**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
MN34/2010
UD33/2010
WT23/2010

against
EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**
**ORGANISATION OF WORKING TIME ACT, 1997**
**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr J. Horan
Mr C. Ryan

heard this claim at Naas on 11th April 2011
and 22nd July 2011

Representation:

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Claimant(s) : Ms. Treasa Kelly BL instructed by Maher Broderick, Solicitors, 6 The Courts, Main Street, Newbridge, Co Kildare

Respondent(s) : Mr. Alastair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

**Preliminary Point**

The claim under the Organisation of Working Time Act 1997 was withdrawn during the course of the hearing.

**Summary of evidence**

The claimant is making the case that he was unfairly selected for redundancy in or around September 2009. The Respondent must therefore establish to the satisfaction of this Tribunal that there was a genuine redundancy situation and that they acted reasonably and fairly in implementing its redundancy programme.

By way of background it is common case that there was a series of unsavoury e-mails sent to the claimant and several colleagues within the workplace. It is not suggested that the claimant invited such e-mails though he did know that these were general circulars insofar as there were more recipients other than himself getting these e-mails. All the recipients were working on the G.I. site and operating within the employer controlled computer system having workplace addresses.

The claimant's position within the workplace was a placement position. The respondent company placed the claimant within the workplace as a technical person with electrical skills. The workplace was operated by G.I. who was effectively a client of the respondent company and as such a party upon whom the respondent relied for its very existence and evidence was heard by the Tribunal as to the importance of this client to the respondent company.

In or around June of 2009 the respondent's Human Resources Department was contacted by the relevant manager from G.I. alerting them to the fact that a number of employees placed on the G.I. premises had been in receipt of inappropriate e-mail material from an unidentified individual known as 'Pavel Long'. The Tribunal did not look at the material in question but it was generally accepted that the material, of a sexually explicit nature, was wholly inappropriate.

The claimant did not deny receiving the material in question though in his case it was limited to two e-mails which were found in his sent box and which it was accepted might have been sent to the claimant's work address, where it remained unopened and was forwarded to the claimant's own private address at his homeplace. The Tribunal recognizes that the client, G.I. must have been appalled to think that it had some sort of grouping within the workplace which was knowingly receiving such material.

The respondent conducted its own investigation into the claimant's conduct and on foot of that, a final written warning and a four week suspension was delivered. Although no detailed evidence was heard in respect of other employees (both respondent's and G.I.'s) it appears that a number of employees were dismissed for gross misconduct. It seems logical to conclude that the conduct of these employees was worse than that of the claimant whose proven involvement related only to the existence of two unopened, forwarded e-mails. The claimant appealed the severity of the sanction in the hope perhaps of having a written warning and not the suspension. The claimant did concede in evidence that he did have to be exposed to some sort of sanction.

The next step that appears to have been taken by the respondent company is the decision that the claimant cannot be returned to the G.I. workplace. The reason given was that the claimant had brought the respondent company into disrepute. The Tribunal unanimously accepts that the respondent was well within its rights to make this decision. The obligation on the respondent was to protect as many of its employees as possible from the fall out of this unfortunate occurrence. Additionally, the respondent indicated that as it had no alternative work available the claimant was facing redundancy and was on notice of that fact.

The claimant makes the point that the claimant's position was not made redundant and that someone would have to be put into this position, and the Tribunal accepts redundancy should apply to the position and not the person. The Tribunal further accepts that the option of redundancy was not open to the respondent at this time and the decision to make the claimant redundant was one made in haste. On the other hand, the respondent did put some effort into placing the claimant in alternative positions in both Belfast and Dublin Port and the Tribunal accepts that these were genuine attempts to find a suitable alternative placement. These options were rejected by the claimant who still harboured some misguided hope that he would be allowed return to the G.I.

workplace and this was never a realistic option.

**Determination**

In conclusion the Tribunal finds that the claimant was unfairly dismissed within the definition of the Unfair Dismissals Acts but the Tribunal has to take into account the level of contribution that the claimant made to his employment prospects. The Tribunal awards the claimant the sum of €16,000.00 under the Unfair Dismissals Acts 1977 to 2007. The Tribunal notes that a redundancy payment has already been made to the claimant and this may be offset by the respondent against the sum awarded.

The Tribunal finds that the claimant was served notice of the termination of his employment and accordingly the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)