EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

EMPLOYER UD332/2003
- Appellant (The Employer)

against the recommendation of a Rights Commissioner UD10699/02/GF
In the case of

EMPLOYEE **- Respondent (The Employee)**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. J. O'Neill
Ms. E. Brezina

heard this appeal at Dublin on 27-29 July
and 7-9 December 2009

Representation:

Appellant:
Mr. Tom Mallon B.L. instructed by, on the first three days,
Ms. Deborah Delahunt and, on the last three days,
Mr. Kevin Langford, Arthur Cox Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

Respondent:
Mr. Padraic Lyons B.L. instructed by
Mr. Niall Clerkin, Clerkin Lynch Solicitors,
29 Kildare Street, Dublin 2

Determination

This appeal arose as a result of an employer (the appellant) appealing against a recommendation of a Rights Commissioner UD10699/02/GF in the case of an employee (the respondent).

Dismissal as a fact was in dispute between the parties.

In an opening submission on the first day of the hearing the employer held that the employee had repudiated his contract of employment and that the employer had not dismissed him. The

Tribunal considered documentary evidence presented by each side and in particular a series of letters sent by the President of the respondent university (the President) to the employee from 24 April 2002 to 6 June 2002 and was satisfied that the employee had been dismissed within the meaning of the Unfair Dismissals Acts, and that the Tribunal would hear the case.

The employee was an assistant lecturer in the employer's computing school from August 1987. He was promoted to the position of lecturer in October 1991. In summer 1999 the employee assaulted a colleague during a dispute about the mark to be awarded to a student he was supervising. As a result he was suspended without pay for the month of August 2000, and a final written warning of indefinite duration put on his personnel file. Following an appeal to a Rights Commissioner this final written warning was reduced to twelve-month's duration.

It is the employer's position that, following the incident, the relationship between the then Head of School (HS1) and the employee deteriorated for the remaining two and half years that HS1 held that position. The employee was difficult to manage; it was hard to arrange meetings with him; there were always strings attached to his attendance at meetings and he tried to dictate the agenda.

Evidence was given by both sides of the difficulties, over a number of years, between the employee on the one hand and fellow employees, including university officers, on the other. The sequence of events that led directly to the dismissal started in March 2002 when the employee's superior, the Head of the School of Computer Applications (HS), who had replaced HS1 in January 2002, set up meetings with his staff to discuss assisting students toobtain work placements in the aftermath of the dotcom bubble. Several meetings were arranged to facilitate attendance by the staff involved. The employee did not attend any ofthese meetings nor did he respond to the invitations from HS to attend. The employee, histrade union representative and university officers attended a meeting on 28 March 2002 todiscuss a grievance that the employee had lodged in October 2001 against HS1, whose threeyear appointment in that post had expired in December 2001. It was arranged that theemployee would meet HS that afternoon. This was the first and only time that HS saw theemployee following his appointment as Head of School on 1 January 2002.

At the meeting with HS on 28 March the employee would not respond to questions from HS about his work including his attendance and he walked out of the meeting without answering the questions stating that these were personnel/disciplinary matters that required the attendance of a trade union representative. Later that day the employee advised HS by email that he was taking leave and he failed to respond to HS's enquiry about the nature of the leave in question. The Tribunal is satisfied that HS was entitled to enquire about aspects of the employee's work including his attendance pattern as operational matters relevant to his responsibilities as Head of School. The Tribunal is satisfied that the employee was wrong to leave the meeting with HS without answering the questions that were put to him about his work. If HS had proposed invoking the disciplinary procedure then it would clearly have been appropriate for the employee to seek trade union representation. There is no suggestion from either side that HS's actions were anything other than investigative.

HS made further unsuccessful attempts during April 2002 to meet the employee. The employee cited the death of a friend as an explanation for not attending a meeting arranged for 16 April. The employee took a week off over this incident and the meeting was

rescheduled for 22 April 2002. Two hours before this re-scheduled meeting HS received an email from the employee stating that he (the employee) was going to two universities in two different jurisdictions.

It was open to HS to invoke the disciplinary procedure to address the failure of the employee to attend meetings with him but instead HS, having become frustrated at his difficulties in meeting the employee, wrote a letter to the President on 23 April 2002 in which he set out hisdifficulties with the employee. In this letter HS stated, "He also makes it clear that if subsequently I wish to arrange a meeting, he will not co-operate unless a union rep is presentbecause he regards any question about his activities as having "*disciplinary implications*". HSconcluded by stating that, having failed to establish a dialogue, the only way forward was byformal action.

It was open to the President to advise HS to deal with the matter in accordance with the disciplinary procedure. The President did not do so but instead wrote to the employee on a number of occasions instructing him to meet HS on various dates in May to address matters of concern regarding the employee's work. The employee did not open some of the letters, instead he sent them to a prominent politician for onward transmission to his trade union and sent some others directly to the trade union. The employee did not enquire about the content of the unopened correspondence by contacting his trade union. This behaviour was bizarre and unjustified.

The President warned the employee in his letters during May 2002 about the serious consequences of his continuing refusal to engage with HS. The President subsequently suspended the employee with pay, later he suspended him without pay, and following a final warning he dismissed him in a letter dated 6 June 2002. The President did not invoke the disciplinary procedure and no representative of the respondent met the employee's trade union in advance of the dismissal despite a request by the trade union for relevant information and a meeting

There was a discussion during the Tribunal hearing about whether a 1985 or a 2001 disciplinary procedure would have been appropriate if disciplinary action were taken against the employee. During the hearing the President accepted the employee's view that the 1985 procedure would have been the appropriate one. However the President did not invoke either procedure. He contended that there was no dismissal because the employee had repudiated his contract of employment and thereby effected the termination of his employment (in that the respondent had accepted the repudiation and treated the contract as ended). The Tribunal is satisfied that the respondent acted in a manner that failed to afford the employee his right to fair procedures in advance of confirming his dismissal. The sometimes bizarre and unjustified behaviour of the employee was not a basis for denying him fair procedures including his right to trade union representation in advance of a dismissal decision and his right to a formal appeal procedure. Accordingly, the Tribunal finds that the employee was unfairly dismissed.

In a closing submission on the final day of the hearing it was argued on behalf of the employee that there had not been a valid dismissal. The claim was lodged and remedy sought under the Unfair Dismissals Acts. These Acts circumscribe the Tribunal's jurisdiction and prescribe the remedies available to it. The employee sought reinstatement as the remedy for his dismissal. The Tribunal noted that the employee referred to the President, the Heads of School and other faculty members and officials in his blog on the internet on a number of occasions using terms such as "scum", "traitors", "criminals", "cowards", "useful idiots" and

other derogatory utterances to describe a significant number of named individuals in the university. He also made offensive references to members of the President's family. The Tribunal is satisfied that neither reinstatement nor re-engagement would be an appropriate remedy in the circumstances of this case.

Unfair Dismissal proceedings at the Tribunal were adjourned in February 2004 pending determination of a High Court action initiated by the employee against the employer. In November 2004 the employee instructed his legal advisors not to proceed with the High Court action. The employee did not advise the Tribunal until December 2008 that he had withdrawn his High Court action and that the case could now be resumed before the Tribunal. The Tribunal finds that the responsibility for this delay rests with the employee. Furthermore, since his dismissal the employee failed to find paid alternative employment at a time of economic prosperity and virtually full employment. He spent a great deal of the time in the United States where it was not possible for him to gain paid employment in his area of specialisation, rather he acted as an unpaid visiting fellow at a number of prestigious institutions in that jurisdiction. For these reasons the Tribunal is not satisfied that the employee made reasonable efforts to mitigate his loss following his dismissal.

By his failure to engage with the employer the employee contributed substantially to his dismissal. Having regard to this contribution and his failure to take reasonable steps to mitigate his loss the Tribunal varies the recommendation of the Rights Commissioner and considers that an award of €45,000, under the Unfair Dismissals Acts, 1977 to 2007, is just and equitable in all the circumstances of this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)