EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE *claimant*	UD2273/2009, MN2111/2009 WT962/2009

against

EMPLOYER *respondent*
Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr G. Andrews
Mr J. Maher

heard this claim at Dublin on 18th January and 18th July 2011

Representation:

Claimant : Purdy Fitzgerald solicitors, Kiltartan House, Foster Street, Galway

Respondent : Kilroys, Solicitors, 69 Lower Leeson Street, Dublin 2

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn at the outset of this hearing. In reference to the Organisation of Working Time Act, 1997 the respondent agreed to compensate the claimant for three outstanding public holidays. It was the respondent's case that the claimant resigned from her employment in May 2009. The respondent is part of a corporation that describes itself as a global supplier chain solution company that provides a variety of logistics and service programmes to high technology industries.

Claimant's Case

Prior to her commencement of employment with the respondent in the latter half of August 2004 the claimant signed up to terms and conditions pertaining to that employment in late July 2004. Her position was that of a programme manager and her place of employment was with a respondent customer in Paris, France. The claimant's remuneration included the possibility of securing a bonus payment. In addition to that contract she was also furnished with a company employee handbook. That lengthy document contained among other things details on disciplinary policy and procedure, grievance procedure, use of email, performance appraisals, and sick pay policy. That policy stated that the respondent might pay sick leave up to twenty-six weeks maximum to an employee subject to certain criteria being met. In acknowledging she received and was familiar with those terms of

employment and the contents of the handbook the claimant added that no changes to those documents had been made known to her during four years and nine months she was with the company.

On 15 April 2008 a vice president of the corporation sent a general email to its staff on the use of email customer and corporation addresses. The vice president's email specifically cited the claimant's situation as an example of this use.

By early 2009 the claimant had been promoted to a more senior role with the title of key account programme manager. Up to then she had no disciplinary or grievance issues with the company that she had great respect for. Her work performance had never been the formal subject of criticism and that remained the case following a meeting with the senior director of sales/direct manager on 27January 2009. The previous day and while back in Ireland on leave the claimant emailed a formerwork colleague. That email expressed regret that this person had left the company and added that…*you are better off out of here*…… The claimant also wrote that she was also trying frantically *to getthe hell out* of the company. The listed address she used to send that email was the customer clientof the respondent.

The claimant found as shocking the contents of a letter, dated 13 February 2009 from a human resource manager. That letter listed six separate allegations against her in relation to the e-mail of 26 January. It also stated that the company would carry out an investigation into this matter. In evidence the claimant rebutted those allegations and emphasised that despite appearances that email was not sent from the customer account. She explained to the Tribunal how the dedicated social networking site she used operated in this case. She outlined the background and circumstances of her comments about the respondent and her place there and understood their concerns about that. Notwithstanding her loyalty and service to the company the claimant felt that she had the right to seek employment elsewhere. Nevertheless she accepted in an email dated 13 February to the human resource manager that those comments were inappropriate and indeed apologised for them at the time and gave reasons for speaking "too rashly". The second paragraph of that email confirmed and explained to the recipient the mechanism, means, medium and mode of how her 26 January message was delivered. She again highlighted that this mail was not sent through the customer's address.

The respondent's letter of 13 February requested the claimant's presence at a meeting on 17 February and informed her that the company intended to carry out an immediate investigation into this affair and indicated that a disciplinary process could result from this. In hindsight the claimant concluded she was "very stupid" not to have accepted the respondent's invitation to have another staff member accompany her at that meeting. It was her impression there was no need for one as following earlier contact with the respondent she felt no action would be taken against her. Both the senior sales director and the human resource manager attended that forty-five minute meeting where the claimant said she was badly treated.

The claimant received a letter dated 24 February from the human resource manager which also enclosed a copy of the decision of the senior director of sales following an investigation into her email of 26 January. That decision concluded that the allegations against her had merit and that the process would enter a disciplinary stage. According to the letter the forthcoming disciplinary meeting was for the *Chairperson to evaluate the findings that have been made against you and decide on what, if any, disciplinary sanction to impose.* An appeal from any possible decision should be forwarded to the human resource manager. The claimant rejected the assertion from the company that she had failed to follow procedure in taking days off. Her absences in February were

due to ill health and had been accounted for by medical certificates.

The disciplinary hearing on 2 March was attended by the human resource manager, the senior director of sales acting as chairperson, and the claimant and her witness. The claimant's explanationfor the respondent's more mellow approach at that meeting was that there was another work colleague present. Subsequent to that meeting the human resource manager informed the claimantin a letter dated 9 March that the chairperson had decided to demote her *due to your misconduct* back to the position of programme manager. That sanction entailed a reduction in her income. Sincethe claimant's attempt to pacify the respondent and bring the process to a close was not accepted bythe resource manager she then appealed this sanction. This continuing saga and conflict with heremployer was adversely affecting her health and well-being.

The appeal hearing took place on 20 March and those in attendance were the general manger of the respondent in Ireland together with the human resource manager plus the claimant and a witness on her behalf. The claimant read out a statement in which she offered to return to her former position without being subjected to any sanction. She also repeated her commitment to the company and respect for their regulations and commented that this affair was based on a genuine oversight. She reminded her listeners of her discipline free record and high level of work performance. The chairperson acknowledged that statement but indicated her 26 January email was a serious issue and said he would consider the matter.

The same foursome met again on 24 March when the general manager presented his findings. In noting that the claimant did not dispute the six original allegations against her he found that those allegations had been proven by the respondent. He continued by saying that he had considered dismissing her on the grounds of gross misconduct as he found both the contents and context of her e mail of 26 January shocking. He was still certain she had used a client email address to send that email despite her denial and explanation for that. The general manager added that email has caused damage to the company. Her sanction was a demotion to programme manager with a noticeable drop in salary. This disciplinary measure was to commence on 1 April 2009. Apart from the general sanction the claimant was shocked to learn that the location of her employment was also to alter from what was stated from the human resource manager on 9 March. It was the claimant's opinion that the respondent had unfairly and badly treated her.

By the end of March the company had declined the invitation for this case to be referred to the Labour Relations Commission. By that stage the claimant had intended to report for work but her doctor insisted she was unwell to do so and issued a medical certificate to that effect up to 14 April. While on sick leave the human resource manager contacted her in relation to her absenteeism and strongly suggested steps would be taken by the company in relation to that absenteeism should she not report to work on 14 April. That letter also asked the claimant to put the disciplinary and appeals process behind her and return to fully engage with her new role. The claimant told the Tribunal that she was absolutely hysterical, hurt and shocked that the respondent contacted her while absent on poor health. A further medical certificate declaring the claimant unfit for work was issued on 11 April for another two weeks and was forwarded to the company by email.

When the claimant received another letter from the human resource manager, dated 16 April she reverted to her legal team again. That letter advised the claimant that the company would discontinue her sick pay from 20 April should she not confirm she would return to work by then. Through her solicitors the claimant stated she was prepared to undergo a medical assessment by a company's medical adviser. She also regarded the company's threat to stop her sick pay as further evidence of their ongoing campaign of distress and upset towards her. Not only was the offer of

medical assessment not taken up, the respondent's solicitors acting on their instructions wrote that the claimant's use of its sick leave policy was not "proper". The respondent indicated that the claimant's ongoing absence was the result of a stand off in relations between them on the issue of her sanction. Another medical certificate was forwarded to the respondent stating her absence from work would continue to 11 May. By that stage the claimant had noticed that her email connection to the company had been revoked. She found this move insulting and disrespectful and added that the respondent had behaved in a particularly deliberate and malicious campaign against her. She felt the company was now bullying and harassing her. A medical certificate stating she was on continuing sick leave up to 25 May was again forwarded to the company.

By that date the claimant had made two attempts to have herself medically examined by a team chosen by the respondent. The respondent insisted that the claimant's failure to return to work revolved around her dispute with them "rather than any other matter". It was their opinion that her absences were not "genuinely attributable to the sickness or injury claimed". The claimant now concluded that it would be unsafe to return to work considering the respondent's attitude. By 22 May she had decided with regret that she had no other option other than to resign from the respondent as a result of their treatment towards her.

In cross-examination she agreed that her salary when she commenced employment with the respondent was €40,000 and when she resigned her annual salary was €68,000. She was undertaking a minimal amount of programmer duties. She was the primary contact of the client. She had a meeting with her line manager on the 27 January It was not true that she told the seniordirector of sales that she was not entirely comfortable in her new role. She was seeking a changebut not to a lower position, it was a sideways, upwards or a new challenge. It was untrue that shewas seeking a downwards move to that of key accounts manager.

She could understand why the content of the e-mail she sent on the 26 January 2009 was upsetting, she was one of the top performers and she was seeking alternative employment. This was a personal comment and it was not meant for the respondent. She felt that the respondent's responsewas disproportionate. She felt it was not necessary to have a representative in attendance with herat a meeting on the 17 February 2009. She contacted the senior director of sales after receiving theletter and she told him that she did not send the e-mail from the client account. He responded thatif she told the truth that he was sure everything would be sorted out. When she made submissionsthey were not taken into account.

When she was asked if on the 13 March that she told the HR director that she would not accept€50,000 she replied that money was not the issue, she wanted to have an amicable closure. If therespondent no longer wanted her in an RSD role she would consent to return to her previous role. She could not accept this as being linked to a sanction. The respondent refused this offer. Theoutcome of the disciplinary process was totally disproportionate. She did not think a reduction of€16,000 in her annual salary was appropriate She did not put forward any sanction. When she wasoffered €55,000 she could not accept it and she responded that she would proceed to appeal. Whatshe said to the HR manager was an amicable offer was to move back to her previous position.

She could not return to work on the 31 March. After 1 April 2009 she instructed her solicitor to contact the respondent and perhaps go to the Rights Commissioner. When put to her that she could have brought a claim under the Payment of Wages Act to the Rights Commissioner and that she did not need to resign she replied that she was not a legal person. She could not accept a demotion as linked to a sanction. She wanted to retain her job with the respondent and she wanted to resolve

the matter amicably. What she considered bullying started when she was on sick leave. Things stepped up a notch with the lodging of her letter. She engaged her solicitor on the 13 March. She did not invoke the grievance procedure. She did not raise the issue of bullying prior to the 17 April 2009. She did not seek a reference when she resigned from the respondent. She looked for alternative employment on the 22 May 2009. She placed her CV on many different sites and she wanted to remain in France.

Respondent's Case

The senior director of sales told the Tribunal that he commenced employment in January 2007/2008. He worked with the claimant and she reported to him. The claimant was the only employee in the regional sales division. The claimant undertook work on project management and sales. The claimant had a GE e-mail address. He met with the claimant on the 17 February 2009. The claimant told him that any reply she had received from her e-mail on 26 January would have gone to the GE server; it did not go to the GE server. The claimant apologised and she did not feel that she had done anything wrong. He felt that the claimant should be demoted and he had considered other sanctions such as a final written warning and a dismissal. He met with the claimant on the 27 January 2009 and she told him that she was not comfortable in the sales aspect of the role. The claimant indicated to him that she wanted to move back to an accounts role and he perceived this as a move downwards. It was not a sideways move or a promotion. She did not like the increased level of pressure and the day-to-day demands of the role. She told him she wanted to revert to the type of role she had undertaken previously. The respondent consulted with a number of people who had high regard for the claimant and dismissal was not appropriate. He felt the best solution was demotion.

In cross-examination he stated that the claimant's performance in the job was good. He became aware of the e-mail of the 26 January 2009 a few days before he arranged the meeting. He spoke to the HR manager about it but he did not speak to the president of the respondent about it. Based on his observations he decided to investigate it. He felt that he and the HR manager had to take some form of action. He attended the disciplinary hearing on the 2 March 2009. He consulted with the HR manager and he came to the conclusion that he had enough evidence to go to the disciplinary hearing stage. He had made up his mind that the rules of the respondent had been breached. He felt that his decision was reasonable. He was aware that the claimant had purchased an apartment and he expected her to remain with the respondent.

In answer to questions from the Tribunal he stated that as far as he was aware there was never an incident where an employee had breached the e-mail policy.

The HR manager in Europe since 2005 told the Tribunal that she was in control of the matter. The claimant was not happy when the respondent offered her €52,000.00. If the respondent gave her €60.000 they would not be in the Tribunal. She did not recall the claimant telling her that the disciplinary sanction was not the stumbling block. The respondent did not agree to give the claimant €60,000.00 The MD made the final decision. The claimant was offered €55,000.00 and given a choice to return and agree this amount. The next day the claimant responded that she was going to have to take the matter further. She did not recall the claimant say this was a disciplinary sanction. She felt the claimant was a very professional employee and regarded her as a colleague. She wanted the claimant to return to work and she did not recall the claimant's response.

She sent a letter to the claimant on the 14 April 2009 but she did not receive a response. In a letter

addressed to the claimant on the 16 April 2009 she advised the claimant of her high level of absences since the 1 January 2009 and if she did not return to work by the 20 April that an alternative would be put in place, whereby the GE account would be placed directly in the Dublin office. In this letter she was informed if she did not return to work by Monday 20 April 2009 the respondent would discontinue paying her sick pay as and from that date. Sick pay was paid at the discretion of management and the respondent could not continue to pay the claimant. She consulted with the MD on the matter. The claimant did not complain of a campaign of victimisation at any meetings.

In cross-examination she stated that she received the e-mail that the claimant sent on the 26 January 2009 at the end of January 2009. She could not recall why she waited until the 13 February 2009 to write to the claimant regarding this e-mail and she stated she was thinking of an appropriate reason. This letter related to the claimant's employment and allegations that she failed to follow the respondent's procedure regarding e–mails. She consulted with her solicitor and she discussed it with the senior director of sales. The content of the e-mail, which the claimant sent on the 26 January 2009, had to be investigated. She had to talk to the claimant and discuss what was behind this e-mail as the respondent felt that the e-mail was very serious. She did not recall when she first heard about the issues of sanction. She had an involvement in the investigation hearing. The respondent was a small company and it did not have any other HR personnel to deal with the matter. The MD did not tell her at any time what sanction to impose. The witness and the senior director of sales dealt with the investigation. She did not discuss the matter with the MD prior to the appeal hearing. She attended the appeal hearing along with the MD and a witness on behalf of the claimant. She had no input into the decision. She was there to represent HR, she took notes and she took into consideration what the claimant said at the investigation. She spoke to the MD at the appeal stage and she gave him feedback about the conclusions.

The former MD of the respondent told the Tribunal that he attended the Appeal hearing on the 20 March 2009. He read all the documents regarding the decision that were made prior to the Appeal. In a letter dated 24 March 2009 he outlined his response to the Appeal hearing. The claimant was in a position of complete trust He was advised that the claimant approached the HR manager on 12 March 2009 after the appeals procedure had concluded.

In cross-examination he stated that the president of the respondent brought the e-mail of the 26 January 2009 to his attention. He did not have a discussion with anyone else about the matter. The president of the respondent asked him to deal with it and he could not recall the exact words he used. It was a very serious e-mail. When put to him that he never instructed the HR manager how serious he felt about it he replied he told her to deal with it and he did not give her guidance in the matter. He was given all the documents and contents of the letters prior to the Appeal hearing and he did not discuss the contents before the appeal. He discussed the salary reduction before the Appeal. He felt that he could be fair and totally objective at the Appeal hearing.

The only discussion he had prior to the appeal was a salary reduction that he proposed and would he sanction it. He felt that he could be fair and totally objective at the Appeal hearing. The use of the GE Account did not form part of his decision. The reason that he imposed sanctions on the claimant was due to the seriousness of the content of the e-mail and the potential impact on the respondent.

In answer to a question from the Tribunal he stated that the e-mail of the 26 January 2009 did not cause damage to the respondent.

Determination

The Tribunal carefully considered all of the evidence adduced and the respective submissions of the parties.

It is accepted that the circumstances surrounding the claimant's alleged dismissal arose directly both as a result of the claimant sending an e-mail on the 26 January 2009 to a former work colleague of the respondent's and of the respondent's response to this action.

For the purpose of clarity it is accepted that the parties agreed that the sending of this e-mail was not sent with the intention of causing any reputational damage to the respondent and that the claimant issued an apology in respect thereof.

It is determined that this act was a breach of the respondent's e-mail policy. The Tribunal has considered the decision of the respondent to deem this response of the claimant to the matter to be inadequate and to implement its disciplinary procedure.

In addressing this the Tribunal gave consideration to (a) the decision itself and (b) the manner in which it carried out this procedure.

It is firstly determined that the decision to implement the procedure was a proportionate response. The Tribunal is satisfied secondly that the manner in which the respondent implemented this procedure was deficient. It is determined that this deficiency presented itself in that (a) the investigative process engaged in effectively determined the outcome prior to the disciplinary hearing and (b) the appeal process provided was conducted by an employee who had partaken in pre disciplinary activity involving the claimant while attempting to amicably resolve matters thus compromising the necessary independence of his role.

It is therefore found and the Tribunal determines that the sanctions imposed by the respondent as a result of its disciplinary procedure were invalid. It is also found and determined that these were not agreed to by the claimant and were therefore a breach of her contract of employment.

The Tribunal finally addressed the conflict that arose between the parties following the imposition of these invalid sanctions. It has examined the appropriate clauses of the respondent's handbook addressing the question of sick pay and is satisfied that the respondent is not entitled as it claims to exercise its discretion in respect of terminating sick pay. It is determined that it could only do so after it has properly investigated whether the claimant's absence from her employment was genuine or not. In this regard the Tribunal notes and finds that the respondent neither (a) requested to nor made any arrangements to have the claimant independently medically examined and (b) that medical certificates were furnished by the claimant in respect of her absences.

In a claim for constructive dismissal, as is made, the onus of establishing that a dismissal was unfair rests upon the claimant. The Tribunal finds and determines that the claimant has discharged this onus in that it is found that she has established that the respondent acted unfairly and unreasonably towards her in (a) the implementation of a flawed disciplinary procedure was a breach of her contract of employment and (b) in their behaviour towards her in response to her work absence. It is determined that these matters were sufficient appropriate reasons for the claimant to consider her position and to decide to terminate her employment and further determines such a response to be both proportionate and reasonable in the circumstances that pertained. It is therefore determined

that the claimant was unfairly dismissed by the respondent.

The only remaining matter to be considered and addressed by the Tribunal was the question of whether the claimant contributed to her dismissal. The Tribunal determines that she did. The Tribunal awards the claimant a sum of €50,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn at the outset of this hearing and no award is being made under this Act. In reference to the Organisation of Working Time Act, 1997 the respondent agreed to compensate the claimant for three outstanding public holidays and no award is being made under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)