EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMPLOYEE - appellant	UD1984/2009

against the recommendation of the Rights Commissioner in the case of:
EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Mr. P. Casey
Ms. H. Kelleher

heard this appeal in Cork on 30 September 2010 and 15-16 December 2010

Representation:

_____

Appellant(s):
Mr. Noel Murphy, Independent Workers Union,
55 North Main Street, Cork

Respondent(s):
Ms. Deirdre Crowley, Ronan Daly Jermyn, Solicitors,
12 South Mall, Cork

The determination of the Tribunal was as follows:-

This case came to the Tribunal as an appeal against Rights Commissioner Recommendation UD74609/09/MR under the Unfair Dismissals Acts, 1977 to 2007.

The respondent company was in the business of supplying and fitting residential windows and doors. Staff numbers had fallen from over a hundred to less than twenty by the time of the first

Tribunal hearing. The appellant had been employed on the factory floor.

On 14 November 2008 the appellant sent a handful of text messages (unrelated to work matters) to the personal mobile phone of a Polish colleague (hereafter referred to as WB). WB did not have his phone with him and WB's wife received these texts of a highly explicit nature. On his return home WB checked his phone and found the disturbing texts from the appellant. When the appellant contacted WB to see if WB had found the texts funny he was emphatically told that the texts had not been found amusing whereupon the appellant texted that he was sorry about this.

WB made a formal complaint to his supervisor (hereafter referred to as TB) showing him the sexually explicit texts sent from the appellant. TB brought the matter to the attention of the respondent's HR director (hereafter referred to as MOS). MOS wrote to the appellant on 17 November advising him of the formal complaint in relation to sexual harassment and telling him that the respondent was obliged to investigate the matter. The appellant was also informed that the respondent's health and safety manager (CD) and financial controller (DL) would conduct the investigation.

On 19 November DL wrote to the appellant giving him a copy of the complaint and inviting him to a meeting the following day. The appellant was also invited to bring someone with him but he decided not to do so. On 22 November the appellant spoke to the assistant factory manager (AP) asking him to speak to WB on his behalf. At a rescheduled meeting on 24 November the appellant was given written statements from WB and four others. The appellant was given two days to review these and then attend a resumption of the investigation meeting. When asked, the appellant admitted having sent the texts in question to WB and said that they had been sent as a joke.

DL and CD passed on their findings to a disciplinary panel – MOS and a senior manager (DC). The appellant had admitted sending the texts and had continued sending them to WB's phone although WB's phone was at home. These actions led to undue personal stress to WB and WB's wife. It was found that the texts sent to WB had been sexually explicit and that sexual harassment had taken place. The appellant had also breached confidentiality by discussing the matter and had been intimidating by telling AP that he was considering taking a private legal case against WB.

MOS and DC held a disciplinary meeting on 12 December 2008. The appellant attended with a solicitor who apologised to all concerned on behalf of her client. When all matters were put to him the appellant was given the options of resigning or being dismissed. He was given a number of hours to consider these options but did not resign.

After consideration of all matters involved in the case the respondent wrote to the appellant informing him that, due to the circumstances of the case, he was being dismissed. He was given the right to appeal with the right to be paid in full during the time of exercise of the right to appeal.

The appellant went to a union representative who wrote to MOS on his behalf denying sexual harassment and wishing to arrange an appeal. The appeal was arranged but the appellant was informed that he could not have a union representative present because the respondent did not recognise the union.

The appellant did not attend an appeal hearing and on 20 January 2009 the appellant was sent a letter to advise him that the decision to dismiss was upheld and that his P45 would issue in due course.

On 21 January 2009 the appellant wrote to the Rights Commissioners' service to lodge a claim of unfair dismissal. A hearing was scheduled for 2 July 2009 but the appellant did not attend. The Rights Commissioner checked to see if notification had been sent to the appellant and it was confirmed. The Rights Commissioner struck out the claim for failure to prosecute. The appellant appealed the decision to the Employment Appeals Tribunal.

The appellant told the Tribunal that he had commenced employment with the respondent in June 1996 when there was a staff of over thirty people. Over the years work increased and the respondent took on more staff including some Polish workers. Staff numbers increased to over a hundred. However, around the time of the incident in question work had decreased and staff were being let go on a weekly basis. The appellant stated that on the factory floor there could be a lot of banter and slagging. Some of this was of a rude and crude nature but this was normal.

The appellant did not deny having sent the text messages (all on the same day) to WB. He said that they had not been intended for WB's wife and that he had not been aware as to with whom WB lived. He had contacted WB to ask if WB had seen the texts and was told that they had not been thought to have been funny. The appellant then texted back to say that he was sorry about this.

The appellant acknowledged that he had been called to an investigation meeting and that the allegations had been put to him. He stated that he had not been happy with the solicitor whom he had brought to the disciplinary meeting and that he had decided to go to a union. However, the union was not recognised by the respondent and, therefore, could not attend any meetings. He did not find acceptable the respondent's offer of either dismissal or resignation.

The appellant admitted that he had phoned AP (the abovementioned assistant factory manager). He did this to try to informally solve the matter between himself and WB.

Determination:

The Tribunal had to consider whether or not the appellant had been fairly dismissed by the respondent under Section 6 (4) of the Unfair Dismissals Act, 1977. The Tribunal was satisfied that the appellant knew that his conduct could lead to his dismissal. He indicated to a colleague (AP) that he could be dismissed. He did not give the Tribunal reason to believe that his dismissal had not been merited. The Tribunal is unanimous in finding that there were substantial grounds justifying the dismissal and that the dismissal was fair. The appellant was fairly dismissed for bullying and sexual harassment in breach of the respondent's policy. The appellant's actions were sufficiently serious to justify dismissal.

The Tribunal was satisfied that the respondent's refusal to allow union representation did not constitute an unfairness in the procedures. The investigation was sufficiently thorough and the disciplinary procedures were substantially fair.

The appeal against Rights Commissioner Recommendation UD74609/09/MR under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)