EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee - *claimant*

CASE NO.

UD847/2008

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. O'Connor

Members: Mr. D. Hegarty
Mr. K. O'Connor

heard this claim at Tralee on 2nd April, 3rd, 4th, 5th November 2009

Representation:

Claimant: Mr Edmund Sweetman B L instructed by
Richard R O' Hanrahan, Solicitor, Limerick Law Chambers, 22 High Street, Limerick

Respondent: Mr Eoin Clifford B L instructed by
Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

The determination of the Tribunal was as follows:

Following a preliminary hearing on 2 April 2009 the Tribunal found that the claimant's employment with the respondent terminated on 29 April 2008. The respondent had maintained that she was still an employee up to the time of that hearing.

Claimant's Case

The claimant commenced employment with the respondent in 1990 in its household department and over a decade later moved to the medical records section where she held the position of medical records manager. While she enjoyed that work the witness was not entirely happy with the resources at her disposal and at times felt under so much time pressure that she undertook some of her work at home. It was common knowledge that she did this and even the hospital manager was aware of the practice. She referred to a letter she sent to him in March 2002 stating that she had to bring work home in order to get it done. She also wrote to the then finance manger in September 2004 informing her that most of her administration work was done outside of the working day. The claimant returned to work in early 2006 following a three-month absence on sick leave. As a

consequence of that, a process began where she adapted to a different role and a new medical records manger was to be appointed. The process resulted in, among other things, the issuing of litigation proceeding from another staff member against the respondent.

The claimant stated that her relationship with that litigant was confined to work and was purely on a professional basis. She recalled an instance where she refused to sign a work related form for that person and became the subject of criticism for that refusal. Despite that she maintained she did the right thing. Prior to 23 August 2006 the witness had a number of brief interactions with the new human resource (HR) manager including a query about her salary. However, her encounter with that manager and the newly appointed medical records manager "crushed her". She initially described the atmosphere with the HR manager as frosty. The claimant explained the reason why she was sending those emails home but felt her explanation fell on deaf ears. She felt so traumatised and shocked at being placed on suspension that her "life ended that day". The claimant had expected this meeting was called to discuss her salary issues.

According to the claimant the HR manager appeared to conclude that she was giving her colleague information on her case against the hospital. The witness was familiar with the company's email policy and would never have knowingly or maliciously acted contrary to it. Besides, she was not aware at that time that this person was taking a case against the respondent. She learned of that action during the course of the second investigatory meeting on 22 September. It emerged that this employee had commenced proceedings against the respondent in late July 2006. The witness however accepted she erred in sending information about a patient to herself and regretted that mistake. Nonetheless she insisted her attempted dispatch of emails in August 2006 to herself was to analyse them at home with the sole aim of organising and structuring her workload.

The first investigatory meeting took place on 5 September when all the blocked emails were examined on a projector. The claimant said she was worn out at answering the same questions and felt "badgered and ambushed" by the way she was treated. It was her impression that the HR manager wanted to stand by the suspension decision and "that was the end of it". Due to the stress of the situation the claimant physically collapsed during a break at the second investigatory meeting and required hospital treatment. Her general well being had deteriorated by that stage and she was placed on ongoing medical treatment.

Medical certificates were produced which showed that the claimant was suffering from anxiety and depression due to a stressful situation in relation to her work and employment. A consultant occupational physician who was engaged by the company to examine the claimant commented on her condition in late 2006 as follows: *A full resolution of her symptoms will probably only occur with resolution of the matters identified and the most important issue now is to make progress in addressing this.* In January 2007 a consultant physician and rheumatologist wrote to the claimant's employer stating that the claimant's distress and anxiety was caused by the interview on 22 September 2006. That medical person continued; *To avoid such episodes and further distress andanxiety the patient should not be subjected to further interviews of a similar nature.*

In October 2006 the claimant initiated High Court proceedings against the respondent. Those proceedings generally consisted of seeking interlocutory injunctions related to this case. The claimant told the Tribunal that she took those proceeding to clear her name, as the respondent did not believe her explanation in sending those emails. Her intention was to get her job back. Those proceedings, which concluded in spring 2007, denied the claimant's injunctions but reserved costs. By that time the claimant's remuneration had been reduced to sick pay but that was restored to full pay while her suspension continued. She was unable to attend a third investigatory meeting on 19

April 2007 due to illness. Instead she submitted a detailed document to that meeting in which she accepted she acted inappropriately to some extent. She repeated that she had the best of intentions and there was no ulterior motive in the sending of those mails.

In May 2007 a draft report from the two-person investigation committee was issued in which they found the claimant behaved improperly. The claimant issued a lengthy response to that draft. She alleged that this committee lacked impartiality and then addressed the findings made against her. By the end of July the final report issued in a similar vain and content to the initial draft. That report was followed by a letter to her by the hospital manager informing her that a disciplinary process was to be invoked under the terms that apply to gross misconduct. Further correspondence ensued between the legal teams on this matter. The respondent decided that it could not agree to hold a disciplinary hearing without the physical presence of the claimant.

At that time the claimant had been advised by medical personnel not to attend any situations or interviews that would worsen her ongoing fragile condition. The respondent was aware of that advice. The claimant received another letter from the HR manager dated 21 August telling her that as a result of receiving a sick certificate that she was unfit to attend a meeting the respondent was now applying its sick pay scheme. In reply the claimant's solicitor wrote that her inability to attend such a meeting was entirely the result of the way the respondent, particularly its HR manager behaved in this case. The respondent regarded the claimant's absence for such a meeting as "imprudent from a procedural and natural justice point of view" and again rejected scheduling such a meeting without her. Salary payments including sick pay ceased being paid to her by October 2007, as this case remained unresolved. In January 2008 the claimant's health and welfare had sharply worsened to the extent that her life was threatened.

In renewed correspondence in April 2008 the claimant's legal representative called upon the respondent to remedy their client's situation. That letter also questioned the reasoning behind the lack of remuneration for the claimant and suggested that the company was attempting to forcibly terminate the claimant's employment. By 29 April and in the absence of "any appropriate reply" the claimant's solicitors wrote to the hospital: *..that in the view of your repudiation of our clientscontract of employment, she has no option but to bring the fact of her dismissal before theEmployment Appeals Tribunal forthwith where she institute a claim for damages for her unfairdismissal.* By that time the claimant had lost trust and confidence in the respondent as an employer

A solicitor who represented the claimant a the first investigation meeting on 5 September 2006 said in evidence to the Tribunal that she and her client had no opportunity to examine the relevant email documents prior to that meeting. Her request to view them in a hard copy form was always denied during the course of that meeting and a separate room was not provided to them to study those documents. The witness stated that in the course of a conversation with the HR manager during a break in the meeting that the referred to the claimant as sinister. She was not only taken aback at that comment but her confidence in the claimant's version of events was undermined. She had also told the HR manager that the only aim of the claimant in this case was to regain her job.

A consultant psychiatrist told the Tribunal that referring someone to her profession was "a big deal" and it was not common that this happened at early stages of illness. This witness first met the claimant in September 2007 and continued treating her into 2009. She described the claimant as a decent, honest woman who suffered a traumatic experience as a result of the treatment she experienced by the respondent. The claimant misread a situation at work on 23 August when she was "thrown out" of the premises. Her initial encounter with the investigation/disciplinary process

had been very upsetting for her. That experience together with other subsequent events dramatically changed the claimant's attitude towards her employer from one of loyalty to that of betrayal.

The claimant's motive in taking a High Court case related to her desire to take control of her ongoing situation with the respondent. She wanted her name cleared. That case was not discussed between the witness and the claimant. The witness who still described the claimant as very unwell commented that closure to this case was the best possible solution. The psychiatrist was certain that the source of the claimant's illness was due to the treatment she received from the respondent.

Respondent's Case

The respondent is a privately run health care company managing up to five hospitals in the State. The events in this case generally relate to a situation which occurred at its hospital in Tralee, county Kerry.

Among the extensive documentation it furnished to the Tribunal were copies of its internal E-mail and Internet policy and its disciplinary policy. (Tab I of Booklet 3) The company listed nine rules to staff relating to e-mail usage and while those rules emphasised care and caution there was no explicit reference to prohibiting the sending of emails. That list ended with the sentence: *If any breach of our E-mail policy is observed then disciplinary action up to and including dismissal may be taken.* The respondent also had issued a memorandum to all medical records officers and managers that they had a responsibility to ensure the safety and confidentiality of all hospital records.

The respondent's disciplinary policy gave breaches of confidentiality as an example of misconduct that could attract a formal disciplinary procedure. That procedure had a mix of seven possible sanctions ranging from an informal discussion to an appeals process against a dismissal decision. The hospital operated two types of suspension namely with or without pay. The respondent reserved the right to apply the former method of the disciplinary process in instances of alleged gross misconduct or gross breaches of rules and regulations. The latter type of suspension would only apply as a disciplinary action, where at the conclusion of an investigation a finding had been made that an employee had been guilty of a breach of their employment conditions which amounted to misconduct or gross misconduct.

The company's information technology manager (IT) outlined to the Tribunal how the respondent's email system operated. One piece of software concerned itself with anti- spam and anti virus and blocking outgoing mails. This person monitored the blocked mails. He noticed that an email containing five documents and sent by the claimant on 15 August had been blocked. Since that was most unusual the witness contacted the HR manager who told him not to release it until he got advice. Two days later another email sent by the claimant with twenty-one documents was also blocked and again he was told not to release it. In both cases the addressee also appeared to be the claimant.

This manager accepted that at times staff worked at home and that they did not consult with him over their own work emails. He also acknowledged that the company's email policy did not forbid staff sending emails home but did disallow the transfer of confidential information to outside sources.

On 23 July 2007 the respondent in the form of its then human resource manager and assistant director of nursing issued its final investigative report into allegations that the claimant attempted to

email a large number of files out of the hospital's electronic storage system to an off-site third party email address. Its authors listed at least five adverse findings of fact against the claimant. Among those findings was that the claimant tried to externally transfer a folder that related to another employee who was taking litigation proceeding against the company. Another finding was that the claimant acted in breach of hospital policy on confidentiality and security records and of the aforementioned email and Internet policy.

In March 2005 the IT manager sent an email to staff members including the claimant under the subject USB Memory Stick/Keys. That email read in part: *If you want to work on a document at home and then bring it to work, please email to your work email address.*

Up to August 2006 the human resource (HR) manager who commenced employment with the respondent in March of that year had minimal contact with claimant. Following a report to him from the hospital's information technology (IT) manager he called the claimant to his office. The IT manager informed the HR manager that he had stopped a number of outbound mails to a particular address. Those files caused concern to the IT manager, as it appeared those files were highly confidential. Both the sender and the recipient of those files were directly linked to the claimant. The HR manager then consulted with a member of an employer body and available management colleagues and as a result of those discussions a decision was made to suspend the claimant. That decision was based on the information supplied by the HR manager. When contacted the hospital manager, who was on holidays, concurred with that decision. In an affidavit to the High Court the HR manager described the files in question as not banal but of a highly confidential and sensitive nature.

The HR manager acknowledged that the initial meeting he set up with the claimant on 23 August to address this attempted "export" of emails could have been seen by her as an invitation to call to his office to discuss her salary situation. Just prior to that meeting and before the arrival of the medical records manager as a witness for the respondent and before her appearance the HR manager offer to the claimant for a witness was declined. This manager outlined the circumstances and seriousness of the emails and informed the claimant she was now suspended pending the conclusion of an investigation into this alleged affair. In protesting at that development the claimant said it was her normal practise to send work files to her own home computer for back-up reasons. The HR manager felt however that it was possible that someone else was using the claimant's home email address for his or her own purposes or it was a bogus address. He felt obliged to ensure hospital data had to be protected. The HR manager also understood why the claimant was shocked at the circumstances and outcome of that meeting.

As a follow up to that meeting the witness wrote to the claimant the same day regarding that meeting. Among the contents of that letter were these sentences:

I explained that these transfers of highly confidential, highly sensitive information could have serious implications for the hospital in that it breached confidentiality on a number of grounds. These grounds include employee confidentiality, patient confidentiality and Hospital business confidentiality.

That letter continued:

I advised you that this investigation was part of the hospital Disciplinary Procedures and given the serious implications around such breaches of confidentiality, the hospital was now putting you on

suspension with pay for the duration of the investigation. The HR manager said that this letter was an accurate account of the meeting. He also stated that he did not try to jump to conclusions about this issue.

Two investigation meetings took place in September 2006 attended by among others the HR manager, the assistant director of nursing, the respondent's solicitor the claimant, and her legal representations. An issue arose at the first meeting on 5 September over access to the relevant files. The HR manager maintained all reasonable access to the files was provided without allowing them to leave the hospital. All the relevant files were reviewed on an overhead projector. Towards the end of that lengthy meeting the HR manager and the claimant's representative had an "off the record conversation" That manager denied calling the claimant sinister and added he referred to the situation with the files as sinister. That was a reference to the apparent link between the contents of the files and litigation action taken by a colleague against the respondent. The witness was not aware of the nature of the relationship between the claimant and that colleague at that time. The respondent did not explore that relationship during the course of its investigation.

During the lunch break at the second meeting on 22 September the claimant had to be hospitalised as a result of her physical collapse. That illness and her High Court proceedings in relation to the relevant documents stalled the respondent's investigation to April 2007. A third investigation meeting without the presence of the claimant took place on 19 April. In lieu of her presence she had furnished a detailed submission to that meeting. One month later the investigation team issued its first report into the claimant's alleged wrongdoing. 0n 12 June the claimant's legal team furnished the respondent's solicitor a submission in respect of the first report. The witness denied the assertion that he had a significant interest in securing a negative finding against the claimant. It was his opinion that he behaved fairly and professionally in his dealings with the claimant. He regretted the hurt that she felt and experience as a result of this situation.

In July 2007 the final report issued and the HR manager had no more involvement in this process. Both the witness and the assistant director of nursing signed off on that report which concluded with the following:
You are advised that should the hospital manager, who is absolutely independent of this stage of the process, decide based on all the facts to invoke in (sic) disciplinary action against you, you will have a further opportunity to put your case forward a the disciplinary and appeal stages of this process.
The HR manager commented that the function of the disciplinary committee is to impose sanctions. That committee also could have disregarded the report and indeed behaved as it wished.

The HR manager told the Tribunal that stopped emails actually never left the respondent but that some of them were potentially damaging to the respondent's case in an ongoing litigation case.

The hospital manager was the final decision maker for their premises in Tralee. He held that position since 1993 and emphasised the importance of trust, confidentially and patient care for therespondent. While on annual leave in August 2006 he answered a telephone from a colleague whobriefed him on a developing situation at the hospital. Based on the information he received the witness agreed to the decision to suspend the claimant. While he had no recall of viewing the investigation committee's initial report issued in May 2007 the witness became more active in thiscase following the issuing of its final report in July. He wrote to the claimant on 24 July inviting herto attend a disciplinary hearing on 2 August. Among the contents of that letter was the following:
I have decided that the mater warrants consideration under the terms that apply to

gross misconduct…..the warning stages of our disciplinary process are bypassed and we find ourselves atthe final disciplinary hearing stage.

The witness told the Tribunal that he had not arrived at any forgone conclusions by that time. The intention was to deal with this matter as quickly as possible. However the claimant did not make herself available to attend a disciplinary hearing. The witness regretted that as this was an opportunity for her to present her case. He said it was not possible to conclude the process while the claimant remained unavailable. Besides, he was disappointed that her legal representatives could only attend on her behalf as he was "far more open" in meeting the claimant in person. He believed that her representatives could not substitute for her at a hearing. The hospital manager who described the claimant as a loyal and extremely committed employee could not understand why she would have sent confidential information on a patient and staff to a potential third party. Perhaps there was an innocent explanation but he did not get an opportunity to explore that. She could have brought certain facts to the disciplinary hearing contrary to the findings of the investigation committee. The witness found it regrettable that such a meeting did not take place and a "vacuum" in this process emerged.

The hospital manager had no recall of being involved in the claimant's sick pay arrangements. He said that normal procedures applied as medical certificates had been received by the respondent on behalf of the claimant. He denied that the imposition of a sick pay scheme and the subsequent withdrawal of full pay to her at the expiry of that scheme was an attempt to pressurise her to engage in the disciplinary process. The respondent still viewed the claimant as an employee up to the time of the Tribunal' findings in a preliminary hearing. Her suspension "still stood" up to that ruling. The witness stated that with the benefit of hindsight this matter should have been dealt with differently.

Determination

The Tribunal carefully considered the evidence adduced and the many documents opened during the hearing. The incident that ultimately led to the termination of the claimant's employment was that she sent two emails from her place of employment to her home computer. Both email messages were blocked by the respondent's IT security system. The IT manager reported the incidents to the HR manager. The Tribunal finds that it was reasonable for the HR manager to suspend the claimant on full pay to allow time for an investigation into the suspicion that she was in serious breech of the email policy. However the claimant should have been given notice of the meeting on 23 August 2006 and had the opportunity to nominate a person of her choice to accompany her.

The report signed 23 July 2007 by the HR manager and the Assistant Director of Nursing states:

The investigation finds that as a matter of fact all files contained in the folder 'M-- K—' relate directly to and can be considered of significant importance in current civil litigation cases between other employees and the hospital.

The investigation finds as a matter of fact that the only plausible grounds on which such diverse files could be rationally assembled into one individual folder is with reference to civil litigation.

The investigation finds as a matter of fact that there is no justifiable reason on work grounds that H—C—should email any files to her home.

The investigation finds as a matter of fact that H—C—is in clear breach of the Hospital Policy on Confidentiality and Security of Medical Records …, and is in clear breach of the Hospital E-Mail and Internet Policy….
It is the view of the Tribunal that this report is seriously flawed. The HR manager believed before the investigation that the claimant was in collusion with her colleague who was engaged in litigation with the respondent, notwithstanding the claimant's long and loyal service with the respondent. Her explanations for her actions were disregarded without any examination of the merits of her arguments. None of the evidence before the Tribunal established that there was a relationship between her colleague and the claimant that would offer the prospect of collusion against their employer. Also none of the emails under investigation were addressed to the claimant's colleague.

The emails in question were sent by the claimant, to herself, to be accessed at home, something not prohibited in the respondent's policy. Also the emails were in relation to her work. The claimant established that the hospital manager was aware in March 2002 that she was doing work at home. Finally, as the emails in question never left the hospital the question of a breach of confidentiality does not arise.

When the claimant was certified by her doctor to be unfit to attend the disciplinary meeting arranged for 2 August 2007, it was not reasonable of the respondent not to proceed with the meeting given that the claimant had instructed her solicitor to represent her. Also the respondent's had a sworn affidavit of the claimant's position dated 22 January 2007.

The claimant was a dedicated worker with approx 16 years service. She emailed work home to tidy up as part of her adapting to a new role. The HR manager and the medical records manager jumped to conclusions about the reason for her actions and refused to consider her explanation. The Tribunal finds that the claimant was constructively dismissed. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The claimant is awarded €43,362.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)