted a Holiday Requisition Form and SM noted that the claimant stated that she *“was going either way whether it was approved or not and didn't want to know until August”*.

In 2009 all staff were informed that they had to take their annual leave by November as SM was taking December off to travel abroad.

On 16<sup>th</sup> July 2009 the claimant was informed by SM, at a one to one meeting, that the Committee had refused her request for the twenty eight days leave. The claimant was upset at the decision. She was informed that she could apply for alternative dates for her trip. The claimant was asked to take two weeks leave in late July/August as the crèche was quiet.

On 5<sup>th</sup> August 2009 the claimant went to the travel agents to change the dates. The only dates available for her trip were from 22<sup>nd</sup> January 2010 to 12<sup>th</sup> February 2010. The claimant changed the dates and incurred substantial expense in so doing. On 17<sup>th</sup> August 2009 she informed SM of the changed dates. On 26<sup>th</sup> August 2009 the claimant lodged a Holiday Requisition Form for the changed dates and posted it through the letterbox of one of the Committee members (TMcG). SM informed her that she would have to submit the request to the Committee. On 28<sup>th</sup> August 2009 TMcG and another Committee member (LC) met with the claimant and told her that the Committee's decision was unchanged. The request was *“disapproved”*.

In September 2009 the claimant applied for a day off for the 18<sup>th</sup> September 2009 to attend a wedding. It was not granted as another member of staff, who had requested the same date earlier, was facilitated. The claimant was informed that she could open the crèche that morning of the wedding and finish at 2.00p.m. The claimant was later informed that she could not open the crèche that morning as she had not got the required qualifications in childcare.

On 10<sup>th</sup> September 2009 the claimant met with SM and MC (a Manager). The refusal of the claimant's leave was discussed and the fact that she had been refused leave for a wedding on the 18<sup>th</sup> September 2009. The claimant also queried why it was a colleague who informed her that she was not qualified to open the crèche. The claimant was most upset and attended her doctor who certified her unfit for work for a period of four weeks.

In December 2009 the claimant again spoke to MC about her planned holiday to Australia. The claimant then requested a leave of absence so she could travel. MC said she would speak to the Committee. The leave of absence was refused. MC and SM, allegedly, informed the claimant that she could resign her position and re-apply for it when she returned from Australia but that there was no guarantee that the position would not be filled in her absence.

The claimant informed them that it was not possible to change the dates as she had paid €1,100.00 for the original holiday and then incurred a further €360.00 per ticket to change the dates. She told them she would have to take a leave of absence as she could not afford to lose the money.

On the 8<sup>th</sup> January 2010 MC wrote to the claimant informing her that the Committee's decision with regard to her Annual Leave Application remained unchanged and that by taking holidays without permission that she was breaking her Contract of Employment and that her job could not be guaranteed on her return. On the 17<sup>th</sup> January 2010 the claimant wrote to the respondent requesting the management and Committee to reconsider her request for annual leave from the 21<sup>st</sup> January 2010 to the 12<sup>th</sup> February 2010. In response to the claimant's letter of the 17<sup>th</sup> January 2010, MC and SM wrote to the claimant on 19<sup>th</sup> January 2010 informing her that the decision of the management and the Committee remained unchanged and that by taking the holidays without permission she would be breaking her contract of employment. On the 21<sup>st</sup> January 2010 the claimant wrote to the respondent requesting a meeting with the Board of Management on the day or following days of her returning to work. The respondent subsequently wrote to the claimant on the 12<sup>th</sup> February 2010 informing her that she was being suspended from work with pay from Monday 15<sup>th</sup> February 2010 until Friday 19<sup>th</sup> February 2010 to facilitate an investigation into her absence without leave from work from the 22<sup>nd</sup> January 2010 until the 12<sup>th</sup> February 2010.

The claimant attended a meeting at the respondent's request to investigate her unapproved absence from work from 22<sup>nd</sup> January 2010 to 12<sup>th</sup> February 2010 on the 16<sup>th</sup> February 2010.

Subsequently, CM chaired a disciplinary meeting on the 17<sup>th</sup> February 2010 to consider what disciplinary action needed to be taken including dismissal, and to consider if the claimant wished to put forward any mitigating circumstances. The claimant stated that her contract stated "*four weeks annual leave from the 1<sup>st</sup> January to the 31<sup>st</sup> December*" and that she had not been given reasons for not being allowed the holidays. The claimant was told that she would be contacted when a decision had been reached.

By letter dated 19<sup>th</sup> February 2010 the claimant was dismissed for gross misconduct with effect from 19<sup>th</sup> February 2010, with four weeks pay in lieu of notice. She was advised of her right to appeal on or before the 26<sup>th</sup> February 2010. The claimant appealed the decision to PK (a Development Worker, Galway Childcare Committee). The decision to dismiss was upheld.

### **Respondent's Case:**

Two Managers (SM and MC), and two members of the Committee (TMcG and CM), gave evidence. They stated fair procedures had been followed and that the claimant was well aware of the reasons for the refusal of her annual leave. The claimant had not been told that she could re-apply for her job if she went ahead with her trip to Australia, but was told if she went it would be a breach of her contract. It was common knowledge that the claimant was still going on the trip either way. She was given a good luck card from her colleagues.

CM, who chaired the disciplinary meeting, on 17<sup>th</sup> February 2010 stated that it was a very short meeting but the matter was given every consideration. She stated that there was a breach of the bond of trust between the respondent and the claimant and reiterated that the

claimant could take only accrued and approved annual leave.

**Determination:**

Having carefully considered all the evidence and submission in this case, the Tribunal is satisfied that the claimant's behaviour did not constitute gross misconduct. What constitutes gross misconduct can vary depending on the circumstances. The test is: what is reasonable in all the circumstances. Furthermore, "*the actual decision, as to whether dismissal should follow, should be a decision proportionate to the gravity of the complaint, and of the gravity and effect of dismissal on the employee*" - *Frizelle v New Ross Credit Union Limited* (1997) HC. In the present case, the decision to dismiss was not proportionate to the gravity of the complaint. Under the circumstances, the claimant was entitled to entertain a reasonable expectation that her application for annual leave would be granted. The Tribunal finds that the respondent acted unreasonably in dismissing the claimant. The Tribunal unanimously finds that the claimant was unfairly dismissed. Accordingly, the Tribunal awards the sum of €20,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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