EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		CASE NO.
Employee	-Claimant	UD179/2008

against

Employer	-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. S. Ó Riordain B.L.

Members: Mr. M. Forde
Mr. J. McDonnell

heard this claim in Waterford on 22 January 2009 and 1 April 2009

Representation:

Claimant:
Mr. John Goff, Nolan Farrell & Goff, Solicitors, Newtown, Waterford

Respondent:
Mr. John Farrell, IBEC, Confederation House,
Waterford Business Park, Cork Road, Waterford

The determination of the Tribunal was as follows-

Opening Submissions

The claimant was an operator with the respondent whose employment began on 10 May 1993. He alleged that he was unfairly dismissed by letter dated 5 February 2008, that fair procedures were not followed, that any allegations against him were unproven and that, even if proven, would not have warranted dismissal.

The respondent contended that the decision to dismiss had been fair in all the circumstances and that the decision had been in keeping with the requirements of the unfair dismissals legislation on both substantive and procedural grounds.

At the Tribunal hearing the above dates were agreed, it was stated (by the respondent's representative) that the claimant had been paid in lieu of notice and the claimant's gross weekly paywas agreed by the respondent's representative to have been €767.21.

After the Tribunal asked if the parties wanted to make opening submissions the respondent's representative replied that the respondent had internet that could be accessed and also had an intranet site (to give information to employees) which could be accessed by any employee. Therespondent had about five thousand employees in Europe. There were 1400 employees in Ireland.There were four hundred pcs (personal computers) on the industrial estate where the claimant hadworked.

The Tribunal was furnished with a copy of a page welcoming people to the respondent's European intranet. The respondent's representative told the Tribunal that nothing could be changed on thispage except that there was a gap where the welcome message was displayed. The respondent's management had not known this but found out that a change could be made because on 4 December2007 the abovementioned intranet page contained the following message: "500 jobs to be gone atWaterford plant before end of first quarter 2008".

This caused industrial relations difficulties for the respondent. The respondent started an investigation, which, it was submitted, was thorough. Some thirty-eight people were interviewed. The respondent identified the two people who would be nearest the relevant pc in a particular part of the plant. They were the claimant and a female colleague (hereafter referred to as E).

The Tribunal was now referred to a diagram showing where E and the claimant sat on Lines 4 and 5. Once per hour, the claimant would need to go to Area (Line) 4 and once per hour E would need to go to Area (Line) 5. Twice per shift, when E was on a break, the claimant would have cause to go to E's pc on Line 5. All changes were made to this pc (hereafter referred to as PC5) including changes, which the claimant admitted. No changes were made to the other pc (hereafter referred to as PC4).

The respondent's representative asked the Tribunal to draw its own conclusions as to why the claimant had made changes to PC5 rather than PC4. The claimant was proficient in pc skills andhad used PC4 to access intranet and internet sites regarding his own non-work interests. The claimant used PC5 to make web-page changes. He admitted making changes (but not the particularone that was before the Tribunal) and showing them to other employees. There was no suggestionthat anyone other than the claimant had made changes in the welcome-message bar.

The respondent found out on 5 December 2007. The claimant changed his story a number of times. The first time, the claimant led the respondent to believe that he did not know how to do this and that he hoped the person would be caught. The claimant also misled the respondent about what he had done on his own pc.

The respondent representative indicated that the claimant had acknowledged on 13 December seeing messages on the intranet. One referred to a manager (MH) and said that MH had got a €250k payoff when leaving. This message was changed to say that another person (TK) would get MH's job. The claimant referred to a message about another person (MA). The content was vulgar. The claimant said that he had seen this and had taken it off. No one else had seen this. A fourth message contained references to a personnel manager (hereafter referred to as VB). The fifth was about five hundred jobs lost.

The claimant subsequently acknowledged that he had put up messages and changed messages. He acknowledged a message about VB. No-one had seen the message about MA. There was no evidence that anybody else had put a message on the welcome bar. The claimant denied at first

but"piecemeal" he made various admissions having at first denied being able to do this.

After the message about the future loss of five hundred jobs had resulted in a serious industrial relations issue there was a full investigation. The respondent came to the reasonable belief that the claimant was responsible and that the dismissal was fair.

Asked if there had been an appeal, the respondent's representative replied that there had not been one and that it was not part of the respondent's grievance procedure.

Replying to the respondent's representative's submissions, the claimant's representative said thatthe claimant had nearly fifteen years' service but was dismissed for one alleged offence on 4 December 2007. This was the only reason in the dismissal letter. The evidence fell "way short" ofwhat was needed to show who had placed the message. The respondent's procedures were unfair.The claimant consulted his representative who wrote to the respondent seeking full particulars ofallegations and evidence. The respondent wrote back saying that it would not talk to the claimant'srepresentative.

The claimant's trade union said to the claimant to go with his trade union or with his solicitor. When the respondent wrote back and the union would not go with him the claimant went with the option that he did not want. The claimant's representative said that a recent P.I.A.B. case, which had gone to the Supreme Court, was relevant.

In response, the respondent's representative said that the claimant had been an hourly-paid process operator in the respondent and that a long-standing agreement provided that negotiating rights were given to a particular trade union. The respondent and the union were adhering to the agreement.

Regarding the claimant's representative's reference to a (P.I.A.B.) case, the respondent's representative said that the decision therein had not been made at the time of the claimant's case, that it did not apply to the respondent's internal investigation and that three other cases said that the P.I.A.B. case was not relevant for an Employment Appeals Tribunal unfair dismissal case as opposed to an employers' liability case. The Tribunal indicated that legal references and argument would have to be advanced later if the claimant was pursuing this aspect.

The respondent's representative said that an employee facing dismissal had a right to professional representation. The branch secretary of the abovementioned union was involved. Before that, in-house shop stewards represented the claimant even when it was a fact-finding situation.

The claimant's representative submitted that, even if the claimant admitted what was alleged, it fell far short of what was required by the unfair dismissal legislation. The message was on the respondent's web-page for less than twenty-four hours. No damage had been caused to the respondent.

Respondent's Evidence

Giving sworn testimony, VB (the abovementioned HR manager for the claimant's area at

the respondent's Waterford plant) said that, on Wednesday 5 December 2007, MF (the respondent's overall HR manager for Waterford) told her about a message on the web-page about "five hundred jobs to go" and that an investigation had been started.

On Thursday 6 December 2007 MF told VB that the respondent's information technology department had found that the message had been put on the abovementioned PC5 between 18.26 and 18.32 (on 5 December 2007). VB was asked to start an investigation.

VB spoke to the production manager for that shift for that week. It was found that two individuals (the claimant and E) would have work related access. On Friday 7 December 2007 VB interviewed the claimant about the incident. A shop steward represented the claimant. E was also interviewed and was represented by a shop steward. The claimant said that he was outraged to be part of the investigation and that he had not placed the message. He asked if a password was needed to do it. VB said no. The claimant did acknowledge that it was a serious matter for the respondent. The claimant said that he had used a computer to look at cars et cetera.

VB met MF and another person (TF) about the outcome of the interviews. They decided to suspend both the claimant and E pending the outcome. VB met the claimant with a shop steward and told him of his suspension. The claimant asked if he was the only one. VB said no. The claimant's shop steward asked for a break. The shop steward came back shortly and said that the claimant had gone home.

Asked at the Tribunal hearing if suspension with pay had suggested guilt, VB replied that it did not but that these two employees had access to the pc used and the respondent had needed to be sure that the incident could not occur again.

The Tribunal was now referred to the minutes of the investigation. The respondent's representative suggested that this corresponded to VB's evidence and showed that the process was done professionally.

On Wednesday 12 December 2007 VB interviewed other employees. Information was sought about possible other incidents. A series of questions was asked of everyone. Thirty-eight employees were interviewed on 12 December by VB and her colleague, TF.

Asked what she had taken away from her interviewing, VB replied that she had taken away that the claimant had used PC5 and that he had showed messages to a number of employees. It was also found that E did not have good computer skills. There was no information to say that someone other than the claimant had made changes. No one had seen the claimant type up messages but he admitted showing them to others.

On Thursday 13 December 2007 VB interviewed E with her union branch secretary/organiser. On that same day the claimant was also interviewed. Asked at the Tribunal hearing if Line 4 pcs had internet access, VB said that all pcs had internet/intranet access. Asked if the respondent had done an investigation to establish that, she said that it had done so and that it had internet mail on Line 4 about cars. Further questioned, she stated that PC5 had internet and intranet. She added that PC4 had internet and that the respondent's I.T. people had said that all pcs had intranet access. The matter was handed over to MF (the abovementioned HR manager for the respondent for Waterford).

VB indicated, in reply to cross examination, that the unauthorised placing of material on the intranet was a breach of company internet policy which had been adopted in 2003. She was unable to say whether or not the claimant had been informed of this policy. She agreed that the overall work area was open plan and was very big (half the size of a football pitch was suggested by the respondent' representative) and that everybody on duty in the company that had not been interviewed; the thirty-eight interviewed worked in the vicinity of the pc and were on the same shift as the claimant.

Giving sworn testimony, MF confirmed that he was the respondent's HR manager and that, in consultation with others, he had made the decision to dismiss the claimant. On Wednesday 5 December 2007 he was in an office with an operations manager. Two shop stewards came in and they were very irate and angry. They referred to the intranet message and asked what was going on about five hundred jobs going. MF's reaction was that this was wrong but he checked it. In September the respondent had had two hundred lay-offs. When the general manager was asked if five hundred jobs were really going he said that this was absolutely not the case.

MF asked the I.T. manager how this message could have got on to the internal website. The I.T. manager came back to MF and said that when this had been investigated by the U.K. it had been found that this had happened in Line 5 at the respondent's Waterford premises.

MF asked VB to start an investigation as to how this message had got on to the website and who had put it up. It had been put up between 18.26 and 18.32 on Wednesday 5 December 2007.

MF was involved in preparations for the investigation. The intranet announcement about jobs going leaked to the media. The respondent had to deal with the media. MF was involved in compiling questions for VB to ask. This became known around the plant. Copies were made of it. The respondent did not know who had leaked it to a local radio station. It was not published in the print media.

On 13 December MF became involved. VB and TF came back to him with answers from the claimant and E. MF held a disciplinary meeting with the claimant on that day with a union branch official and shop steward.

Asked what had happened at the 13 December meeting, MF said that the investigation had revealed that other staff interviewed said that the claimant had put up messages. The claimant had admitted to putting up two messages that he had previously said to VB that he had not put up. The claimant had asked if it needed a password but he knew about this.

At the meeting MF asked the claimant if he had put up a message about VB. The claimant said that he had done so and that it had been a bit of fun. The claimant got very upset and left the meeting. Two union people left with him. They said that the claimant was not in a fit state. MF agreed to postpone until after Christmas and that the claimant was to stay on full pay.

There was a meeting with the claimant and union representatives on 14 January 2008. MF and TF represented the respondent. A shop steward said that, because the claimant was a smoker, he might have gone for a cigarette at the time that the message was sent. MF told the Tribunal that the respondent would have a record of that use of a swipe card and that he agreed to postpone so that the respondent could check this. The meeting was rescheduled.

At a meeting on Tuesday 29 January 2008 the claimant's trade union representation said that the claimant was not well enough to attend because of ill health and MF said that the respondent could not continue to pay the claimant indefinitely. There was no record of the claimant swiping in or out at the time the message under investigation was sent. The respondent only kept camera footage for one month and footage was not available. The claimant had been in the area at the time because he had been seen by a production manager who was going to a college appointment. E (the claimant's abovementioned colleague) had been doing something, which required the use of a machine. Her swipe card would verify that. She was working at a machine, which was physically removed from the pc in question at the time of the incident.

The respondent spoke to a production manager and said that it could not continue to pay wages to the claimant. A meeting was arranged for 5 February. VB had gone on holidays to Australia. MF outlined the history of events. He felt that the claimant's story had changed from being exasperated (as to why he was investigated) to the next meeting when he made an admission because it was put to him from VB's findings that he had put up two messages on this site. The story changed again regarding the putting up of a further message about VB. MF asked why the claimant had not made an admission at the first meeting. The claimant and a union branch official pleaded for a postponement. The claimant said that he did not want to do anything without advice.

At the 5 February 2007 meeting MF said that there had been a breach of trust and that, based onstories changing, the matter was very serious. He said that the respondent believed that the claimanthad put up the message about five hundred jobs going at Waterford. MF let the claimant and theunion official respond. They said that the claimant did not do it. The claimant pleaded innocenceand referred to his fifteen years' service. MF told the claimant that the respondent would dismisshim. A letter of that date gave effect to this.

Asked at the Tribunal hearing if it had been open to the respondent to use a sanction short ofdismissal, MF replied that the respondent had believed it to be a very serious issue and that therehad been a clear breach of internet/intranet policy which had created huge unrest and which had notbeen just fun or banter. MF added that the respondent had also taken into account changes in theclaimant's version of events.

MF, in cross examination, agreed that there was no direct evidence linking the claimant to the intranet entry and that, prior to this incident, there was no record of earlier interference with the intranet and it was not possible to determine the extent of any such interference. He indicated that VB had kept a written synopsis of the interviews, which was available. He was asked about his response to the letter of 20 December, which the claimant's solicitor had sent to VB requesting full particulars of the allegations against the claimant and of any evidence linking the claimant with the alleged offence and seeking confirmation of the status of the disciplinary enquiry. He indicated in this regard that his response to the effect that the company intended to uphold the disciplinary agreement with the relevant trade union and that it would, therefore, be inappropriate to enter into correspondence with solicitors was the correct approach. He agreed that he had given no details of the investigation to the solicitors. Information had been given to the trade union. In relation to the production manager having seen the claimant in the vicinity at the time of the incident, he agreed that the production manager's office was 20 yards from the pc. He accepted that only four or five people saw the notice on the intranet and that it had been removed quickly the next day, but it had led to real difficulties and he confirmed his view that it was gross misconduct for which dismissal was the appropriate sanction. He also indicated that he had regard to the claimant's medical situation in the disciplinary process.

Giving evidence NM told the Tribunal that he is the I.T. manager for the respondent in Waterford. The respondent's Electronic Mail and Internet Policy for Waterford (entitled SPP 509) was submitted to the Tribunal. Section 4.5.4 of this policy states, "Employees should safeguard againstusing the Internet to transmit personal comments or statements through e-mail or to post information to newsgroups or usenet that may be mistaken as the position of the Company." Section 4.6 of the policy pertains to the violation of the policy and states, "Any employee who violates this policy or uses the Internet for improper purposes shall be subject to discipline, up to and including dismissal." Both of these sections were quoted in the claimant's letter of terminationdated the 5 February 2008.

NM told the Tribunal that this policy is available for all staff to view on the respondent's network drive. As I.T. manager, NM sends out an annual email to make staff aware of the policy. A sample email dated the 25 June 2003 was submitted to the Tribunal. NM sent this email to all Waterford users to remind them that the respondent's electronic information systems including email, internet and network are only to be used for conducting company business. The email further stated that any non-business use including non-business email, music downloads and games, breaches company policy and Waterford SPP509 for Electronic Mail and internet use. The email concluded by stating that any employee found in breach of these policies may be disciplined, up to and including dismissal. Hyperlinks to the policies were enclosed in the email. Reminders were sent in subsequent years.

All employees have access to the respondent's computer system for record purposes. The claimant had a high level of access to the system as he was trained to a particular level where he could carry out tasks above and beyond that of a normal operator role. In some cases that level of access allows internet usage and there was some email activity on the claimant's account.

During cross-examination it was put to NM that the claimant had not received the internet policy. NM replied that the mailing was sent to all Waterford users and the claimant's email address was part of that mailing list. NM could not say at the hearing whether the claimant was part of the listing in 2003. Two further emails were opened to the Tribunal dated the 3 December 2004 and the 17 August 2007 respectively. The email of the 3 December 2004 was between NM and VK and related to ensuring that all users were aware of changes to the email and internet acceptable usage policy. In the email dated the 17 August 2007 NM asked VK to communicate an email to all users relating to compliance of the policies and procedures in an attached link. NM confirmed that a password was not required to change the welcome message on the respondent's intranet.

In reply to questions from the Tribunal, NM was aware of other employees being disciplined forabuse of the respondent's internet policy. The original internet policy was communicated on the 21January 2002 and was revised on the 12 June 2003. NM did not have proof that the claimant hadhad sight of the policy or that he had opened the email containing the policy. As part of complianceNM has to monitor the list of computer users. He examined this list in November 2007 andFebruary 2008 and the claimant was on the list in 2007. NM could not say if the claimant was onthe list in 2003. NM could not prove that the email of the 3 December 2004 from VK was latercirculated to the claimant. The Tribunal asked NM if the only reference to potential dismissal wasin the 2003 email. NM stated that the email he sent in 2009 also made reference to potentialdismissal. Although the respondent no longer employed the claimant in 2009 the policy was available on the respondent's network drive throughout the claimant's employment.

NM indicated that the UK Office of the respondent company had confirmed that the offending message had been placed on the intranet between 18.26 and 18.32 on the day in question. PC SRO Line 5 had been used. In a subsequent review of security IT removed the capacity to place post messages on the intranet from all relevant pcs.

In reply to cross examination, NM confirmed that IT was unaware of the capacity to post messages on the intranet until the incident and that there was no record of any previous messages.

Claimant's Evidence

Giving evidence, the claimant told the Tribunal that he had worked as an operative since finishing school. He worked for one year for a factory but since then he has worked for the respondent. The room he was working in was about the size of a soccer pitch. There were 75 employees working in the Operators Seating Area. On the 4 December 2007 the claimant was working from 2pm to 10pm. He had a personal worry on that day. On the 5 December 2007 he was asked by MJ to attend at the office. His colleague E was also asked to attend at the office. The claimant was told about the message on the intranet concerning the loss of 500 jobs. The claimant was informed that the Personnel Manager would be speaking to him on the 7 December 2007 in relation to the message on the intranet.

On the 7 December 2007 the claimant met with VB. The shop steward was present at this meeting. The claimant denied at this meeting that he had put up the message on the intranet concerning the loss of 500 jobs. When he was asked if had previously put up messages on the welcome bar the claimant denied that he had, as he did not want to get the blame for something he had not done. The claimant was distraught after this meeting and subsequently needed medical attention. When the claimant was suspended he knew there was a possibility that he could be dismissed.

At the meeting of the 13 December 2007 the claimant was represented by a union official. The claimant admitted that he had previously put three messages up on the intranet welcome bar. These three messages involved other employees and were seen by other employees. The claimant put these messages up momentarily and deleted them immediately. The claimant discovered by accident that he could alter the message bar on the intranet. The claimant stated that he had not put up the message "500 jobs to be gone at Waterford plant before end of first quarter 2008". It was mentioned at this meeting that the claimant's colleague (E) was computer illiterate but the claimant believed this to be incorrect. VB produced documents at the meeting regarding internet usage policy. The claimant offered in his defence that he was not the only person to use the internet.

The claimant was upset after this meeting and wanted professional legal council. He spoke to a solicitor who wrote a letter to the respondent on his behalf. The respondent replied to the letter stating that the respondent has an agreement with a union that on matters of discipline, the union represents hourly paid employees. The respondent stated that as it was the company's intention to uphold this agreement, any correspondence with the claimant's solicitors would be inappropriate.

At the meeting on the 14 January 2008 the claimant asked if the company would be willing to check CCTV and card swipes for the day of the incident to check the claimant's whereabouts. Atthe meeting of the 29 January 2008 the claimant was told by the company that an investigation wasconducted but only the claimant's swipe card had been checked. The claimant argued that if he wasexiting with another employee only one of them would need to use their swipe card to exit. Thecompany did not provide any CCTV evidence as it is kept for only one month.

At the final meeting of the 4 February 2008 the claimant was told his employment was being terminated and that this was the punishment. The claimant did not know of the case against him and he was not informed if he could appeal the decision to dismiss. The letter from his solicitor was not discussed nor his right to representation. The claimant was paid in lieu of notice. The claimant received a letter of dismissal dated the 5 February 2008 and signed by MF (HR Manager).

The claimant gave evidence pertaining to loss.

During cross-examination the claimant accepted that at the meeting of the 7 December 2007 he did not admit to putting up messages on the intranet. The claimant lied, as he did not want to be blamed for something he had not done, i.e. the message regarding 500 jobs. The claimant accepted that the matter was serious and that it could lead to dismissal. At the meeting of the 13 December 2007 the claimant admitted that he had put up two messages on the intranet. The first concerning a monetary payment to MH and the second that a colleague would get MH's job. The claimant put these messages on the intranet approximately three months before his dismissal. The two messages were typed together, a group of employees were gathered and there was some "slagging" going on. The claimant put up the message about the golden handshake as a joke but he removed it straight away. When asked, the claimant stated that he always made the changes to the message bar on PC5, the computer usually associated with his colleague, E. The claimant was not aware of any other employees who changed the message on the welcome bar.

The claimant removed another message from the internet, which contained an obscene word. The claimant did not put up this message, it was vulgar and he removed it. Two other employees had seen the message also. The message was on the intranet for approximately six months. It was put to the claimant that no one else had reported seeing this message. The claimant admitted that hehad also put up a message on the system concerning VB (HR manager for the claimant's area). Hehad not saved this message on the system and he removed it straightaway.

It was put to the claimant that he had approached VB about the possibility of negotiating an exit package. The claimant stated this was correct as he was trying to find out if a severance package was available to him, as there were a number of rumours concerning exit packages. The claimant asked VB to meet him on the 4 December 2007. The claimant was unsure of the time that he had put up the message about VB. When E raised a concern with the claimant about the traceability of the messages the claimant told her not to worry, as it could not be logged and the message was deleted straightaway.

In reply to questions from the Tribunal, the claimant stated that at the meeting of the 7 December 2007 he was shown the statement concerning the 500 redundancies. At a later meeting he was told what other employees had said regarding the message. The claimant knew what was alleged against him but he was not provided with the information of what he was accused of or what his whereabouts was at the time the message was put up on the intranet. The only sighting of theclaimant was at the Production Manager's office at 18.26pm but the claimant only became aware ofthis on the first day of the Tribunal hearing. Only when the claimant asked during the meeting didthe respondent consider checking the CCTV.

Determination:

The event which gave rise to the dismissal in this case was the unauthorised publication on December, 2007 on the "welcome bar" of the respondent company's Corporate Euroweb Intranet of

a message to the effect that "500 jobs to be gone at Waterford Plant before the first quarter of2008". The respondent, in its dismissal letter of 5th February, 2008 indicated its belief, followingan investigation, that this was posted by the claimant; that it appeared on over 400 computers in theplant and that, as well as creating huge unrest, instability and worry among employees in the plant,it was a clear violation of company intranet policy which states:

"Employees should safeguard against using the Internet to transmit personal comments or statements through e-mail or to post information to newsgroups or usenet that may be mistaken as the position of the company."

"Any employee who violates this policy or uses the Internet for improper purposes shall be subject to discipline, up to and including dismissal."

The onus is on the respondent company to establish that the dismissal of the claimant is not unfair having regard to the provisions of the Unfair Dismissals Act, 1997 to 2007. The respondent must, therefore, show that, acting as a prudent and concerned employer, the matter was properly and fairly investigated and that the conclusion reached was reasonable; that the disciplinary processes were fair and respected the claimant's rights, and that the penalty was proportionate and was within the band of penalties which might be imposed by a reasonable employer.

The evidence of the parties is set out in detail and the principal arguments advanced by the parties may be briefly summarised as follows:

The respondent submitted that the company had carried out a thorough investigation and reasonably arrived at the conclusion that the claimant was responsible, based on the facts that 38 staff on duty that night were interviewed; that he was one of two staff members (both of whom were originally suspended pending investigation) with most immediate access to the pc terminal used; that the claimant initially lied about putting messages on the intranet; that he changed his story as evidence emerged and gradually admitted that he had previously placed three messages on the intranet from the same pc terminal used in this case; that no evidence was given to the company in support of the claimant's contention that a fourth message had been placed on the intranet and that no evidence was available to the effect that anyone else in the company (including the IT staff themselves) knew how to alter the intranet (controlled from London) and that he accepted when the matter was being investigated that the incident was very serious and could lead to dismissal. The respondent also indicated that the claimant's rights to fair procedures were fully respected in the investigation and disciplinary process leading to his dismissal. In the respondent's view, the dismissal was fully justified.

The claimant denied that he placed the offending message on the intranet and he contends that the decision to dismiss him was both procedurally and substantively unfair. At the time of the incident he was in difficult personal circumstances and he was later ill. The disciplinary process failed to respect his rights or address his concerns when his solicitor wrote seeking detailed information. His failure to admit initially that he placed earlier messages on the intranet arose because he was afraid that he would be blamed for something he did not do. Only 38 out of 75 staff were interviewed and no accurate record of the investigation was kept or given to the claimant. The company failed to look for objective facts; the CCTV camera record which would have shown people going in and out was not retained and the actual evidence of the production manager put him some distance from the pc used. He was being dismissed for gross misconduct and under the company's internet policy and yet there was no evidence that he had ever seen this policy or that he or any other employee had

been required to acknowledge receipt of notice in this regard prior to his dismissal. The company's grievance procedure failed to provide any appeal mechanism. The dismissal in any event was grossly disproportionate for a good employee with 15 years service. A rumour had been put up on the system, which very few people looked at, and was quickly removed without damage to the company. The claimant holds that his dismissal was unfair and that he has suffered grievously as a result.

The Tribunal is satisfied on the basis of the evidence that the investigation was both thorough and fair and that the conclusion that the claimant placed the offending message on the respondent company's intranet was, on the balance of probabilities, reasonable. It was, in the Tribunal's view,reasonable for the company to interview the 38 employees selected rather than everyone on duty inthe plant and the fact that they initially suspended the two employees (including the claimant) whohad the most immediate access to the pc used demonstrated the fairness of their approach to the investigation. While, with the benefit of hindsight, the securing of the record of a CCTV cameraon a door would have been beneficial, his presence in the area was confirmed at the critical time bythe production manager who clocked out at 18.26 and the record of the interviews with the claimantestablishes that his representatives were told of this during the meeting on 29th January, 2008. Equally, the company's response of 7th January, 2008 to the letter of 20 December, 2007 from theclaimant's solicitor was reasonable in circumstances in which the claimant was represented by histrade union at all stages of the agreed investigation and disciplinary process, both before and afterthe solicitor's letter. The Tribunal is also satisfied that all the crucial evidence collected was givenby the respondent to the claimant (directly or through his union representatives) throughout the process.

In circumstances in which the crucial evidence established that the claimant (who was accompanied by his trade union representatives at all stages) had in fact previously placed a message on the intranet on a number of occasions (using the pc in question) and the claimant initially lied but, as undisputed evidence emerged, gradually admitted this, and there was no evidence of any other member of staff having ever done so, the conclusion of the investigation was one which in the Tribunal's view would have been arrived at by a reasonable employer on the balance of probabilities.

The Tribunal does not, however, agree that dismissal was the appropriate sanction arising from the incident. Notwithstanding the recognition of the claimant during the investigation of the seriousness of the incident, there is a very strong duty on the respondent to take steps, as part of their disciplinary procedures, to ensure that staff are seen to be advised individually of activities which, potentially, could lead to dismissal for gross misconduct. In the normal course, employers would require a formal acknowledgement by employees of having received and read a policy of this nature. There is no evidence that the internet policy (which relates to internal – external communications but which, presumably, is also intended to cover intranet communications) was ever seen by the claimant and the activities of the IT section, subsequent to the incident, in bringing the internet policy to the more direct notice of staff is relevant in this regard. It does appear from the evidence that the company were aware of this important lacuna in their disciplinary procedures.

The Tribunal, while fully recognising the potential for serious mischief and damage in industrial relations caused by the placing of the message on the intranet, must also have regard to the fact that very few staff actually saw the message (previous messages on the intranet never even came to light of management presumably because of the infrequent return to view the "home" page) and the matter was very quickly sorted out with the union immediately when it came to light and with the local media without any damage to the company. The employer's contention used as a prime basis

of dismissal, of the message creating huge unrest, instability and worry among the employees is not really substantiated in a situation in which the union representatives were told that the message was untrue and an investigation and disciplinary process were immediately and visibly put in hands.

In the Tribunal's view, most reasonable employers would have been more disposed to a financial penalty/suspension plus a final warning rather than the ultimate sanction of dismissal in circumstances such as apply in this case involving a good employee with 15 years experience. It may well be that such a more limited sanction would have been considered within an appeal mechanism if such existed.

The Tribunal, in all the circumstances, considers that the claimant was unfairly dismissed and determines that his claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds.

The Tribunal considers that compensation is the appropriate remedy in this case but that the actions of the claimant very greatly contributed to the situation. The Tribunal considers that, in many respects, the claimant is, unfortunately, the author of his own misfortune. The Tribunal in the circumstances determines that compensation in the sum of €6,500.00 should be paid.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)