EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE - claimant	UD450/2008 MN408/2008

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Ms. H. Kelleher

heard these claims in Cork on 27th January 2009 and 17th September 2009

Representation:

Claimant: Mr. Donnchadh McCarthy BL, instructed by
Martin A Harvey & Co, Solicitors,
Parliament House, 9/10 Georges Quay, Cork

Respondent: Mr. Ruairi O Cathain, Ruairi O Cathain, Solicitors
30 South Terrace, Cork

The determination of the Tribunal was as follows:-

Summary of the Evidence

The claimant commenced employment with the respondent, a tour operator, on 3 May 2006 on a six-month probationary period which, on its expiry, was extended by a further six months. She worked as a sales executive. The claimant had been trained in the United States and had studied business and marketing. She was the top salesperson in the office and earned a bonus of just over ten thousand euro in her first year. The claimant was happy in her job.

However, problems arose in 2008. On or around 25 February another employee (AE) reported to MD that on the previous Saturday the claimant had telephoned her and had been aggressive and used foul language to her during the conversation. MD spoke to both employees about the incident. The claimant denied using foul language. It was the claimant's evidence that she had telephoned AE because she had sent out a negative e-mail about her (the claimant) and as a result of their conversation AE apologised to her. The claimant thought that this was the end of the matter. However, AE made a complaint to MD, who spoke to both of them about the matter on Monday, 25February 2008. MD then enquired as to whether there were any other matters he should know aboutand as a result, over the course of the week, employees reported other issues to him. Arising fromthese communications MD spoke to the claimant on 29 February 2008 about having accessed hisemails and a text message. The claimant's response was how could he believe the other employeebecause she had savagely attacked a girl. He suspended the claimant on pay pending an investigation.

In this letter dated 5 March MD informed the claimant that the subsequent investigations brought to light other allegations including:

- allegations of dishonesty (taking bookings that according to office practice should rightfully be accredited to other employees)
- accessing his personal computer after work hours
- reading his personal e-mails
- accessing the computer of fellow workers, including her direct manager after hours
- accessing his mobile phone on night of 26 January to check a text message on it

The letter continued to state that in light of the allegations of dishonesty, invasion of privacy and intimidation of employee(s) he had no option but to consider the prospect of gross misconduct and that if the allegations were proved further disciplinary action, which could include dismissal would be taken. Hw also indicated that if the allegations were proved false appropriate action would be taken against the relevant employees.

On 11 March 2008 the claimant sent an email to MD:

- indicating that she would not be attending the meeting that day,
- seeking full information on the complaints against her,
- seeking confirmation that she could call witnesses, cross-examine those making allegations against her and the right to have legal representation, and
- requesting the grievance procedure and the right to appeal any decision made against her.

By e-mail dated 13 March 2008 MD explained to the claimant that it was a two-stage process: (i) an investigation into the facts and (ii) a disciplinary hearing if the facts warranted. In the e-mail he indicated that they were currently in the investigative process and seeking her version of the alleged incidents to establish the facts; that at the meeting she would be furnished with a full copy of the complaints, which she could take away; and that at the second stage "if the findings and facts" so warranted there would be a disciplinary hearing at which she could cross-examine witnesses and call her own.

At a meeting on 19 March MD presented the allegations to the claimant and told her that she could take them away and look through them. By e-mail dated 31 March the claimant sent her responses to the allegations and offered to meet MD to "follow up". By e-mail dated 1 April the claimant asked to meet MD outside the office or at the office outside office hours because she wanted their discussion to be in private. MD needed time to consider her responses. It was his evidence that the claimant sent a text message turning down the opportunity to cross-examine the respondent's witnesses. No further meeting was held between the parties.

Having considered the complaints made by the employees and the claimant's responses MD concluded that the instances of accessing the specific text message on his mobile phone, his computer and the computer of other employees as well as falsely alleging that another employee had assaulted a third party constituted gross misconduct, destroying the relationship of trust and confidence and warranting dismissal. Some of the other issues constituted misconduct. He concluded that two of the three bookings should have accrued to another employee and one was properly credited to the claimant. By letter dated 7 April 2008 MD wrote to the claimant enclosinghis report on "the recent disciplinary hearing" and informing her that she was being dismissed forgross misconduct. The claimant was shocked; she had been expecting to be called to a meeting onthe issues. MD had told her that there would be a follow-up meeting. The claimant never thoughtthat she could be dismissed.

The claimant denied that there had been a policy that she was not to access MD's computer. When travel agents would phone staff would have to look at MD's computer, which was not password-protected and was always switched on. Similarly, the claimant and a colleague would regularly look (for work purposes) at the office manager's computer, which was always switched on and was not password-protected either.

According to the claimant her family as well as the respondent's had experience of adoption in their lives. It was a matter of open discussion and she had not read his private e-mails or spoken behind MD's back about it. She denied that she had accessed a text message on MD's mobile phone when it had fallen from his pocket at a function on 26 January. She denied having engaged in malicious gossip; an incident had taken place but AE had been found not guilty; she (the claimant) had spoken only to MD about that matter. While she agreed that there had been a large number of allegations against her, most of these emanated from a person with whom she had a disagreement.

After her employment with the respondent the claimant contacted recruitment agencies. One company (which dealt with travel counsellors who worked from home) approached the claimant because it wanted someone to go into an office. A question arose as to why the claimant had left the respondent. The claimant said that she "had been let go for gross misconduct" and was taking a case against the respondent. The company had asked the claimant to go to Britain for training and had said that it would have to talk to Britain about hiring her. The company subsequently said that the claimant was not someone that it could take on. The claimant switched mobile phone and lost details of job applications. She supplied e-mails to the Tribunal of her efforts to obtain employment. She was no longer seeking employment because she had had a baby since the first Tribunal hearing.

The claimant continued to seek employment until February of 2009. She went on maternity leave one month before her baby was born in March 2009.

Determination

On the first day of the hearing in January 2009 the respondent vigorously defended the unfair dismissal claim. However, by the second day of hearing in September of that year the respondent had ceased trading, did not have relevant witnesses with him and conceded the claim for unfair dismissal. The Tribunal notes that in any event, having heard the respondent's evidence, it would have determined that the dismissal was unfair.

The Tribunal, having considered the limited evidence adduced and having taken contribution and the claimant's efforts at mitigation into account as well as the period when the claimant was available for work, considers that compensation in the amount of €21,250.00 to be a just and equitable award under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal's assessment as to the claimant's gross weekly pay incorporates a reduced amount in respect of the claimant's bonus, which the Tribunal considers would be significantly reduced in the deflationary period covering the period of financial loss.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Organisation of Working Time Act, 1997, were withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)