EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO. UD2632/2009

EMPLOYEE *claimant*

against

EMPLOYER *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Ms A Gaule
Mr G Whyte

heard this claim at Dublin on 30th March 2011,
30th June 2011,
1st July 2011,
15th November 2011,
16th November 2011,
5th March 2012 and
6th March 2012.

Representation:

Claimant:
Mr Fionan O Muircheartaigh BL and Johanna Meegan BL instructed by
Mr Brendan C Walsh, Solicitors, 90 Park Drive Avenue, Castleknock, Dublin 15

Respondent:
Ms Rosemary Mallon BL and Mr Tom Mallon instructed by
EMPLOYER

Respondent's case:
The respondent is a large financial institution. The claimant had been employed by the respondent from 23rd April 2001 to 31st August 2009. The claimant had been dismissed for inappropriate use of the respondent's e-mail system.

The Tribunal heard evidence that the allegations against the claimant had been invesigated and that as a result of this investigation the matter was referred to the respondent's disciplinary procedure. A disciplinary hearing took place and a decision was made to dismiss the claimant. The claimant appealed this decision. An appeal hearing took place and the decision to dismiss

the claimant was upheld.

The person who conducted the investigation (JL) on behalf of the respondent outlined his remit, which was to investigate the inappropriate use of the e-mail system by five employees, including the claimant. He understood that e-mails, which originated from the claimant, had been the subject of a complaint by an outside organisation. JL was given a sample of 12 of the offending e-mails but he also took it upon himself to view a much wider range of the claimant's e-mails, both in and out. Having done this JL was satisfied that the sample he had was representative of the overall content and nature of the claimant's e-mail usage. This sample was then shown to the claimant as part of the investigation.

During the course of the investigation JL discovered that some of the offending e-mails had come to the claimant from other staff within the respondent. JL reported this to Group Human Resources and was assured that the volume of e-mails from those other staff members was not of the same volume or nature as the claimant's. He could not say whether any of these other employees were investigated in relation to these e-mails.

Having completed the investigation JL was satisfied that the matter might require some disciplinary action and therefore referred the matter to the Human Resources Department.

The matter was then passed on to another senior manager, M, who considered it, subject to the disciplinary procedure. M decided that there had been a serious breach of the respondent's code of practice and information technology policy. Having held a disciplinary meeting with the claimant and his union representative M decided to dismiss the claimant.

M viewed the same sample of twelve e-mails that had been given to JL and did not look at any other e-mails. He was aware that some of these e-mails were sent to the claimant from other offices within the organisation but confirmed that the disciplinary procedure focused solely on five individuals, including the claimant, all based in the same office as the claimant. Of the five, three were dismissed, one received a final warning and one received a verbal caution.

The claimant lodged an appeal against his dismissal and in accordance with the grievance procedures another senior manager, GR, was assigned to this.

GR held an appeal hearing on 20th August 2009 and present at this was GR and a member of Group Human Resources together with the claimant and his union representative.

It was submitted to GR, during the appeal hearing, that the penalty was too harsh and that there were some inconsistencies between how others had been treated and how the claimant was treated. The claimant told GR that the reason why he had forwarded these e-mails was to mask his homosexuality and that he had forwarded some of these e-mails without even looking at them. The claimant accepted that he was aware of the IT policies but had not read them.

GR had been given a sample of the e-mails and said that he had been quite shocked by their content; which he described as pornographic, rude, racist and sexist. GR decided to uphold the decision to dismiss the claimant because the images that had been circulated were in clear breach of the code of practice and the information technology policy and because the claimant, as a member of management, had a duty to enforce those policies.

Claimant's Case:

CM was an employee of the respondent and trade union representative. CM told the Tribunal that he had received a telephone call from the claimant on 19th February 2009. The claimant advised him that he had been sent home the previous day and that he needed their advice and support. CM contacted Group Human Resources who told him that he was not getting the full information from the claimant and that the claimant had a case to answer.

At a meeting the Group Human Resources Officer BK called him aside and said that three people were going to be dismissed and that two would be reprimanded.

A preliminary investigation was prepared for 12th March 2009. On the morning of the investigation CM met with BK because he had concerns, three people were at home and two were still at the bank. At the meeting CM never seen any e-mails, he did see screen shots. He did not believe that the claimant seen any e-mails at any stage and was not in attendance in July when JR was allowed to view some of the content from his computer. CM requested a full review of the e-mail accounts but was advised that they did not form part of the banks investigations

The claimant gave evidence that he began work for the respondent in April 2001. He was promoted after two years and then became assistant manager. After being dismissed from the respondent he was successful in obtaining a junior temporary position with another bank, he got an interview with them and was offered a full time post. He then lost the job because the respondent would not provide a suitable reference. He was successful in obtaining a job in October 2011 at €10.60 per hour. His mortgage was with the respondent and he had continued to pay it until it became impossible to continue with the full amount each month, they now send him letters threatening to repossess.

The claimant was called in by his manager and told that he was being suspended. The claimant was placed on special paid leave, he did not know whose instructions the manager was acting under but told he would be written to in due course and given a telephone number to ring. The claimant asked if a complaint had been made against him and he was told, no he was just unlucky. At the investigative meeting he was shown a sample of pictures and after the next meeting he got a letter. At the meeting the claimant said that he received a large number of e-mails of this type on a frequent basis and that it was often more senior managers who sent them to him and the claimant wanted to know why he was being selected for disciplinary action.

At the external appeal meeting he was not allowed to have his representative. An information technology expert and bank executive was present, the meeting lasted 30 minutes and the information technology expert controlled the computer. The claimant stated that he had requested a copy of all e-mails and what he received from respondent was useless. The only thing he could see were images, not where e-mails were originating or going. The claimant stated that e-mails of this type were part of the culture in the respondent. The claimant believed he started getting this type of e-mails on the day he started work, they came and went to everyone, it was rampant. There was even an inappropriate calendar in the men's toilets since 2002. An e-mail that was singled out as the most despicable came from the business manager, another that he received from an assistant manager had been sent to seventeen other people, the person who sent it has since been promoted. Various other examples were given to the Tribunal. The claimant felt he was humiliated from the beginning, he had never denied sending the e-mails and at least 150 people were on the lists. Some of them have now been promoted. He was doing well and had been promoted three times.

Under cross-examination the claimant stated that he did not get to see e-mails just sample pictures during the investigation. He was asked if he recognised the pictures. The claimant accepted that he was relying upon his homosexuality as part of his defence. The claimant said that some of the e-mails he had not opened but just passed them on and some he had sent on in an attempt to disguise his sexuality. The claimant had not read the respondents e-mail policy. He was assured during the meeting of 12th March that he had the respondent' s total confidentiality and then he was exposed to the nation. The claimant admitted on day one that he had sent e-mails and apologised, he did not know that he was in breach of the information policy.

BG was an information technology expert and security engineer. BG gave evidence that he had worked in providing security systems to large organisations. BG stated that the use of appropriate technology can prevent up to 98% of improper e-mails from getting through. It would be normal practice to have e-mail of inappropriate size, containing pictures blocked. Asked if it was possible to retrieve deleted material he said that his understanding was that it was possible.

Under cross-examination BG said that in 2008 the scanning device may not have been as effective at stopping spam as it would be currently but that would have been effective regarding images.

Determination

The fact of dismissal was not in dispute. The respondent accepted that the claimant had been its employee and that the claimant had been dismissed for disciplinary reasons.

The Tribunal accepts the evidence of the trade union representative that he was informed by a member of Group Human Resources that of the five members of the branch who were the subject of investigation that three would be dismissed and that two would suffer a lesser sanction. The Tribunal also notes that of the five individuals involved, three were suspended at the instruction of Group Human Resources and two were allowed to continue at work. It shows at least remarkable foresight by Group Human Resources that the three employees who were not allowed back to work from the beginning of the investigation process were the three who were not allowed back to work at the conclusion of the disciplinary process and that the two employees who were allowed to continue in work from the beginning of the investigation were allowed to continue in work at the conclusion of the disciplinary process. The Tribunal has formed the opinion that the outcome of the disciplinary process was predetermined and that at least some of the key decision makers in the disciplinary process did not exhibit the required independence and were in effect guided by Group Human Resources to the outcome which had been decided by Group Human Resources from the outset. Therefore the Tribunal finds that the dismissal was unfair for procedural reasons. The Tribunal can appreciate that there may have been an understandable desire on behalf of the respondent to manage the situation given the sensitivity of the reputational issues and the Tribunal does welcome the open and frank nature of the relationship which the respondent sought to establish with the trade union.

The Tribunal notes that the investigation into the sending of inappropriate e-mails was triggered by a complaint from the computer services department of another organisation. The computer services department had complained that their organisation was receiving very large sized e-mails from employees of the respondent which were raising capacity issues for the e-mail

service provided by this other organisation. The Tribunal understands that the problem was caused by the large amount of data which can be contained in even one photograph sent as an e-mail attachment and that some of these emails contained a large number of photographs. There was no evidence that any person to whom these images were sent actually complained about their content.

The Tribunal has had sight of the images and is satisfied that they were reasonably classified as being "inappropriate" by the respondent. The Tribunal also finds that the images were contrary to the information technology policy of the respondent as set forth in the relevant documentation and that this policy was made available to the claimant. The Tribunal accepts theevidence of the claimant that he did not actually familiarise himself with the contents of thispolicy. The Tribunal is of the view that the claimant ought to have familiarised himself with thispolicy and does not accept this failure by the claimant excuses his behaviour to any significantdegree. On the other hand the Tribunal notes that the respondent gave substantial emphasis tothe fact that the claimant was a member of management and argued that the sending of thesee-mails was a more serious matter given the claimant's status as a manager. The Tribunal isfamiliar with the modern tendency of large financial institutions to grant the title of managerquite widely. The Tribunal understands that the claimant did not have any subordinate employees who reported to him and that the title of manager was more in the way of a marketing tool granted to impress customers. Insofar as the claimant could be classified as amanager at all (and in the traditional sense of having a responsibility for managing people, hewas not), he was a very junior manager. Therefore the Tribunal does not accept that sendingthese e-mails while holding this title of manager was in any material way an exacerbatingfactor.

The Tribunal has carefully examined the contents of all the images provided to it. There are a large number of images and they may be usefully classified as of being of a number of different types. The Tribunal does not intend to classify them exhaustively or very precisely and does so for the purposes of outlining its reasoning into the substantive issues (the procedural aspects of the dismissal has been dealt with above).

A large number of the images are photographs of the female form and are in the nature of soft pornography of a type that might be found in some tabloid newspapers or not far from that standard. The Tribunal accepts the claimant's evidence that he is homosexual and had no interest in the material himself. The Tribunal has carefully examined the circulation lists and concludes that large amounts of this kind of material was sent by e-mail by and to what must be large numbers of employees of the respondent on a near daily basis. The Tribunal surmises that this material may have been sent as part of some kind of male bonding behaviour or as an expression of machismo. There is no evidence before the Tribunal that the material was sent with the intention to harass anyone. The Tribunal does not wish to go so far as to say that this behaviour was the culture in the respondent but Tribunal does find that is was reasonable of the claimant to perceive it thus and attempt to fit in by going along with the behaviour that surrounded him.

Many people might reasonably find this kind of behaviour, the sending of soft pornographic images of women to male co-workers, at least a little odd and many employers would reasonably regard this kind of behaviour as unacceptable. It is clear that the respondent had an information technology policy that prohibited the circulation of this kind of material. The Tribunal was never furnished with any explanation as to why this type of imagery was being sent to the claimant by other employees of the respondent.

Irish employment law supports a wide discretion for an employer to set what it considers is the standard of acceptable behaviour in the workplace and to enforce that standard by disciplinary action up to and including dismissal. However, the Tribunal has long held that the relevant standard is the *de facto* standard of acceptable behaviour in the workplace which might not be the same standard as appears in the policy documents of that employer. Where the *de facto* standard in all or a substantial part of the workplace falls below the official standard and the employer wishes to raise the *de facto* standard to that found in the official standard then it is appropriate for the employer to advise its employees of the change in standard and with sufficient clarity that real change is required and that the warning itself is not just the further expression of mere aspiration. In this case the standard of acceptable behaviour in a substantial part of the respondent had fallen below the official standard and the respondent took inadequate steps to rectify the situation and only acted on foot of an externally sourced complaint by taking disciplinary action against the individuals first identified in that complaint. The fact that the respondent did not warn these employees of the need to modify their behaviour with adequate clarity in advance and that the respondent did not pursue any action against other clearly identifiable employees of the respondent causes the Tribunal to find that the claimant was selected for dismissal without sufficient rationality such that the dismissal is substantively unfair. It appears to the Tribunal that the disciplinary process was driven by a desire to manage the image of the respondent by displaying its willingness to take firm action against the persons captured in the complaint received from an outside party and not for the proper purposes of a disciplinary process, which is mainly to modify behaviour within the organisation.

A large number of the images can be broadly classified as appearing to have been intended to be humorous, often in the form of captioned images. This second category of images was approximately as numerous as the first. These images are mainly in the nature of what are ordinarily described as dirty jokes. Almost all of the images the subject of the investigation fell into either the first category of soft pornographic images of females or the second category of humorous images. The Tribunal does not intend to comment on the quality of the humour, save to observe that they are of a type that would not be to everyone's taste and are juvenile in nature.

Three of the images from this second category were given special prominence in the case as presented to the Tribunal by the respondent. One was of a former pop singer widely known to have been convicted of paedophilia in a country in the Far East. The image appears to have been edited to depict the singer walking while carrying a shopping bag and the image of the face of an Asian boy is superimposed above the bag to make it appear that a boy is being carried in the bag. This image is captioned with the words "GG pops out for a Chinese" and "Anything to declare?". A second image is of a grossly obese teenage boy, fully but tastelessly dressed and wearing thick glasses. The image appears to have been has been edited to superimpose the words "I **** on the first date". This image is captioned with the word "Optimist". A third image is of a naked infant boy examining his genitalia and captioned with the words "And the fascination never ends!!" The Tribunal finds that none of these images of children are pornographic in nature.

A fourth image is a wedding photograph of a black couple, the male in a white shirt and white jacket and the female in a white dress. The male is darker than the female and the underexposed photograph was taken against a dark background with the result that he appears to be headless. The caption is "Why its important to smile in pictures...". The Tribunal finds that this is not a racist image.

The Tribunal is aware that the sending by e-mail of text and/or images containing puerile humour is not uncommon amongst younger office worker and is a form of social interaction widely engaged in. During the disciplinary process the respondent did not make available to the claimant the full content of the e-mails but only the images. It was at the direction of the Tribunal that the full content was made available to the claimant. The Tribunal finds that the failure of the decision makers during the disciplinary process to consider the images in the context of their captions and to allow the claimant to make that case was procedurally unfair. The refusal of the respondent to provide the full e-mails prejudiced the claimant in his defence that the sending of soft pornographic images of the female form was being carried by many other employees of the respondent and materially inhibited his ability to make his case that this activity was so widespread that he needed to do so to in order to disguise his sexuality such that the dismissal was procedurally unfair.

RMcG carried out the final appeal and in his decision he states "I cannot accept the theory that the level of homophobia in the [respondent] is such that failing to forward obscene emails to others would demonstrate that he might be gay". The Tribunal finds that the claimant was sent large numbers of soft pornographic images of the female form by other employees of the respondent and was surrounded by patterns of behaviour which represented the sending of such material as normal masculine behaviour. The Tribunal also notes that it was common case that a soft pornographic calendar containing female images was left hanging on the back of the toilet door for a prolonged time. The Tribunal finds that would have been reasonable for the claimant to regard the fact that he was being sent such imagery as sexual harassment of himself by the other employees of the respondent, had he wished to take that view of the matter. Instead he sought to fit in.

The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and awards to the claimant reinstatement.

In selecting reinstatement the Tribunal has had regard to the fact that the claimant appears to have been popular with his work colleagues and that his co-workers appeared to have certain sympathy with him. The Tribunal rejects compensation as being an inadequate remedy given the level of his loss. The Tribunal notes the uncontroverted evidence of the claimant that he had borrowed a large sum from the respondent in the course of its business and that due to the loss of his employment he was no longer in a position to keep up his payments and that his home was at risk. The Tribunal is of the view that reinstatement would be of some advantage to the respondent in seeking to recover those sums owed to it.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)