EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.
Employee UD651/2007

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

Employee

-v-

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Fahy BL
Members: Mr. D. Morrison
Mr. M. McGarry

heard this appeal at Castlebar on 28th May 2008 and 26th September 2008

Representation:
Appellant: Mr Noel Kilfeather, SIPTU, Mayo No. 2 Branch,
Moneen Road, Castlebar, Co Mayo

Respondent: Mr. John Brennan, IBEC, West Regional Office,
Ross House, Victoria Place, Galway

This case is before the Tribunal by way of an employee appealing the recommendation of a Rights Commissioner (ref: r-047172-ud-06/JT) under the Unfair Dismissals Acts, 1977 to 2001.

Appellant's case:

The Tribunal heard evidence from the appellant. He was employed in the Respondent company from 1999 to 2006. He was called to a meeting on 16th June 2006 and was told that his job was under threat because his actions were serious. He was told that he had sent e-mails and he initially denied this, as he was not thinking straight. There was a threat of legal action against the company and that the Respondent would remove its operations from the area. The appellant thought that he had no option but to resign otherwise people would lose their jobs. The HR manager told him that if he resigned he could get his job back in September of the same year. The meeting took place at 1.30p.m and included himself the HR manager (ER) the company director (PC) and the shop steward (CC). There was a further meeting at 4.00 p.m. and the same people attended. The HR manager told him that if he did not resign then he would be dismissed and the HR manager told him that if they sacked him he would never work there again.

There was another meeting at 4.30 p.m. on the 22nd June 2006 with the same people. PC and ER left the room and let himself and the shop steward CC to discuss the matter. CC explained the seriousness of the matter. He decided to resign. They invited the management team back into the room and informed them of the appellant's decision to resign. The appellant resigned there and then. He felt under pressure to resign and that he had no choice.

Prior to the meeting on 22nd June 2006 at 4.30 p.m. the appellant explained that he had a meeting at 2.00 p.m. with ER and it was just the two of them. ER told him that if he resigned then he would get him a job there later on in the year. Later on he discussed the matter with his family. They thought it was unfair and to withdraw his resignation.

He resigned because of the company mentioning legal action and lawsuits. He thought he could not be there if that was going to happen. He thought that if he resigned he would get his job back following his conversation with ER on the 22nd June 2006.

The chairman asked to see a copy of the disciplinary and grievance procedures. They were opened to the Tribunal. The Chairman asked if the documents referred to gross misconduct. The HR manager told the Tribunal that it referred to serious misconduct.

The appellant was asked if he was told the purpose of the meeting of 16th June 2006 and he said he was. He was told it was an investigation meeting. The chairman clarified that there was two meetings on 22nd June 2006 one of which occurred at 2.00 p.m. with ER and the appellant. Also there were two meetings on 16th June 2006 one at 1.30 p.m. and one at 4.30 p.m.

Cross-examination:
It was put to the appellant that his evidence was that ER threatened that he would be sacked and the appellant replied "yes". It was put to him that this would be denied. It was put to the appellant that it was the first that they heard of this and it was a tissue of lies, the appellant replied, "it is true".

In response to questions the appellant explained that he had meant to send the e-mail to a friend and he did not think that there would be two people in the country with nearly the same e-mail address. The appellant did not deny that he sent the e-mails.

The appellant agreed that at a meeting on the 22nd June 2006 some four points were raised. He agreed that ER said the investigation was at an end and that he apologised for all (of the offences). He agreed that the findings were that he sent offensive e-mails and broke the e-mail policy. He agreed that he wasted company time. He agreed that the company could be liable for potential legal action. He agreed that ER asked him if he had anything further to add and he told ER that he had not.

The appellant agreed that they took a break at the meeting on the 22nd June 2006 and after the break he resigned. He agreed that the management asked him if he was sure and he told them that he was. He agreed that he signed a note of resignation. The appellant explained that he did not offer to resign; he felt that he had no other option but to resign.

The representative for the company made an application that the Appellant did not meet the standard of proof, that the appellant resigned. The Tribunal rose and resumed. The Tribunal determined not to accede to the request.

The Tribunal heard evidence from the shop steward (CC). The witness gave evidence as to the similarity of this particular case with other instances whereby an employee sent pornographic material. He explained that no other case bears a full resemblance to this one and the various other sanctions imposed in other cases.

The witness was asked if ER threatened or coerced the appellant. The witness replied that he did not think so and that he would not let a member be threatened. He was not aware of an employee being dismissed because of e-mail abuse. It was not unique that an employee resign after the results of an investigation.

Respondent's case:

The Tribunal heard evidence from the HR manager (ER). He worked in the company for fifteen years and four of them were in HR. He told the Tribunal that he did not put the appellant under pressure nor did he threaten the appellant on 16th or the 22nd June 2006. He read the seven things that emanated from the investigation. He indicated that he needed time to consider the matter. He told them that he would return in an hour. Fifteen minutes into the break he got a phone call from CC to say that the appellant wished to tell him something.

He returned and the appellant told him that he wished to resign. He asked the appellant if he was sure and the appellant said he was. He accepted the appellant's resignation. He asked for the resignation in writing and the appellant signed the resignation note.

A few days later the appellant disputed the situation and maintained that he was forced by him and PC to resign. He disputed this. He never offered the appellant that he would get his job back i.e. a "trade-off". The witness gave further evidence of receiving a letter dated 30th June 2006 from the appellant expressing his unhappiness and seeking to be reinstated. He also had a couple of telephone conversations with the appellant. The witness telephoned the appellant on the 5th July 2006 and the appellant stated that he had been forced to resign by the witness and a company director (PC). The witness then contacted the appellant on the 7th July 2006 and informed him that he would not be reinstated. He gave evidence that the appellant had resigned of his own volition and had a shop steward with him when he resigned.

Under cross-examination the witness confirmed that he was concerned that somebody may take a legal action against the company as a result of the appellant's actions and the company regarded that as very serious. He denied that he told the appellant that his actions were going to have implications for other employees and did not suggest that another position would be made available to the appellant at a future date. He confirmed that the appellant had been trained not to use the internet for personal use. He believes that the appellant's decision to resign was a positive decision for the company and for the appellant.

The witness agreed that it would be uncommon for an employee who had access to a grievance procedure to opt for resignation. He stated that he would get it very hard to accept that all the e-mails sent by the appellant to a member of the public were sent in error. The appellant should have stopped sending the e-mails when he was asked to do so by the recipient of the e-mails on four occasions. The witness confirmed that he was contacted by the recipient of the e-mails who informed him that he had sent everything to his solicitor.

The witness gave further evidence that he put a new system in place that monitors all PC's in the

plant after the appellant resigned. He confirmed that three other employees were sending similar e-mails as those sent by the appellant. These employees had sent the e-mails internally within the company, not externally and their actions did not bring a threat against the company. The three employees concerned were spoken to individually, advised of the seriousness of their actions and were given written warnings. None of them offered their resignation.

In reply to questioning the witness confirmed that the appellant's employment would have been terminated had he not resigned. The witness confirmed that he had placed the threat of legal action greater than the action of the appellant breaking company policies. He stated that it would have had a bad visual effect on the company if the legal threat had gone ahead. He confirmed that the appellant held the position of line lead and was in charge of general operatives in the company.

Determination

Having considered all the evidence in this case the Tribunal finds by majority, with Mr Fahy dissenting, that the appellant's appeal against the Rights Commissioners decision fails.

Mr Fahy in his dissenting opinion found as follows:
"The main facts of the case are not in dispute in that the claimant sent e-mails from the respondent's computer to a third party, which were offensive e-mails. The third party complained to the respondent that it could take legal action against the respondent if the respondent did not sort out the matter.

An investigation was carried out and during the course of the investigation of the 16th June 2007 the claimant was informed by ER (HR manager for the respondent) that he faced the threat of criminal proceedings and that the matter was very serious. A further meeting was held on the 22nd June at which the claimant's shop steward was present, also a company director and ER (HR manager). After approximately one hour into the meeting, the HR manager and the company director left the meeting, were later recalled by the claimant and told that he wished to resign from the respondent's employment. Shortly afterwards he withdrew his resignation, by letter of the 30th June 2007 and sought to be reinstated with the respondent company.

I consider that the claimant's resignation of the 22nd June 2007 was not a voluntary resignation and was induced directly by the threat of criminal proceedings. The claimant while accompanied by his shop steward to the meeting of the 22nd June 2007, did not have legal advice prior to submitting his letter of resignation. The respondent hurriedly accepted the claimant's resignation on the 22nd June 2007 and did not afford the claimant an opportunity to reflect on the gravity of the decision which he was about to embark on. It was the respondent's evidence to the Tribunal that the claimant would be sacked if he did not resign.

It was the respondent's evidence that it did not have a different policy or separate disciplinary sanctions, for employees who transmitted or circulated e-mails within the company to fellow employees from circulation to third parties outside the company. The respondent said that the sanction imposed on other employees, who breached company policy by transmitting e-mails within the company, was a final written warning and that the employees were not dismissed. The respondent denies that the claimant was dismissed and puts forward the proposition that the claimant resigned. I do not accept this proposition as the resignation was not voluntary having been induced to resign or face criminal prosecution.

Furthermore the respondent did not adduce any evidence before the Tribunal which

substantiated the claim that the company faced legal proceedings from a third party. I consider that the claimant was treated differently from other employees who breached company policy relating to e-mail transmissions, notwithstanding that the claimant transmitted emails to a third party outside the company, as he was dismissed from his employment. The claimant denied, initially, that he sent the offending e-mails and therefore should receive a disciplinary sanction. I consider that the claimant has been unfairly dismissed and that the appropriate sanction in this case should be a suspension of two months from his employment. I determine that the Rights Commissioner's recommendation should be set aside and that the claimant should be re-engaged with effect from the 22nd August 2007."

By majority the Tribunal, having carefully considered the written submissions and the evidence adduced at the hearing find:

(a) That the claimant breached the company's email policy.
(b) That the sending of pornographic images to persons outside the company on the company's PC despite requests from one of them to desist, constituted grave misconduct.
(c) That at the meetings with the company's representatives on the 16th and 22nd June the claimant was advised by a representative of his choice who indicated that the claimant was not subjected to pressure.
(d) That the claimant made the case that he had been coerced/forced into resigning his job. The Tribunal rejects his claim of duress or undue influence and finds that he resigned his job having had the benefit of advice from his union representative.
(e) That there was no dismissal as the claimant submitted a written resignation.

For the above reasons the appeal against the Rights Commissioner's decision fails under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)