

EMPLOYMENT APPEALS TRIBUNAL

Claim of:
Employee

Case No.
UD545/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. D. McEvoy

heard this claim at Cork on 2nd April 2008 and 20th and 21st May 2008

Representation:

Claimant: Mr. Frederick Gosnell, Frederick V Gosnell, Solicitors,
Pembroke House, Pembroke Street, Cork

Respondent: Mr. Eamonn Carroll, Noonan Linehan Carroll Coffey,
Solicitors, 54 North Main Street, Cork

The determination of the Tribunal was as follows:

Respondent's Case:

The respondent is a state-funded community development organisation, which provides training and gives support to various community groups. Its Board of Directors acts as its management committee. All the directors of the Board are volunteers. The staff liaison group (hereafter the group) reviews policies and procedures of the organisation, takes instructions from the management committee/respondent, brings any problems to it and acts as a buffer between the respondent and staff. The group dealt with the matters herein. At the relevant time the group comprised of two volunteers from outside the organisation (SLL & SLP) and two directors of the management committee (M/SLC & M/SLS). SLL had been a founder member of the respondent but had resigned and was drafted on to the

group in 2006. A support agency (SA) provides support, training and guidance to voluntary management committees such as the respondent, its sub-committees and members of staff but lets them make their own decisions. Those identified herein as SA with a third letter are support workers.

In 2002 the respondent employed the claimant as its Project-coordinator. As all members of the management are volunteers. The claimant, who is a professional, was the one key member of staff and trust between the parties was an essential element in the employment relationship. The respondent's offices consist of a main reception area, where a part-time administrator (PA) worked, and the claimant was assigned the office off reception. Each of them had a computer, secured by their individual passwords. The claimant gave PA his password when he was going on annual leave. The claimant was on sick leave, between October 2006 and February 2007. During this time PA discovered that the claimant's password was changed and she got it from him through the intervention of a staff liaison officer.

Around mid December 2006 PA had difficulty accessing the jobs page on the Fás website and being aware that the claimant had downloaded these on a weekly basis she clicked on his favourites folder hoping to find them there and found six pages of unacceptable material (web addresses). That evening she informed some members of the management committee and on their advice she contacted SLP through whom professional advice and assistance was sourced. A human resource consultant (HR) advised on all procedures at all stages of the investigatory and disciplinary process; support agency staff also provided support throughout the entire process. The password to the computer was changed and it was removed to SLP's home. In early January 2007, HR arranged for its delivery to his home in a sealed/secure box and for a computer consultant to examine it. HR was present when the computer consultant switched on the computer. Based on the consultant's findings HR compiled a report, dated 29 January 2007. HR advised the group that they needed a mandate from the management committee to investigate the matter.

In the interim, in a letter dated 10 January 2007 the claimant informed the respondent that he was hoping to return to work on 5 February 2007. The claimant's suggestion, that he return on a phased basis or meet with members and staff of the project prior to 5 February, was not taken up by the group. By letter dated 18 January 2007 the group asked the claimant to provide medical certificates covering his absence from 27 November 2006. The letter continued:

The Staff Liaison Group would be happy to meet you on 5 February, 2007 – the date you indicated in your letter as being when you would be available to return to work full time. We believe you should rest until then and concentrate on getting better. We would like to meet you at 11.00 am for about an hour to discuss the project's requirements and how these can be met. Can you confirm that you will be fully fit to return to work on 5 February and will be able to meet us at 11,00 am?

The claimant's computer was under investigation at this time.

HR's report, on computer consultant's findings, was submitted to the respondent on 29 January 2007: a number of adult pornographic sites had been accessed on numerous occasions and images of a pornographic nature had been downloaded on 7 days over a 15 month period; the images were placed in directories on both 28 April 2006 and 3 May 2006; the images were downloaded before 9.00am, at lunchtime and after 5.00pm; the images were in the nature of soft core pornography. The images obtained from the computer and a document containing a list of what computer consultants and HR deemed relevant were presented to the Tribunal. The computer consultant's examination revealed that there was one user profile (the claimant's) on the system and only one individual account on the computer. On HR's advice the respondent did not proceed further with the investigation until the claimant was fit to return to work. The claimant was certified fit and due to return on 5 February 2007.

On 2 February the group reviewed the material received from HR and agreed a course of action: that a limited disclosure be made to the management committee that the claimant's computer had been used inappropriately and to obtain its permission to continue the investigation into the matter. On 5 February (the day arranged for the meeting with the claimant) the group had a meeting with the management committee and got a mandate from the management committee to proceed with the investigation and suspend the claimant. At a meeting with the claimant later the same day the group informed him that unacceptable the material had been found on his computer and that he was being suspended on pay for three weeks pending the completion of an investigation into the matter. The claimant was not asked any questions at the meeting other than whether he was fit to return to work. An investigation meeting was arranged for 14 February where the documents would be made available to him and he could have a representative with him. His suspension and the upcoming meeting were confirmed to the claimant by letter dated 5 February 2007.

Two days later, on 7 February, the claimant spoke to SLL and SAK on the telephone and indicated to them that he intended to resign. In his conversation with SAK he told her that he was "full of regret and remorse" for the items on his computer; he accepted that the working relationship with the respondent, which had been a difficult one, was over; and, asked her to call off the investigation and that he would give "one months notice following his suspension". He also mentioned that he had got help over the previous months. In his telephone conversation with SLL he advised her that he intended resigning and apologised for accessing the material, causing distress and breaching their trust. SLL told him it was inappropriate to contact her at her workplace and instructed him to put his resignation in writing. On 9 February SLL wrote to the claimant instructing him to submit the confirmation of his resignation by 5.00 pm on 13 February 2007 or otherwise the investigation meeting would go ahead as planned. The claimant did not submit his resignation.

The group conducted the investigation meeting on 14 February 2007 and the claimant's trade union representative was present with him. In the interests of fairness the group decided that only SLL would put questions to the claimant. SLL ascertained that the

claimant was fit. She then explained to the claimant how the material had come to be discovered on his computer and advised him that the purpose of the meeting was to afford him an opportunity to respond to the allegation. HR's one-page report and the list of the web sites visited were given to the claimant and his representative and a fifteen-minute break was taken to allow them time to consider these. When the meeting resumed the claimant's representative informed the meeting that the claimant wished to make a statement. His statement, as recorded in the minutes of the meeting, is as follows:

I realise this is a serious matter, I've been under quite a lot of stress, I didn't realise this until I got therapeutic help, did things quite out of character, did things that hurt people, in the project and my personal life, not beneficial to myself. This is an ongoing process, invidious and has become quite normalised within me, led me to do things which I'm ashamed of. I apologise profusely. In August 2006 I took medical advice, took advice from people. (Have been through) quite intense therapeutic process (with different people, counsellor, psychiatrist etc.), stress and finding way out of things now. The therapeutic process is now almost complete and I am now prepared to leave it all behind me....

The apology was somewhat vague and SLL, seeking clarification, asked the claimant what he was apologising for and he confirmed that it was for accessing imagery. SAK's evidence corroborated this; whilst she had not recorded SLL's questions seeking clarification because the question had been put in a number of ways in rapid succession she had recorded the claimant's reply to those questions: "I did access the imagery, I had no intention to distribute. This is out of character for me." Copies of the minutes of the meeting were submitted to the Tribunal. SLL and SLP provided the feedback on the investigation meeting to the management committee and in particular the claimant's admission. They did not make recommendations to the management committee; it is not part of the group's function to make decisions or recommendations. The other two members of the group who were present at the meeting of 14 February, as well as SAK, corroborated SLL's evidence as to the claimant's admission, apology and clarification. In cross-examination SLL was adamant that the claimant's apology was not for having been sick.

On 19 February the management committee had a meeting to discuss the findings of the investigation and to identify the next step to be taken in light of the claimant's admission. SAM (a support worker) facilitated the meeting. HR had advised that the two issues to be discussed were whether (a) the claimant's behaviour constituted gross misconduct, and (b) whether their trust in the claimant had irretrievably broken down. It was a long and difficult meeting. There was a lot of discussion at the meeting. The facilitator gave each director a number of opportunities to speak. The claimant's stress was taken into account because this had been indicated in his medical certificates but they did not know at that stage about his depression. The management committee voted on the two issues separately. The directors unanimously found that the claimant's behaviour constituted gross misconduct and five directors as against two believed it constituted a breach of trust. The management committee directed the group to hold a disciplinary meeting. Dismissal was not discussed at the meeting. Despite the unavailability of minutes, SAM's

recollection was that minutes were taken at the meeting. By letter, dated 20 February, the claimant was invited to a disciplinary meeting on 28 February.2007.

At the disciplinary meeting on 28 February the claimant's admission and apology, made at the previous meeting, were noted. The claimant was informed that his behaviour amounted to gross misconduct warranting sanction up to and including dismissal and that he was being afforded the opportunity to put forward an explanation and any mitigating circumstances for his behaviour. The claimant's representative made the case that the claimant was seriously depressed and not in control and asked that this be taken into account. The claimant's representative maintained that the expert report and the respondent's procedures were flawed; that others had used the computer password and that without the worksheets and diaries (which had been sought but not furnished) they could not deal with the issue. A short break was taken after which the representative produced a note from the claimant's consultant psychiatrist, dated 30 November 2006, stating that the claimant suffered from depression. The respondent's evidence was that this was the first it had heard of a psychiatrist's note or that the claimant suffered from depression; the certificates submitted to the respondent stated he was suffering from stress. The claimant did not participate in the meeting and his representative answered all questions on his behalf. His replies were: "... if something happened he apologises for this.... this was out of character.... (the claimant) was not in control...to know what he was doing". At another stage, in reply to SLL's query regarding the claimant's admission at the meeting of 14 February the representative told her "[The claimant] did not say that he accessed sites. ... It's unfortunate, whatever happened [the claimant] cannot recall." The claimant's suspension was extended until the management committee reached a decision. The disciplinary committee did not have a decision-making function. The members of the disciplinary committee comprised of the three members of the group who had formed the investigation committee as well as, on this occasion, SLS (the fourth member of the group), another member of the management committee and SAK (a support worker). The disciplinary committee did not have a decision-making function.

On the evening of 28 February 2008, following the disciplinary meeting with the claimant, SLL and SLP reported on their meeting with the claimant to the management committee and then left. The eight members of the management committee were present and involved in making the final decision. SAM facilitated the meeting. There was a wide discussion, sometimes heated. Each director was asked for her opinion and was later given a further opportunity to again voice her opinion in light of the discussion that had taken place. There was some discussion on the claimant's past history within the organisation but SAM kept the discussion on the issue at hand. The directors were very let down and felt they could not rebuild their trust in the claimant. The claimant's depression was taken into account. There was some confusion among the directors as to whether the claimant had retracted his earlier admission. A majority decision was reached to dismiss the claimant on both grounds. The two dissenting members of the committee left the meeting and resigned from the management committee.

By letter dated 1 March 2007 the respondent informed the claimant that he was dismissed for behaviour amounting to gross misconduct and breach of trust. The claimant was

advised that he could appeal the decision to dismiss him. According to the respondent's disciplinary procedure the decision can be appealed to the management committee but SAK stated that had the claimant appealed the decision to dismiss him the respondent would, as it did at all stages of the procedure, have consulted with HR to ensure that the appeal was carried out in accordance with fair procedures.

Both SAM and M/SLC agreed that they had used the claimant's computer but had only done so in his presence. Neither of them knew his password. The claimant had told M/SLC that, in case of an emergency, he had left the password in an envelope in a filing cabinet but he did not tell her exactly where. On the occasion that SAM had used it he had asked the claimant for access to the internet so he could order tickets for a rugby match; the claimant logged in and inputted his password and SAM accessed the relevant website. PA, who is the administrator and the only other employee at the relevant time, believed to the best of her knowledge that only the claimant and she had used his computer. She did not know the claimant's password apart from when he was on holidays or on sick leave when he had given it to her; other than this she had only used the claimant's computer in his presence. She had neither given his password to anybody nor downloaded pornography.

In September 2006 there had been an issue between SAM and the claimant because the claimant had called a meeting of the management committee to report on an application for funds and SAM felt that under normal circumstances the claimant should not call the management committee together. It was SAM's function to facilitate meetings of the management committee. They were in the middle of a process and calling by the claimant could have harmed the process. SAM believed that the claimant had been acting in good faith. It was the claimant's action/practice and not his intent SAM called into question.

Arising from the McArdle recommendations a support team and a supervision team were put in place for the claimant. SLP, one of his support team, explored with the claimant his opportunities for further education and the development of his core set of skills. She had sourced a mentor for him but he only had the opportunity to avail of one or two sessions because he went on sick leave.

There had been some conflict in the respondent organisation in 2005 and two support workers had facilitated an internal review of the organisation. A report on the review was presented to the management committee in August 2006; a plan of action had been developed and it is still in force. The next issue on the agenda was the drawing up of a code of conduct and this was subsequently finalised.

The claimant's contract of employment was signed on 5 September 2003 but this was updated by agreement to include the Disciplinary Policy and Procedure ratified by the management committee on 19 June 2006. The latter states that gross misconduct may result in summary dismissal and it further explains the term as a gross breach of standards of behaviour where an employee deliberately or recklessly carries out an action or conducts himself in a manner that is entirely unacceptable.

The claimant had drawn up a draft discussion document on the use of laptops in August 2005.

Claimant's Case

The claimant started working with the respondent in 2002. He was presented with a three-year work plan and his job was to implement the plan. He had many functions, building a community building, raising funds, and establishing a men's group. Building the respondent's profile in the community was a key function; it was important to let clients and potential clients know about the respondent's services. He was the first full-time coordinator employed by the respondent.

Problems arose with the management committee during his first year. The directors, being volunteers, were not expert in some areas and there were issues and conflict as to where their responsibility ended and his role began. While the decision-making function is vested in the management committee some responsibility had been delegated to him. He submitted a written report to the management committee in advance of their monthly meetings. Some directors subjected him to extensive questioning on his reports and were critical of him. There had been some sporadic verbal attacks on him and he began to fear the meetings.

Two directors verbally attacked him at a meeting on 29 September 2005, accused him of feathering his own nest and cronyism and subjected him to a barrage of questions. The chairman did not protect him from this hostile questioning. Following the meeting he complained to the chairman. According to the terms of his contract of employment his complaint should have been dealt with within ten working days, but nothing was done for the next eight months. The respondent had no anti-bullying policy in place. While he later received apologies he was concerned about a recurrence and asked that a code of conduct be put in place. Such a code would have been a line in the sand. He felt frustrated by the failure to implement one. The issue came up at several meetings of the Staff Relations Committee but nothing was done. The support agency had been involved in 2005 because of conflict between the directors and this resulted in there being little time to address his problem. When the internal review began he was hoping it would resolve his problems. As a result of the McArdle Report in May 2006 support and supervision structures were put in place for him: two members of the group were providing the support and the other members were to provide the supervision.

The claimant was not as involved with the respondent's budget as he would have liked. There was a finance group, to whom he supplied information but he had no decision-making function in that regard. He negotiated with an agency for funds to run a training course. One of the directors tendered for the work but did not deliver the course according to the original proposal. The same director was frustrated when she did not get other training work. Another director wanted work as a volunteer on a project. Relations with some directors became strained because the claimant felt no responsibility to help directors get jobs in the project over members of the community.

Initially, it was the custom for the claimant and PA (the administrator) to attend the entire meetings of the management committee. However, when the group was reconstituted, they (the claimant and PA) left the meeting when the group reported. An agenda-setting group was set up in or around October 2005 and despite several representations to the group he was excluded from sitting on it. This exclusion was a slight and he felt marginalized, isolated and demoralised. He was in the best position to advise on projects; often items he felt were important were not on the agenda. He was not appreciated by the respondent and no matter how successful he was, fault was always found with him.

As a result of this unsatisfactory work situation he was under a lot of stress; he was arguing with family and friends and his health became affected in summer 2006. He was on sick leave in late July/early August 2006. He informed a member of his support group, M/SLO, that he was suffering from depression. On his return to work he continued to see his doctor. Things got worse in August and September. In October 2006, his doctor recommended that he take a month off work. It was his doctor's view that his medical certificate should state that he was suffering from gastritis and stress. However, the claimant told the two members of his support group that he was suffering from depression. His doctor referred him to a psychiatrist because his condition had deteriorated. In January the claimant did not feel great but his doctor wanted him to go back to work. He wrote to the respondent seeking a meeting to update him on developments and seeking a phased return to work. He was disappointed that the respondent did not accede to these requests. He felt some trepidation returning to work on 5 February 2007.

The claimant felt that he should have been given prior notice of the purpose of the meeting on 5 February 2007 and had it done so he would have brought a representative to the meeting. He was too shocked to deny the allegation on 5 February 2007. He had been expecting to return to work not to be suspended from work. After the meeting he was distraught. He had never been suspended before and he felt that his working life was over. He increased his medication. He did telephone three members of the organisation hoping for an informal resolution of the situation: he left a message for SLP but she did not return his call; he spoke briefly with SLL and SAK on the telephone. He knew the latter outside the project and wanted to confidentially discuss his state of mind with her. He did not admit to downloading inappropriate material in either of these two phone calls. He felt guilty about having been absent from work. He did not doubt that there were inappropriate images on the computer but he had not downloaded them

The claimant accepted that he received the letter dated 9 February from SLL, stating:

You telephoned me on Wednesday, February 7, 2007 advising that you wished to resign your position and I understand that you spoke to [SAK] also indicating that you wished to resign. You were asked to confirm your resignation in writing and have not done so. Please arrange to submit the confirmation of your resignation to me by 5.00 p.m. by Tuesday, February 13, 2007. If you do not submit the confirmation by Tuesday, February 13, 2007, please attend the investigation meeting on February 14, 2007 as previously advised.

While the claimant did not reply to this letter he did not agree with its contents. He had neither downloaded the material nor accessed inappropriate sites.

The claimant's representative did most of the talking on his behalf at the meeting on 14 February 2007. SLL explained the allegation to them and presented HR's one-page report and the computer consultant's log to them. The claimant and his representative left the room for a brief consultation and had a cursory look at the report. When they returned to the room, the claimant made a brief statement against the advice of this representative. He felt guilty about having been absent due to his depression and felt that he had left the project down. He made a general apology and said that if he had done something wrong/inappropriate he apologised. He was not asked to clarify his apology. The statement attributed to him in the minutes of the meeting is false. He had no idea why the false statement was incorporated into the minutes. When it was put to the claimant that four people had given evidence to the Tribunal that he had apologised at the meeting of 14 February for downloading the material, he said this (the hearing before the Tribunal) was his opportunity to give his version of events. The claimant reiterated that he neither accessed the sites nor downloaded the material nor made a profuse apology at that meeting.

The claimant's representative gave evidence on behalf of the claimant. The claimant had told him about the phone conversations he had with SLL and SAK on 7 February but he did not ask the claimant about the contents of those conversations because they were a private matter and none of his business. He corroborated the claimant's evidence that his apology was in the terms that if he had done anything inappropriate he apologised. It was the representative's position at the meeting of 14 February that they would not comment on the report and documentation until they had an adequate opportunity to examine and consider it. The claimant was in an extremely upset state at the meeting. The claimant had mentioned his depression at the meeting. When SLL asked the claimant what he was saying (apologising for) the representative replied that if he had done anything inappropriate he apologises. Having considered the report the representative asked for the respondent's worksheets and desk diaries because the claimant spent 60% to 70% of his time out of the office. He never got either of these.

At the disciplinary meeting held on 28 February 2007 SLL mentioned the claimant's apology but the claimant's representative corrected her on this. He told the respondent that their procedures were flawed and that the claimant wanted a resolution. The representative felt that the meeting of 28 February was a kangaroo court. The members of the group had come to the meeting with their minds made up. The claimant did not apologise for downloading images or admit to wrongdoing.

There were two computers on the premises. Both were password protected but the claimant maintained that his password was widely known; PA knew his password and he might have also left it on a post-it on his desk. It was his responsibility to change the password. Once he was logged on to his e-mail account anyone could use it to access websites. He should have checked the history of usage. There was an acceptance of some

use of the internet for personal purposes. People booked tickets or looked at music sites. The draft discussion document he prepared was for the use of the two laptops. It was the directors' responsibility to prepare a policy on e-mail and internet use but this had not been done. The directors and support agency should have prepared a code of conduct. He was frustrated by their delay in attending to this.

M/SLO, a (former) member of the group and a director, of the respondent, had brought to the management committee's attention the large volume of work expected from the claimant. She was involved in attempting to resolve the difficulties that arose between the two directors and the claimant in late September 2005, which ultimately led to the McArdle Report. The claimant wanted to work well with management and sought to have a code of conduct put in place. However, the more work he did the more he was criticised. Some directors criticised him all the time. The claimant told her and SLC (his support group) on 24 August that he was suffering from depression. They reported back to the group that he was ill. S/LMO thought they had mentioned both his stress and depression to the group but these are not reported in the minutes. She had been verbally attacked just like the claimant had and she became ill because of the stress of it all and before Christmas 2006 she had to step down from the group for some time.

KG a former member of the managing committee was at the meeting of the management committee on 19 February 2007 to decide whether they would trust the claimant and whether they were prepared to work with him. The former company secretary had asked for a show of hands and advised them that they should take the claimant's stress into account. She did not remember whether anyone had mentioned that the claimant admitted downloading images, but she did not believe he did because he is a good honest man. The management committee bullied her and she told them they were bullies. She resigned from the management committee on 12 March 2007. Others took the credit for his successes. She would be happy to work with the claimant whether or not he was guilty of the allegations.

Determination

The Tribunal will firstly turn its attention to the substantive issues in this case. Having considered all the evidence the Tribunal is satisfied that the earlier problems the claimant experienced with some directors, did not form part of the respondent's reasons for the dismissal. The evidence of a witness on behalf of the claimant was inconsistent and of no avail to the Tribunal in reaching its determination in this case, and the entirety of her evidence has been discounted.

Inappropriate material had been found on the claimant's computer in mid December 2006. The computer was secured and examined by a computer consultant who found that inappropriate websites had been accessed and images downloaded. There was a stark

conflict between the parties' evidence to the Tribunal as to whether the claimant had admitted responsibility for the material on his computer. The Tribunal accepts the respondent's evidence that the claimant admitted to downloading the material and offered a fulsome apology on three separate occasions: in the two telephone conversations on 7 February and at the investigation meeting on 14 February. The claimant's admission and apology were communicated to the management committee and on foot of it a disciplinary process was put in train. There was some confusion at the disciplinary meeting on 28 February and as a result at the management committee's decision-making meeting later that day as to whether the admission had been retracted. This confusion was understandable given the statements made on behalf of the claimant at the disciplinary meeting. Attempts had been made by the chairwoman of the disciplinary meeting to clarify the point. The management committee by a 6 to 2 majority took the decision to dismiss the claimant on grounds of gross misconduct and breach of trust. This was in accordance with the claimant's contract of employment, which the Tribunal accepts was amended in June 2006 and which defines gross misconduct as a gross breach of standards of behaviour where an employee deliberately or recklessly carries out an action or conducts himself in a manner that is entirely unacceptable.

There was no evidence or allegation before the Tribunal that the claimant distributed, by e-mail or otherwise, the material. Whilst the Tribunal itself might not consider that the alleged behaviour constituted gross misconduct the majority is conscious that it is not its role to substitute its decision, views or opinions for those of the employer. This principle is well established in employment law. In *Looney & Co Ltd v Looney UD 843/1984* the Tribunal stated:

It is not for the Tribunal to establish the innocence or guilt of the claimant. Nor is it for the Tribunal to indicate or consider whether we, in the employer's position, would have acted as he did in his investigation, or concluded as he did or decided as he did, as to do so would substitute our mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in the same position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's actions and decisions be judged.

The Tribunal accepts that the respondent lost its trust and confidence in the claimant. It is essential that all employers, in particular employers such as the respondent, whose members/directors are all volunteers, should be able to place a high degree of trust and confidence in an employee in the claimant's position. The Tribunal does not consider the lack of an internet usage policy to be fatal in this case. The Tribunal is satisfied that at the time of the alleged inappropriate downloading of images the claimant ought to have known that to indulge in conduct of this nature could pose a serious risk to his continuing employment with the respondent. Furthermore, the claimant had prepared a draft policy document in August 2006, albeit for the respondent's laptops which have multiple users, containing guidelines to the effect that each user must log in under their own user name and password and log out at the end of the session and the laptops and internet access was only allowed for the purpose of work.

For these reasons the Tribunal finds that the respondent had substantial grounds for dismissing the claimant.

The Tribunal went on to consider the procedural grounds on which the claimant sought to impugn his dismissal. The Tribunal rejects the claimant's representative argument that the respondent was in breach of fair procedures in failing to give the claimant prior notice of the purpose of the meeting of 5 February. The purpose of this meeting was to inform the claimant that he was being suspended and the reason for the suspension. The claimant's suspension was not a disciplinary sanction but a holding operation pending the completion of an investigation and the principles of natural justice did not apply. (See *Gerald Morgan v The Provost, Fellows and Scholars of the Most Holy and Undivided Trinity of Queen Elizabeth near Dublin and Others* [2004] ELR 235 and *Margaret Deegan and Others v The Minister for Finance* [2000] ELR 190. While it is regrettable that the claimant came to the meeting with an expectation that they would be discussing the project's requirements at the meeting, this expectation has to be seen in the context in which it arose including the fact that at the time of the sending of the letter of 18 January to the claimant his computer was still under investigation and this invitation to the meeting was sent in response to the claimant's earlier letter of 10 January to the respondent suggesting some meetings before his planned return to work on 5 February. The Tribunal further rejects the argument that the investigation committee made a recommendation for dismissal to the management committee and it is satisfied that the decision-making function was vested in the management committee.

Whilst the claimant's computer was password protected the Tribunal is satisfied that its use on a few occasions by others was with his consent and generally, if not always, in his presence. The Tribunal notes that no explanation was given by the respondent for its failure to provide the claimant with the desk diary and worksheets. Whilst the Tribunal accepts that the claimant had admitted to downloading inappropriate material these documents could have established whether he was present in his office at the time of each and all of the offences. However this defect is not fatal where the claimant had made an admission to the offence.

In a management committee comprising of eight members such as the respondent the Tribunal finds that the participation of two of its members in the final decision making process as well as in the investigatory and disciplinary processes offends against the concepts of fairness and reasonableness and renders the dismissal procedurally unfair. The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. Taking all the circumstances of this case into account including the claimant's substantial contribution to his dismissal the Tribunal finds that compensation in the amount of €1,500.00 is just and equitable in this case and makes such an award under the Unfair Dismissals Acts, 1977 to 2001.

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)