

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:		CASE NOS.
EMPLOYEE	- claimant no. 1	RP2587/2009 UD2271/2009
		MN2109/2009 WT960/2009
EMPLOYEE	- claimant no. 2	RP2588/2009 UD2272/2009
		MN2110/2009 WT961/2009

Against

EMPLOYER - respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr G. Andrews
Mr J. Maher

heard these claims at Dublin on 19 January 2011, Wednesday, 20 July 2011, Thursday, 21 July 2011 and Friday, 22 July 2011.

Representation:

Claimants: Mr. Kevin D'Arcy B.L., instructed by O'Regan Little, Solicitors, 7
Winetavern Street, Dublin 8

Respondent:

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is part of a bank's group of companies. LOG is Employment Advisor to the Group and part of the HR Division. He offers advice to the respondent.

An e-mail policy is in place throughout the respondent company. This is brought to each employee's attention at induction, in their contract of employment and at team briefings. Employees are fully aware of the policy. The e-mail policy is taken very seriously.

LOG received a telephone call from the Manager (SJK) in the Mortgage Operations area concerning a threatening e-mail an employee had received from another member of staff. SJK asked LOG to enquire into the matter and forwarded the email to him. Following an examination of the employees' email accounts, material of a very serious nature emerged. LOG referred the matter to PK, Head of Mortgage Operations and said it warranted an investigation.

PK advised him to proceed that if it was found that an employee had received one of the inappropriate emails but then deleted it, no disciplinary action was taken. BL, who worked in IT Security assisted him in the investigation. No particular staff were targeted. Inappropriate e-mails were circulated to colleagues and externally to other organisations. It emerged that 37 email inboxes were accessed, which included the claimants' email accounts, and the investigation did not go any further. Four of the e-mail inboxes were not checked as the staff involved had resigned, taken a career break or moved on.

He viewed the material contained in the attachments to the emails as indecent, obscene and of a pornographic nature.

From a HR point of view, it was a "no-no" to circulate this type of material, especially to other institutions. The content of the emails was highly inappropriate and unacceptable.

As a result, the respondent took disciplinary action against 10 staff members, five of whom were dismissed, including the two claimants, (SR and SM) and five were subjected to lesser sanctions, final written warnings.

LOG attended at the claimants' first stage disciplinary hearings and again at the second stage disciplinary hearings. LOG was a note taker at these hearings and prepared the minutes of each meeting afterwards. Both claimants appealed the decision to dismiss them internally and externally. LOG forwarded submissions to the independent person who heard their appeals.

LOG was not involved in the disciplinary sanction. His view was that the correct disciplinary sanction was arrived at based on the material presented.

BL works in the IT Security Department. He has 31 years experience in his role. His role entails investigating areas such virus outbreaks, fraud investigations and staff related issues.

E-mail records are held in a central location off site.

He received a call from HR to retrieve e-mail accounts and to facilitate them in their investigation. He looked at the entire email database. If an inappropriate email forwarded on to another was deleted that person was not investigated. If an employee receives an inappropriate email, the

requirement is to delete it immediately and to report it.

For an organisation such as the respondent with extremely large staff numbers, approximately 100,000 external emails are received daily and is far greater internally.

An average mailbox size is about 100/200 megabytes. In SR's case the mailbox size was 772 megabytes and SM's was 308 megabytes. BL facilitated HK and SJK at the time.

The object of the exercise was to establish who was involved in forwarding on inappropriate emails. SR never deleted her emails and this extended back to July 2007. BL could not say if attachments in emails were actually opened.

SJK is a manager in Mortgage Operations. The section is spread out over three floors with 70-80 staff working on each floor. Eight to nine supervisors report to him.

In March 2008 all staff received guidelines on email policy and code of conduct and again similar documents were circulated. These were reminders to staff in relation to the email policy in place in the company. He had sent them to supervisors who in turn passed to all staff. He held monthly meetings and always referred to the email policy and Internet use. He gave advice on the limited personal use of emails.

A female member of staff made a complaint to him of receiving an abusive and threatening email. Prior to this he never received any other complaints either internally or externally concerning any emails received in the office. The employee furnished him with a copy of the email. He sought advice from LOG who in turn consulted PK. He assisted BL (IT Security) in his task. He checked the content of the images attached to the emails, which contained foul and abusive language. He took a sample and passed them to HK, who was appointed by PK to conduct the investigation. He assisted HK in analysing the content of emails during his investigation.

His understanding was that all staff including the two claimants had familiarised themselves with both the email policy and the code of conduct. While there was a bit of banter in the room during the day he never witnessed staff congregating around PCs and nobody brought it to his attention.

HK is a manager in Mortgage Operations with no staff reporting to him. He was asked by PK to examine an employee's email account. From that account another employee's email account was identified. He reported this. He was asked to further investigate and one email account led to another. He identified six inappropriate email accounts. He took advice from HR. If A sent to B, and then B sent to C and so on these were to be checked. He was to proceed forwards and not backwards. He examined 37 inbox email accounts as part of his investigation. He found some of them to be obscene, rude and indecent. SJK assisted him in his task.

HK took a random selection of emails and attachments forwarded on to others. He looked at some images, depending on their size. Some e-mails had in excess of 10 images attached. He printed images. He took a representative sample in the overall content. There was an obvious abuse of the email policy. Thirty-seven staff were identified and he believed it came to a natural end there. It never entered his head that a large number identified were working on his floor.

He prepared fifteen reports and he contended that the email contents of those he selected were of a pornographic nature. He viewed 100 of SR's emails and attachments and presumed she had opened

them. It was noticed that of the 9,351 documents in SR's email account, approximately 6,521 documents (70%) were not work related. In SM's case, of the 2,887 documents in her email account, approximately 1,607 documents (56%) were not work related.

He was asked to attend the disciplinary hearings carried out with staff members and duly did so.

PK is head of Mortgage Operations. The section is spaced over three floors and she is responsible for 148 staff. The staffing is 50:50 male/female.

As SJK reported to her she was in daily contact with him and visited the section in person. Work was plentiful in that area and SJK had complained that there was not enough staff to carry out the workload.

SJK informed her that one of his staff members had made a complaint about receiving an inappropriate e-mail. SJK showed her a copy of the e-mail, which she found to be disturbing. She took advice from HR's Employment Advice Service. An investigation was necessary to ascertain who had sent the inappropriate e-mail.

PK appointed HK to conduct the investigation. Following this it emerged wider issues were arising. She needed to understand exactly what was going on. She directed HK, to carry on with his investigation and to look forward rather than back. The investigation into staff e-mail accounts took several weeks. In some cases the trail of e-mails came to a natural end and nothing further was done. If there were no inappropriate e-mails in an inbox account nothing further was done.

She received a sample of e-mails. Her initial reaction was that she never came across material like it before and she was shocked. She had a duty to maintain standards in the company. She found some images attached to e-mails disturbing and she deemed some of the images to be of a pornographic nature. She believed some of the images of children attached to e-mails to be inappropriate.

On 30th January 2009 she received ten reports from HK. She was happy with the way the investigation had been carried out. She took all ten files home with her and tried to see how many of these staff she could save. She devised a spreadsheet with several categories. She gave it a lot of consideration. It was incredibly difficult. The top five staff, which included both claimants, fell into two categories. She deemed these staff had crossed the line and it was very serious. They warranted suspension. The nature of the image and if the email had been sent externally influenced her decision. The other five staff fell on the wrong side of two categories and she decided that these staff receive final written warnings. She believed a core group of those sharing the material thought it was common practice, may have become a bit desensitised to it and did not realise what they were doing.

Both SR and SK were invited independently to a first disciplinary meeting. SR admitted she knew of the existence of the e-mail policy. It came across to PK that SR regretted what had happened. She just was not thinking what she was doing. It did not occur to her that she was doing wrong. When she asked SK if she thought it was acceptable, she replied no, not really. Both claimants had said it was the culture on the floor and everyone was at it. She felt the latter was a very sweeping statement. She wrote to both claimants on 6th March 2009 and having taken into account all of the circumstances in their cases, was currently of the view that the issues outlined in the investigation report represented an extremely serious breach of the information security policy for e-mail usage and the respondent's code of conduct and warranted the potential disciplinary sanction of dismissal.

She invited both claimants to a second disciplinary meeting but added if they wished to accept the proposed sanction and not wish to attend the second meeting the respondent could proceed immediately to confirming the sanction of dismissal in writing. Both claimants attended the second disciplinary meeting. PK made her decision based on the sample material presented to her. Both claimants were formally dismissed by letter dated 16th April 2009.

Both claimants appealed the decision to dismiss them both internally and externally. Their appeals were not upheld at both appeal hearings.

Claimants' Case:

Claimant No. 1 (SR) initially commenced employment on 3rd October 2005. Her statement of the General Terms & Conditions of Employment together with other relevant documents were handed to her. She signed for the copies of the documents but was never asked if she had read them. She found them impossible to read.

Following the offer of a new position in early 2006 her contract and other documents were very casually passed to her. She signed the documents while seated at her desk. Her salary was most important to her and she checked this very carefully.

She sat beside another employee for three days approximately to train in on the job. She worked in Mortgage Operations Section. From the beginning she began to receive e-mails with attachments from some of her colleagues. In November 2006 she applied and was granted leave to travel abroad for seven months. She returned to her position on her return. E-mails continued to be circulated in the office. It never occurred to her to delete these e-mails, never saw a need to delete them nor was she ever told to delete them. As it was her first job she was not aware that there could be a build up of disk space. At the time of her forwarding on e-mails she had received she did not think they were revolting.

Staff meetings were held monthly in an informal casual way. Her manager (SJK) stood at one side of the open plan room. At the conclusion of each meeting the Internet and e-mail policy was discussed. She thought SJK was referring at the time to the inappropriate use of Internet sites. It never occurred to her that he was referring also to abuse of the email policy, which was in place.

Inappropriate e-mails were both received and forwarded by everyone in the office on a daily basis. If a colleague close by received an email she often stood and looked at their screen and on receipt of same she would forward it on. She thought her colleagues might find them humorous. SR contended that she was probably immature at the time. However, she said that while some were inappropriate she did not find them particularly disturbing. She regularly received them from her supervisor and team leader and then she in turn forwarded them on to her colleagues, friends outside and to staff working on other floors in the building.

She never thought this could result in her being dismissed. She loved her job.

On 30th January 2009 her Supervisor (BR) asked her to attend a meeting in the Boardroom. She knew it must be a serious matter. Her Manager (SJK) was already there. A selection of her e-mails was presented to her. She deemed them to be a bad reflection of what she had actually sent on to others. She became very upset and started crying. She said that BR had sent some of them to her. She was asked to collect her belongings and leave the premises and was placed on special paid

leave.

SR had prior to this being voted employee of the Quarter. She had a great working relationship with her fellow colleagues.

She was invited to the First Stage Disciplinary meeting, which took place on 24th February 2009. Prior to the meeting she was furnished with a copy of the investigation report carried out by HK and a copy of the disciplinary procedures.

SR attended the meeting with her Union representative. Also in attendance were PK, HK and LOG. SR was questioned about the content of the e-mails. She explained that she had received the e-mails, viewed them and just forwarded them on to colleagues and friends. She would not have opened all of the attachments. She said she was familiar with the e-mail policy because she was afraid to admit otherwise. Nobody had ever asked her if she was familiar with that policy before. She never thought to delete any of these emails from her inbox account. She contended that she always got her work done on time and even got through extra work in the absence of her Team Leader.

No one had been offended on receiving such e-mails. She felt devastated. She was not a vile person and never viewed the e-mails in a vile way.

The respondent's letter dated 6th March 2009 invited her to Stage 2 Disciplinary meeting. She was not happy to accept the proposed sanction, which she felt was dismissal, as she felt everyone in the office should be dismissed and intended to attend the second meeting.

At the Second Stage Disciplinary Meeting SR contended that the sending of such e-mails was going on all of the time and everyone was at it.

She had never read the Group Code of Conduct. E-mails were sent casually and her supervisor had never asked her to stop sending the e-mails. She was never asked for names of those who had sent on such e-mails.

Five other staff had received final written warnings and SR could not understand why they had not been dismissed as they had sent the e-mails to her. She had identified sixty staff members who had sent these e-mails to her. Different Departments were sending them on.

On 16th April SR was informed she was being dismissed. She had raised concerns about other staff and she felt that PK did not want to pursue them, as there would be no staff left working.

She appealed her dismissal both internally and externally. Her dismissal was upheld. She was trying to stand up for herself. She felt she would never get a job again. She had received great feedback in her job and they were very impressed with her work.

SR has not secured work since her dismissal and returned to college in September 2010 and is pursuing a course in Beauty Therapy.

Claimant No. 2 (SM) commenced employment in early January 2006. At that time she received no proper training. Her supervisor JS gave her several documents to read, she read her contract of employment. She returned them duly signed about one hour later. E-mails were sent to her at the commencement of her employment and were also circulated around the building. About 90% of

staff on her floor sent similar e-mails and she did not believe it was a problem as nobody had ever complained about their content.

In April 2006 she took leave of absence to travel abroad and returned in August 2006 when she signed a second contract of employment, being a fixed term contract, together with other relevant documents. She glanced at these documents but never read them.

Her training in on the job entailed sitting with a colleague for about a week. After some time she got on great with her colleagues and was quite happy in her role. E-mails continued to be forwarded to her. She at no time created such an email. At the time she did not believe the emails were offensive. SM contended that now she saw her wrong doing in forwarding on these emails.

Monthly meetings took place on a Friday whereby her Manager generalised about what was happening in the company. At the conclusion of the meetings SJK spoke about the use of the internet/emails. During the course of the meetings some staff continued working because it was necessary to complete work. Her understanding was that staff were not permitted to use the Internet all the time.

On 30th January 2009 she was asked to attend a meeting together with her supervisor. SJK was present also and he presented a sample of items contained in her email account. She was inconsolable at the meeting and it was like a big blur to her. Her colleague drove her home that day after she was suspended on special paid leave. No one had ever told her that an investigation had taken place.

SM received numerous e-mails from her team leader, GG. Staff congregated around PC monitors to view these e-mails and no attempt was made to hide it. Of the e-mails she had forwarded, nobody viewed them as highly inappropriate.

SM attended a First Disciplinary Meeting on 11 February 2009. PK, LOR and HK were in attendance also. She felt under pressure at that meeting. The images, which were attached to the e-mails, implied she was a horrible person. PK said they were distasteful and of a pornographic nature. PK failed to listen to her defence at this meeting and did not appear to care that many others had been involved in the practice. No one who had ever received them found them to be disturbing, distasteful or objectionable. She contended that SJK did not advise her properly in relation to the e-mail policy. She believed the monthly staff meetings were more about the use of the Internet.

When SM received the letter from PK dated 6th March 2009 she felt she was being bullied into resigning and she had no intention of doing so. She attended the Second Disciplinary Meeting on 31st March 2009. As PK did not listen to her at the first disciplinary meeting, she felt she would hardly listen to her at the second. She asked if all levels of staff were being investigated and felt that PK did not care who else was involved. She had said that she hoped that others would be investigated. If the investigation were carried out thoroughly it would emerge that hundreds of staff were receiving and forwarding on emails.

She appealed her dismissal both internally and externally and both were upheld. At her first appeal hearing she was never asked to name others who had forwarded on these emails.

SM established loss for the Tribunal. Initially she was in receipt of social welfare payments and in August 2010 secured part time employment, working 26 hrs per week. She is also doing a part time course in Beauty Therapy.

Determination:

The Tribunal carefully considered all of the evidence adduced during the course of the hearing and considered the submissions of the parties.

The allegation of misconduct made by the respondent against the claimants it is agreed arose as a result of alleged abuse of the respondent's email policy and that this emerged in the course of an investigation into a complaint made by a member of staff against another which involved email use.

It is contended by the respondent that this alleged abuse presented itself in the issuing by the claimants of emails of an offensive and disturbing nature.

The investigation, which took place over a prolonged period, was carried out without the knowledge of the claimants and its terms of reference were decided upon as a result of a HR process. The implementation of the investigation took place on the directions of an appointed decision maker who also decided upon its participants. One of these participants was the manager in the department where the claimants worked. These terms of reference were in essence a direction that a small sample of the claimants' emails be randomly selected, examined and reported upon accompanied by a direction that the source onwards to whom emails were being communicated only would be investigated and also that those who deleted emails were to be excluded from the investigation. Following the submission of the report of the investigation and its consideration, the decision maker implemented its findings by setting in train a disciplinary procedure in which the claimants participated and which resulted in their dismissal following which they engaged in an appeal process which was unsuccessful.

For the purpose of clarity the Tribunal firstly confirms that the claim of each of the two claimants was by consent considered by the Tribunal at one hearing only and that it was common case that the same issues arose in respect of each claimant for determination. Secondly, it also confirms that it is satisfied that the dismissal of each of the claimants was not in pursuance of or implementation of any alleged policy by the respondent to reduce the numbers of female staff employed by them. Thirdly, it is found and determined that the claimants breached the respondent's email policy by sending emails of an inappropriate nature.

The Tribunal has examined and considered the investigative process engaged in by the respondent. It finds and determines that it was flawed for the reasons which it now sets out.

1. The decision of the respondent to exclude the claimants from their investigation denied them their right to participate in it, which rights are set out in the respondent's policies and procedures and as a direct consequence the respondent therefore denied them the opportunity to make any submissions on its terms of reference.
2. The establishment by the respondent in its investigation of the existence of a voluminous number of emails distributed by the claimants required them to address the matter in a manner, which was adequate to this situation. In these circumstances, to have decided to examine the small sample number of emails that it did compared to the number that existed was both an inadequate and unnecessarily narrow response.
3. The decision of the respondent to exclude from the investigation those who had deleted inappropriate emails was not only a failure to investigate them for a breach of email policy

since they had not reported them but was also restrictive in that it removed from the investigation those who had sent these emails.

The presence of these flaws in the investigation resulted in a self imposed restricted investigation taking place from which was excluded evidence which was both pertinent and relevant for consideration in respect of the sanction to be imposed including the proportionality of any such sanction. It is therefore found and determined that the sanction of dismissal was imposed without consideration of this evidence.

Having considered the evidence presented by the parties the Tribunal is satisfied and determines:

1. That the email policy of the respondent in respect of the issuing of inappropriate emails was being breached by employees of the respondent by the sending of emails of an inappropriate nature prior to the commencement of the claimants employment.
2. That these breaches were being committed by both the claimants and by employees of the respondent who were (a) at the same grade as the claimants and (b) who were also at senior grades respectively to the claimants including the grade of supervisor.
3. That the abuse of the policy aforesaid was widespread in the section in which the claimants were employed.
4. That no reputational damage was being done to the respondent as a result of these breaches.
5. That no issues of a disciplinary nature arose for consideration in respect of the claimants prior to their misconduct.
6. That the respondent accepted that the claimants had become desensitized to the inappropriate nature of the emails that they were distributing

It is noted that the policies and procedures of the respondent allow for the consideration of mitigating factors when considering sanction.

The Tribunal is satisfied and determines that the matters set out from 1 to 6 above represent mitigating factors that relate to the sanction imposed and determines that because of them that the sanction of dismissal imposed on the claimants was in the circumstances surrounding their misconduct not a proportionate response and therefore finds and determines that the dismissal was unfair. The Tribunal further finds and determines that each of the claimants in equal measure contributed to their dismissal.

The Tribunal awards claimant no. 1 €28,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and also awards her €1,200.00 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The Tribunal awards claimant no. 2 €35,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and also awards her €1,100.00 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

As remedies under the Unfair Dismissals Acts, 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007 are mutually exclusive, the claims under the Redundancy Payments Acts, 1967 to 2007 fail.

As no evidence was adduced in relation to the claims under the Organisation of Working Time Act, 1997, the claims are therefore dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)