

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

UD4/2008

MN2/2008

against
Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr R. Murphy
Mr A. Butler

heard this claim at Dublin on 21st April 2008
and 30th October 2008

Representation:

Claimant(s) : Fergus Whelan, Irish Congress Of Trade Union, 31 Parnell Square, Dublin 1

Respondent(s) : Mr. Gary Byrne, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The office Manager gave evidence on behalf of the respondent. All staff were in possession of a company laptop with a roving profile. The claimant told the witness that she had a problem with her laptop; the witness logged onto the laptop as an Administrator and found a large amount of data saved on it. It was not company data but contained an excel document, a large amount of photographs and a payroll system with the claimant's partner's company name on it.

The following Monday, September 2007, she spoke to the Accountant and the company Director and was informed that the payroll system did not refer to the respondent. The witness told the Tribunal that it looked like the claimant was doing her own work on company time. She emailed the claimant about the matter and was informed that she, the claimant, would move the data onto a memory stick. On September 21st 2007 the claimant again emailed the witness stating her laptop was very slow. Five days later the witness audited all the laptops' C drive. The witness told

he Tribunal that some information had been restored on the claimant's laptop that had been previously deleted. She spoke to the claimant who told her that the documents had just re-appeared. The witness gave a list of the time the claimant spent working on personal documents to the Accountant and the Director.

On cross-examination she said that files she had deleted on the claimant's laptop had re-appeared and in her opinion the files could only re-appear if they were re-entered on the laptop.

The Accountant gave evidence. The claimant had been employed firstly as a receptionist and then a bookkeeper. She had interviewed the claimant and commenced employment while the witness was on maternity leave. The claimant reported to the witness on her return from maternity leave. The claimant was offered a salary and her college fees would be paid with time off to study and attend exams.

The office Manager spoke to the claimant around September 13th or 14th concerning the data she had found on the claimant's laptop. They checked the laptop, cracked the password protection and found data not relating to the respondent company. She informed the Director and it was decided they would meet the claimant. She called the claimant into the office and the excess data on the laptop was put to the claimant. She explained that she had received a few faxes for her partner. The Director said that he had no problem receiving faxes but that the other data would have to be checked from a security point of view. A memo of the meeting was prepared on the same day, September 20th 2007.

Another meeting was held on September 27th 2007. The witness, the Director, the claimant and her representative attended. The Director outlined the situation and the claimant stated that she had only received a few faxes. She stated that she had only printed out documents at work. The Director explained that the matter would have to be investigated.

A company was employed to check the data on the laptop and when it was worked on. A letter was received from this company, dated October 18th 2007, giving a list of approximate usage of the payroll scheme during 2007.

The next meeting was held on November 7th 2007 attended by the same parties as before. The claimant was given a copy of the letter dated October 18th 2007 to the respondent. The claimant's reason for the usage was that she was under pressure with her partner to get the work done. She felt the claimant had abused their trust and could have told her about the extra work. The claimant's representative said the claimant should receive a final written warning. The claimant was asked to leave the premises at her own convenience. She left and a written minute of the meeting was sent to her representative.

On cross-examination she said that the claimant had been given a copy of the minutes of the September 27th 2007 meeting. When asked, she said that she did not know who had restored the deleted files to the folder. She said that she had remembered the claimant saying that one of the dates on the list of working on the document was on a Sunday. She again stated that she felt the trust with the claimant had gone. On three dates the claimant had worked on personal data while the witness was on annual leave. She could not remember if she had not spoken to the claimant about this issue. When put to her she stated that she had not given a negative report to the Director and hoped the matter could have been resolved.

When asked by the Tribunal she stated that the claimant had been advised to pursue the company

grievance procedure. There were no other problems with other staff doing personal work on company time and there was no issue with staff storing music or photographs on file.

The Director gave evidence. The Accountant reported to him and had informed him of the issue of the claimant's laptop. He left it to her to deal with it. He attended the meeting of September 22nd 2007 with the claimant and the Accountant. He had told the claimant that they may have to go down the disciplinary route and suggested that she may wish to take advice.

He met with the claimant and her representative on September 27th 2007 and informed them that the company had a concern about personal work carried out on company time. The claimant said that she thought it concerned faxes sent or received for her partner. It appeared that some data had been deleted and restored on the hard drive. The claimant's representative spoke on behalf of the claimant and apologised. As it was stated that one of the dates in question was a Sunday, it was decided to have a more detailed investigation. It was not fully clear if she was creating or working on personal files on company time. The laptop was forensically checked.

At the third meeting in November 2007 the list of dates of personal work carried out was discussed. The claimant's representative stated that the work done was not for personal gain and felt that a final written warning should be issued. The witness stated that the company did not have a problem with staff receiving personal faxes or pictures held on their laptops. He stated that there was a significant breach of trust. The letter of dismissal was issued on November 13th 2007.

On cross-examination he said that he felt the claimant had deleted company files and he had put this to her but could not recall her response. He felt she had done a substantial amount of work during company time. He told the Tribunal that the Accountant had informed him of disciplinary issues with the claimant but not with her work but this had not coloured his attitude to dismiss the claimant.

The witness said the office Manager had thought it prudent to take a copy of the claimant's files in case the original was tampered with.

On the **second** day of the hearing an employee of the company that forensically examined the claimant's laptop gave evidence. He found a folder called Payday and the name of a construction company. He checked when files had been created, accessed and written. A letter containing dates and time of usage of the documents were sent to the respondent.

On cross-examination he said that he had calculated that the time spent on the laptop on personal use was 11 hours and not 7 hrs 10 minutes. He stated that two of the dates submitted when work was done were outside work core time.

Claimant's Case:

The claimant's representative gave evidence. She had contacted him about her problem. She had been summonsed to the first meeting on her own, was told there was a serious allegation of gross misconduct against her and advised to get representation.

He attended the second meeting and he accepted, on the claimant's behalf, that there had been wrongdoing but that dismissal was disproportionate. The witness said that he thought the claimant had been vindicated and the amount of work done on company time was small. He thought a day's annual leave could be taken from her. However at the next meeting he felt the company had

changed their tack. They spoke of the work being completed while the office Manager was on leave. The dismissal letter did not mention this fact.

On cross-examination he said that the claimant had informed him that she did not know what the company were talking about at the first meeting he had not attended. When asked how he knew what the allegation was against his client, he said that he had asked at the meeting but did not know how much time was used. Just before the second meeting on November 7th he was given a copy of the letter of time stating the time spent on the Payday folder. He told the claimant to compare it with the notes she had compiled of the time spent working on personal work.

After the claimant was dismissed there was an appeal held. When asked, the witness said that he had produced the claimant's notes of time spent of the Payday folder but they had not been given the chance to submit them.

He said that the claimant had been in serious trouble and her residency was at risk. He again stated that the claimant did not have a specific idea of what she had been accused of at the first meeting in September 2007.

The claimant gave evidence. She was asked by the office Manager to attend a meeting on September 20th 2007, which the Director also attended. She was informed of "outside" work discovered on her laptop. She asked what work they meant and was informed that she should get a representative and the laptop would be checked. She had informed then that she had received some faxes for her partner. She looked through her computer and remembered some work she had completed for her partner. She concluded that this was the work they were talking about. She went to see her representative and discussed the matter with him. He told her that it was a very serious matter.

Her representative was present at the second meeting of September 27th 2007. They were given a pile of papers and her representative asked what they were. She did not know. The Director had estimated that she had done 2 ½ hours a week of personal work during company time. They said they would look into it again before the next meeting. When she received the report she was shocked. She checked the work she had completed herself. At the dismissal meeting the Director said he felt she had not been honest as some of the work was carried out while the office Manager was on leave. She stated that she had not entered the main computer system and deleted company files. She said that it had never been put to her. She felt the decision to dismiss was made before the final meeting.

On cross-examination she stated said that she had worked well with her colleagues but had been told by the Accountant the day before the day of her dismissal that they did not get on. She stated that the construction company named during the hearing was her partner's and that she had done some work for him when he had parted with his accountant but was not sure when this had happened. She completed most of this work at home.

At the second meeting, September 27th, a list of the files they produced was requested. She did not speak at this meeting. It was agreed that she had done some work but that the amount was small. When asked, she said that she did not know when her partner had purchased the Payday system and when she had taken over the accounts. When put to her she said that she and her representative were denied submitting her report of time worked on her partners work.

The claimant gave evidence of loss. When asked if she felt her appeal of her dismissal was fair, she

replied yes.

Determination:

The Tribunal finds there were substantial grounds for the dismissal in this case, particularly in circumstances where the claimant denied any knowledge of her wrongdoing at the outset. The claimant was given every opportunity to deal with the issues raised by the company and the company adhered to the correct procedures.

The Tribunal is satisfied that the claimant was given every opportunity to present her analysis of the findings made regarding the usage of the laptop.

Accordingly, the claims under the Unfair Dismissals Acts, 1977 to 2001 and the Minimum Notice and terms of Employment Acts, 1973 to 2001 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)