**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD774/2010
MN725/2010

against

EMPLOYER

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Mr. D. McEvoy

ard this case in Cork on 1 June 2011 and 29 July 2011

Representation:

---

Claimant(s):
Ms. Mary Kelly, Independent Workers Union,
55 North Main Street, Cork

Respondent(s):
Ms. Rachel O'Flynn BL instructed by
Matheson Ormsby Prentice, Solicitors,
70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:-

The respondent provides an online shopping facility. The claimant commenced employment with the respondent in August 2007 as a customer service operator in the sellers' section handling calls and emails in a very busy call centre environment. Approximately 400 employees worked on the site at the time, all handling phone calls and emails.

As the respondent is dealing with highly confidential customer information, including credit card details, customer identity and addresses and because the respondent's data bank is internet based its policy prohibits the use of mobile phones and personal use of the internet on the call-centre floor/shop floor to avoid inappropriate transfer of the customer data. Provision is made for emergency situations whereby an employee may ask her manager to use her phone or to be released from the work floor. The respondent provides for personal use of the internet in its internet café during break times.

During the first year in the employment there were no disciplinary issues involving the claimant and she had been happy in her job. However, the claimant's position was that this changed fromFebruary 2009 when a newly appointed site manager (SM) began to "pick on her" and issue herwith warnings. In or around late March 2009 the claimant complained to the site lead (SL) that SMhad been bullying her. The respondent's position was that HRM probed the matter with theclaimant but there was nothing to substantiate the allegation and accordingly she asked the claimantto document her complaint(s) so she could investigate any specific incidents. The claimant neverreverted to her on this matter. The claimant maintained that HRM asked her for proof of beingbullied or picked on and as she could not prove it she did not reverted to HRM. The claimantmaintained that she also complained about the bullying to a senior manager from another site whilehe was on a visit to the site.

While the claimant had been issued with a verbal warning in early November 2008 for breach of the attendance policy on six different occasions in the three preceding months, she accepted that she had been at fault on those occasions.

Following a disciplinary hearing in early April 2009 the claimant was issued with a final written warning for substandard responses to customers and for sending incorrect issue codes to customers which could have the effect of distorting a correct assessment of her work and result in her getting undeserved performance related bonuses.

Following a further disciplinary hearing in early May 2009 the claimant was issued with a further final written warning for time wasting/idling (taking additional and unscheduled breaks on five occasions) and failure to carry out reasonable instructions. SM decided to re-issue the claimant with a further final written warning to give the claimant a further opportunity to improve rather than escalate the matter. Earlier, in February 2009 the claimant had received counselling for taking additional breaks. Following a further disciplinary hearing in late May 2009 and reconvened in early June 2009, for a number of alleged breaches of the attendance policy over the months of February to May 2009, the respondent did not impose a disciplinary sanction on the claimant.

Around this time the claimant was feeling down, stressed, lacking sleep and victimised because SM was calling her in for something every week. The claimant's evidence was that her doctor attributed her condition to problems she was having at work. However, a letter from her doctor dated 27 June 2011 produced in evidence stated:

*"The (claimant) came to me on 9/6/09 complaining of poor sleep, low mood and headaches. She requested a letter for work asking to reduce her hours to part time, as she felt her symptoms were*

*related to work stress. I also advised her to try panadol night at the time to help with her sleep."*

At the claimant's request the respondent put her on a reduced working week. The claimant was refe rred to the respondent's doctor or health adviser a number of times who found that her symptoms were not work related. She was hurt at being asked to produce a death certificate to back up her request for force majeure leave when her grandmother passed away in June 2009.

Throughout May to late August 2009 the claimant was in a performance improvement process and in late August 2009 she was issued with a final written warning in respect of her performance. The respondent has separate and mutually exclusive policies dealing with attendance, conduct and performance.

On 6 August SM, observed the claimant using her mobile phone and emailing while on the shop floor and advised her that texting is not allowed. Two weeks later, by letter dated 20 August the claimant was called to an investigation meeting on 21 August 2009 for the alleged breaches of policy on 6 August. The claimant informed the meeting that she was reading a text from her mother about her son who was sick and that she then emailed her sister to inform her of the situation. She maintained that she was unaware of the policy.
The respondent did not accept the claimant's explanation because shehad been given instructions on the respondent's policy on five separate occasions, four of whichwere within the previous few months and two of those were by way of emails on 25 & 26 June2009 respectively from TM and SM after they had seen her using her mobile on the shop floor. TMin his instruction to the claimant on 25 June reminder specifically referred to the respondent's emergency procedure. The instruction from SM on 26 June stated:

*"As you know, mobile phone usage is not allowed on the floor. This includes making or taking calls and text mailing. Yesterday (June 25, 2009) TM sent you an email as a reminder not to be taking calls on the floor.*

*Today you were seen at your desk using your phone again, of which I had to ask you not to use your phone. I want to ensure that you are clear on the policy as you have been given numerous reminders yet continue to disregard our requests to use your phone off the floor.*

*Please ensure there are no further instances of this."*

The earlier instruction on 20 April 2009 stated, *inter alia*, "*This is a friendly reminder that mobile phones are not to be used on the floor. This includes text mailing from your desk."*

The investigation manager recommended that the matter proceed to a disciplinary hearing.

Following the investigation, by letter dated 31 August the claimant was called to a disciplinary hearing which was conducted by the claimant's team manager (TM) on 3 September. The claimant was accompanied by a colleague at the meeting.. The claimant accepted that she had read a text and used the internet for personal reasons and that her reason for picking up her mobile phone was to get an update on her sick son. The claimant pointed out that she had neither texted back nor missed any customer calls and she made the case that she did not realise that reading a text was contrary to the respondent's policy. She contended that the policy should be clearer. TM was not convinced by the claimant's explanation as she had received five reminders of the policy, four of which had been within the previous four months, and on those occasions she had never indicated that she had been in any way unclear as to the instruction. Despite having remind her of the emergency procedure in

his email of 25 June the claimant had again failed to use the procedure on 6 August. On the latter point TM noted that the claimant had finished her shift on 6 August and she had also worked the following day. He explained to the claimant that the matter in issue was not just her behaviour on 6 August but the repeated use of her mobile phone at work contrary to instructions.

While TM considered other sanctions but given and her history of breaches of policy and that she was already on final written warnings for conduct related issues he took the decision to dismiss her. At a brief meeting on 4 September 2009 he informed her that her employment was being terminated with a month's notice and that she was not required to work out her notice. Thedismissal was confirmed to the claimant by letter dated 9 September, 2009. During the disciplinaryhearing the claimant had not mentioned that she had been suffering from stress but TM was awarethat she had complained of stress and that she had been referred to the company doctor on a numberof occasions.

The claimant's appeal was heard on 12 November although the appeal had been lodged outside the time allowed. The appeal was heard by the now site lead (SL), HRM was also present and the claimant was represented by her union representative. The claimant's position was that SM had not made any effort on 6 August to establish why she had used her mobile phone, the sanction of dismissal had been harsh given that her son had been sick, that she had provided medical proof of this during the investigation and she had only used email in response to her sister's email to update her on her son's condition. SL upheld the decision to dismiss on the basis that the claimant hadreceived numerous reminders of the policy, that there had not been a sense of urgency about her son's illness since she had remained at work on 6 August and she had not applied for force majeureleave. On the basis that the claimant had been aware of the policy including the emergencyprocedures and because the breach on 6 August was one more breach in a line of breaches and theclaimant was already on a reissued final written warning for conduct as well as a parallel writtenwarning for performance issues.

When the claimant contended, at the appeal hearing, that her complaint of being bullied by SM had been ignored HRM reminded her of the advice she had given her at the time she had made the complaint. Whilst the claimant alleged that others had also used their mobiles on the shop floor the respondent's position was that any known breaches are dealt with.

**Determination**

The claimant was dismissed for her repeated breaches of the respondent's policy on the use of personal mobiles and the personal use of the internet while on the call-centre floor/ shop floor,which constituted misconduct.

In determining whether a dismissal is fair or unfair it is not the function of the Tribunal to substitute its decision for that of the employer. Its function is to apply the reasonable employer test as set out in *Bunyan v. UDT (Ireland) Ltd.* [1982] ILRM 404 at p. 413 where it was stated:

> *"…the fairness or unfairness of the dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal therefore does not decide the question whether or not, on evidence before it, the employee should be dismissed. The decision to dismiss has been taken*

*nd our function is to test such decision against what we consider the reasonable employer would have done and/or concluded".*

Due to the nature of the work in the call centre the respondent had a strict policy governing the use of mobile phones and the internet on the call-centre floor to avoid the accidental transfer of confidential customer information. The claimant was aware of the policy and had received two recent email instructions on the policy, some weeks prior to the incidents on 6 August, when members of management had observed her committing the earlier breaches. The decision makers at both the initial stage and at the appeal stage had regard to the fact that that a force majeure situation had not arisen on 6 August and furthermore the claimant failed to invoke the respondent's emergency procedures, of which she had been recently reminded. In circumstances where theclaimant was already on a re-issued final written warning the Tribunal is satisfied that the respondent's decision to dismiss was reasonable. Accordingly , the claim under the UnfairDismissals Acts, 1977 to 2007 fails.

As the claimant was paid her entitlements under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 her claim under those Acts is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)