Neutral Citation: [2015] IEHC 241

THE HIGH COURT

[2014 No. 34 CA]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

JAMES REILLY

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered the 17th day of April, 2015

Introduction

1. In these proceedings, the defendant ("Mr. Reilly") alleges that he was unfairly dismissed by the plaintiff ("the bank") from his employment and has brought a claim pursuant to the Unfair Dismissals Act 1977 (as amended) ("the Act"). The claim originally came before the Employment Appeals Tribunal ("the EAT"), where it was seven days at hearing over a period of about a year. An appeal was brought from the decision of the EAT to the Circuit Court, which took eight days and in turn, the order of the Circuit Court was appealed to this court when the matter was at hearing for ten days. This is without taking account of an initial investigation, a two stage disciplinary process and two internal appeals.

2. By my reckoning, Mr. Reilly has given oral evidence on some eight occasions over a six year period in relation to this matter. Enormous costs have been incurred that Mr. Reilly at least can ill afford. This must be viewed as oppressive to say the least and calls into question the State's obligations under Article 6 of the European Convention on Human Rights regarding the right to a fair and expeditious trial. Not for the first time has this court been critical of this unacceptable situation – see the remarks of Charleton J. in *JVC Europe Limited v Panisi* [2011] IEHC 299. Although as a matter of law an appeal lies from the Circuit Court to the High Court under the Act of 1977, a general reading of the Act appears to suggest an underlying assumption that the Circuit Court should be the final tribunal of appeal. It appears to me that it is well past time that this issue was addressed.

Background Facts

3. Mr. Reilly, who is now 33 years of age, is from Blanchardstown, County Dublin. After leaving school, he commenced employment with the bank on the 23rd of April, 2001 as an entry grade bank official. He rose through the ranks quickly. Within a year, he had won a customer service award for the north Dublin region. By 2004, he was promoted to senior bank official at the age of 22, which was a significant achievement. His ability, particularly in the field of consumer lending, was recognised outside the bank. He was approached by Ulster Bank in 2005 offering the position of sales manager and Halifax offered him the position of branch manager. In 2006, he was placed in an acting sales manager role which was formalised in September, 2007, when he was appointed as a sales manager at the age of 25. This would be equivalent in rank to what would formerly have been described as an assistant branch manager. Mr Reilly's achievement in this regard was extremely unusual if not unique.

4. Most of the facts in this case are not in dispute but in particular, the fact that Mr. Reilly was an excellent employee with an exemplary record who was diligent and hard working.

5. From in or around 2002, Mr. Reilly had his own email address at the bank. His use of that address was subject to the bank's code of conduct and other policy documents to which I shall refer further.

6. In early February, 2009, a chain email captioned "Hangover Brilliance" was forwarded to an individual in the bank who forwarded it in turn to four members of staff in the bank including Mr. Reilly. One of those staff members sent the email on to persons both inside and outside the bank and it ultimately made its way into the ESB group email system, where it was detected by an IT security manager.

7. On the 5th of February, 2009, the ESB security manager alerted the bank's head of IT security, Mr. Brian Leahy, of an email abuse in the following terms:

> "Brian,
>
> I note from the email below that two Bank of Ireland people were involved in forwarding this around the town. We are tackling the ESB names."

8. As a result of this communication, Mr. Leahy immediately contacted the bank's Group Industrial Relations Department ("GIR") and spoke to Mr. Brian Kelly of that department. In fact, Mr. Kelly was employed within a subset of GIR, namely the Employment Advisory Service ("EAS"). On receiving this information, Mr. Kelly instructed Mr. Leahy to "lift" the mail boxes of the two bank employees who had forwarded the hangover brilliance email. This did not include Mr. Reilly.

9. Lifting a mail box is a term for making a forensic copy of the entirety of the mailbox in question so that the content is of that moment "fingerprinted" and frozen in time. It cannot thereafter be interfered with. The process can be, and was in fact, undertaken without the knowledge of the mailbox user. Recognising that this is a significant invasion of the privacy of the individual concerned and something not to be undertaken lightly, lifting a mailbox cannot take place until it is expressly authorised in writing by three different individuals. A form must be completed which is known as an SDAR and for the authorisation to be complete, the form must be signed by a member of bank IT security, a member of GIR and also a member of HP security, Hewlett Packard being the custodians of the bank's email system.

10. When the two mailboxes in question were lifted, a colleague of Mr. Kelly's in EAS, Ms. Margaret Keogh, since deceased, went to view these two mailboxes at the bank's IT headquarters in Cabinteely, County Dublin. Arising out of Ms. Keogh's viewing of the two mailboxes, Mr. Kelly then requested that a further three mailboxes be lifted, one of which was that of Mr. Reilly.

11. The SDAR in respect of the latter three mailboxes was signed off on the 17th February, 2009 and on the same date, the mailboxes were lifted and viewed by Ms. Keogh. When she did so, Ms. Keogh discovered a number of inappropriate emails with attached images in Mr. Reilly's mailbox. Ms. Keogh took what he felt was a representative sample of six of these emails.

12. Evidently, Ms. Keogh had some discussion about these emails with her immediate superior, Mr. Graham Fagan and he or she in turn with Mr. Gerry Mitchell, the head of GIR, as later the same day, or possibly early the next day, the 18th of February, 2009, Mr. Mitchell telephoned Mr. Cyril Macken, who was at that time the head of the bank's 21 North Dublin branches, which included Blanchardstown. Following that contact, Mr. Macken telephoned Mr. David Donnelly, the Blanchardstown branch manager, and instructed him to put Mr. Reilly on special paid leave with immediate effect. Later that afternoon, Mr. Reilly was summoned by Mr. Donnelly to his office where Ms. Breda Byrne, the customer service manager was also present.

13. Mr. Donnelly told Mr. Reilly that on the instructions of Head Office, he was obliged to suspend him with immediate effect and asked him to hand over his keys of the branch. He said that an issue had arisen in relation to emails but he didn't know anything about it.

14. The next day, the 19th of February, 2009, Mr. Reilly contacted his union, the Irish Bank Officials Association ("IBOA") and was put in touch with Mr. Ciaran Mahon for advice and representation. Mr. Mahon was also a Bank of Ireland employee and part-time union official.

15. At the same time, Mr. Macken appointed another bank official, Mr. Paddy Lonergan, to investigate the matter on his behalf.

16. When the mailboxes referred to were lifted, in addition to Mr. Reilly's mailbox, the mailboxes of four other members of staff at Blanchardstown were also found to contain inappropriate material. Of those five members of staff, three, including Mr. Reilly, were suspended. Mr. Lonergan was charged by Mr. Macken with investigating all five cases.

17. On the 27th of February, 2009, Mr. Mahon met with Mr. Kelly to discuss Mr. Reilly's case and that of another bank employee's that he was representing. Mr. Kelly showed Mr. Mahon the offending email images and told him that the bank was viewing the matter as serious as this was a rising trend. Also, on the 27th of February, 2009, Mr. Kelly wrote to Mr. Reilly to advise him that the investigation meeting with Mr. Lonergan would take place on the 12th of February, 2009. Mr. Lonergan began his investigation and appears to have been assisted throughout, where necessary, by Mr. Kelly.

18. The investigation meeting with Mr. Lonergan took place on the 12th of March, 2009. Present were Mr. Reilly, Mr. Lonergan, Mr. Mahon, and Mr. Kelly. In the course of the meeting, Mr. Lonergan put the relevant images to Mr. Reilly for his comments. Mr. Reilly did not deny sending them although he had no particular recollection in relation to some of them. He said he was aware of the email policy but didn't read it. He said he was gay although he tried to mask this fact by sending some of the emails concerned. He suggested that other senior people in the branch had been sending such emails also.

19. Subsequent to the investigation meeting, on the 18th of March, 2009, Mr. Lonergan travelled to the IT department in Cabinteely to view the entirety of Mr. Reilly's mailbox. He says he did so in order to satisfy himself that the sample that had been selected by Ms. Keogh was representative. In the course of this inspection, Mr. Lonergan selected one additional email with an attached image to be included in the sample.

20. In his report, Mr. Lonergan found that the bank's email policy had been breached by Mr. Reilly and that the content of the relevant emails could reasonably be regarded as pornographic, indecent, obscene, offensive, rude and generally distasteful. He considered that they had the potential to reflect unfavourably on the bank. Mr. Lonergan's report was submitted to Mr. Macken, who, on the 2nd of April, 2009, wrote to Mr. Reilly requesting him to attend a first disciplinary meeting to be held under stage one of the relevant disciplinary procedures. The stage one meeting took place on the 23rd of April, 2009. At this meeting, Mr. Reilly said that emails of this nature were going around everywhere and he described the volume that he would delete off his system as phenomenal. He said there was a huge circle of people sending the emails and he might have sent some on so as to cover up his orientation. He described them in terms of being "banter" between colleagues.

21. Mr. Macken conveyed his decision to Mr. Reilly by letter of the 5th of May, 2009, in which he said that he viewed his behaviour in sending the emails as gross misconduct and an extremely serious breach of the bank's email policy which warranted the potential disciplinary sanction of dismissal. Before making his final decision, he invited Mr. Reilly to a further meeting known as a stage two meeting. The purpose of this meeting was to facilitate Mr. Reilly in making any representations he wished in relation to the potential sanction of dismissal. The stage two meeting took place on the 13th of May, 2009, when similar issues were raised and discussed, including Mr. Reilly's excellent work record.

22. Following that meeting, Mr. Macken conveyed his final decision to Mr. Reilly by letter of the 26th of May, 2009, which was to dismiss him with immediate effect. The disciplinary procedure provided for an appeal from this decision to the chief executive of the bank or his nominee. Mr. Gerry Reeves was nominated to hear the appeal, which he did on the 20th of August, 2009. A number of points were made on behalf of Mr. Reilly at the appeal which included a suggestion that the bank had not treated Mr. Reilly in a manner consistent with other comparable cases and the sanction imposed was unduly severe and harsh. Mr. Reilly's exemplary record was again stressed as was the devastating impact dismissal would have on his life. This appeal was unsuccessful, as was a further final external appeal to Mr. Ray McGee, an independent third party and former deputy chairman of the Labour Court. That appeal was heard on the 13th of January, 2010.

23. It is worthy of some comment that before the appeal to Mr. Reeves was heard, Mr. Reilly wanted an opportunity to view his mailbox in IT headquarters accompanied by Mr. Mahon to assist him in analysing the contents. Mr. Mahon was refused permission to attend and was even refused the customary time off for attending to his union duties on that occasion. Mr. Reilly therefore had to attend on his own to view the mailbox under the supervision of Mr. Leahy and Ms. Keogh. To say the least, this must have been a very awkward and uncomfortable experience for him without Mr. Mahon's moral support and it is hardly surprising that he left before his allotted time expired. It is difficult to understand what loss would have been on the bank to allow Mr. Mahon attend also and why it was felt necessary to adopt such a rigid approach.

The Employment Documents

24. It was common case that Mr. Reilly was bound by his contract of employment to observance of the bank's group code of conduct and in particular of a document entitled "Group Information Security Email Usage", dated the 12th of February, 2008. This document provided (at p. 2):

> "Group email systems are provided for in the conduct of group business…
>
> • In email communications, users must not engage in any activity, which is illegal, offensive, disruptive or likely to have negative repercussions for the Group…

The Group reserves the right to monitor and give reasonable grounds for investigation, intercept, access and disclose messages created, received, stored or sent over the group email systems at any time without notice. You agree that the Group may undertake such monitoring and may use such methods and equipment as it considers necessary or appropriate."

25. The document continues (at p. 5):

"Your usage of the Group email systems should not involve you in any activity that is illegal, offensive or likely to have negative repercussions for the group. Particularly, you must not use, retain, distribute or disseminate any images, text, materials or software that:

- Are or might be considered to be indecent or obscene.
- Are or might be offensive or abusive in that their content is or can be considered to be a personal attack, rude, sexist, racist, pornographic or generally distasteful...
- Adversely impact on the image of the Group."

26. Finally (at p. 7):

"9: Policy violation.

If you fail to comply with the requirements of this policy, and/or otherwise misuse and/or abuse the Group email systems, you may be liable to disciplinary action up to and including dismissal. The Group will treat any breach of this policy in a serious manner. At the same time, your conduct and/or actions may be illegal and you may be personally liable for the consequences."

27. The bank also relied on a further document entitled "Disciplinary Procedures" which included the following provision:

"Gross misconduct.

In cases of gross misconduct, an employee may be dismissed without recourse to the earlier steps in the disciplinary procedures. In a situation which may be potentially deemed as gross misconduct, a full investigation will be carried out. An employee may be placed on special paid leave during such an investigation.

Full investigation and careful consideration of the facts will be carried out without undue delay and this may include consultation with any witnesses and the preparation of written statements as appropriate. If the employee's manager is a witness or the only witness to an alleged case of misconduct, that manager will not conduct the investigation or play a part in the disciplinary decision making process.

If an employee has been found to have committed gross misconduct, there may be mitigating factors which mean that a less serious sanction than dismissal is appropriate. Mitigating factors will be considered bearing in mind the principles of fairness and consistency which underline these disciplinary procedures.

Among the matters which may be described as gross misconduct which may be a cause for dismissal are:-…

4. Breach of Group code of conduct or policies (e.g. group email policy, harassment and bullying policy, etc.)."

28. Although not a contractual document, the bank also placed reliance on a notice by the IBOA, dated the 14th of November, 2006 and addressed to all IBOA members in the Bank of Ireland group. This stated the following:

"Re: use of internet/email and company mobile phones.

Members should be aware that there has been a significant increase in the number of staff being disciplined by the bank for breaches of its email/mobile phone policy. The disciplinary sanctions imposed on staff range from written warnings up to dismissal depending on the severity of the incident.

Members should be aware that the company email and mobile phones are for work related use and should not be used to send material which is not work related.

IBOA are instructing members to familiarise themselves with the bank's internet/email policy and to ensure that their use of the bank's computers/mobile phones comply with this policy."

29. Mr. Reilly, however, disputed that he had ever actually seen this document.

The Emails

30. Mr. Reilly's mailbox was analysed for a two-year period between February, 2007 and February, 2009. His sent or outbox contained 1139 documents of which 29 were considered to be inappropriate. Ms. Keogh extracted the original sample of six emails from the outbox and one further was selected by Mr Lonergan. As previously stated, the Hangover Brilliance email which led to Mr. Reilly's mailbox being examined was received by him but not forwarded. In the order they were presented to the court, the first email was captioned "Tsunami". Attached to it were several images of naked women posing on a beach. The EAT, in its determination, described these as being in the nature of soft pornography of a type that might be found in some tabloid newspapers. Mr. Reilly's evidence was that, given his personal orientation, he had no interest in these images.

31. The second email is captioned "Anything to Declare?" The single image attached depicts a man holding a shopping bag with the head of a small Asian child superimposed so that the child appears to be in the bag. On its face, whilst the image is somewhat bizarre, it could not be seen as pornographic, obscene or indecent. It is only when one is made aware that the subject is a former celebrity and notorious paedophile that its intended meaning becomes evident.

32. Mr. Lonergan considered that this image was the most serious of all the images. He described it as being in a category of its own, different from all the others. For reasons which have never been adequately explained, the distribution list for this image was

separated from it leaving only the image. This meant that when it was put to Mr. Reilly at the various investigation and disciplinary meetings, it was not possible to detect the source of this email. It was only after Mr. Reilly was dismissed and had commenced proceedings that the distribution list eventually became available. This showed that the email had originated in the bank's Head Office in Baggot Street, from where it had been forwarded to another bank official who was known to Mr. Reilly. That official forwarded the email to a number of others within the bank and it was forwarded by at least three further bank personnel before it reached Mr. Reilly. There was no evidence that the official in question was ever investigated and in fact, he was subsequently promoted to the level of branch manager.

33. The third email is captioned "Adult Funnies" and includes various images which are vulgar, crude and tasteless. They all purport to be humorous although the humour is of a somewhat juvenile nature.

34. The fourth email is captioned "Mastercard Moments" and has attached to it two images of people in public situations inadvertently exposing themselves. The images include text which purports to be humorous comment. The fifth item is an email with an attached image which shows a group of obese people engaging in sexual activity. The original caption on this email when sent to Mr. Reilly was "What Really Happens at Weight Watchers Meetings!" Mr. Reilly forwarded this email to three male colleagues in the Blanchardstown bank including one with the initials I.W. Before doing so, Mr. Reilly altered the subject line so that it then read "I. in his first brothel". I.W. was a junior colleague of Mr. Reilly and a friend of his. Mr. Lonergan was particularly concerned about this email, which he felt might be considered as bullying by Mr. Reilly of his junior colleague. However, that view was not apparently shared by Mr. Macken.

35. The sixth email had an attached image of two naked men sitting on a couch. This appears to have been sent by Mr. Reilly from his mobile phone to his bank email address and was then forwarded on by him to his personal email address. It was not circulated to anybody else. Mr. Reilly explained this by saying that he accidentally forwarded the email to his bank address when he intended it to go to his private address.

36. The seventh and final email which was the additional item selected by Mr. Lonergan had attached an image of an extremely large naked woman. Mr. Reilly forwarded this to another colleague in the branch but amended the subject caption so that it read "Put I's head on this and send it on". This was a further reference to I.W.

Legislation

37. Insofar as relevant to these proceedings, the Unfair Dismissals Act 1977 (as amended) provides as follows:

> "6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal…
>
> (4) Without prejudice to the generality of *subsection (1)* of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:…
>
> (b) the conduct of the employee,…
>
> (6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in *subsection (4)* of this section or that there were other substantial grounds justifying the dismissal.
>
> (7) Without prejudice to the generality of *subsection (1)* of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so—
>
> (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal,…
>
> 7.—(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers appropriate having regard to all the circumstances:
>
> (a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or
>
> (b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or
>
> (c) (i) If the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under s. 17 of this Act) as is just and equitable having regard to all the circumstances, …
>
> (2) Without prejudice to the generality of *subsection (1)* of this section, in determining the amount of compensation payable under that subsection regard shall be had to—
>
> (a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer,
>
> (b) the extent (if any) to which the said financial loss was attributable to an action, omission or conduct by or on behalf of the employee,

> (c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid,…
>
> (f) the extent (if any) to which the conduct of the employee (whether by act or omission) contributed to the dismissal."

38. It is thus clear that the onus is on the employer to establish that there were substantial grounds justifying the dismissal and that it resulted wholly or mainly from one of the matters specified in s. 6(4), which includes the conduct of the employee or that there were other substantial grounds justifying the dismissal. Section 6(7) makes clear that the court may have regard to the reasonableness of the employer's conduct in relation to the dismissal. That is however not to say that the court or other relevant body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned – see *Royal Bank of Scotland v. Lindsay* UKEAT/0506/09/DM.

39. I respectfully agree with the views expressed by Judge Linnane in *Allied Irish Banks v. Purcell* [2012] 23 ELR 189, where she commented (at p. 4):

> "Reference is made to the decision of the Court of Appeal in British Leyland UK Ltd v. Swift [1981] IRLR 91 and the following statement of Lord Denning MR at page 93:
>
> > 'The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view.'
>
> It is clear that it is not for the EAT or this court to ask whether it would dismiss in the circumstances or substitute its view for the employers view but to ask was it reasonably open to the respondent to make the decision it made rather than necessarily the one the EAT or the court would have taken."

The Decision to Suspend Mr. Reilly

40. The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in *Morgan v. Trinity College Dublin* [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. In Mr. Reilly's case, his evidence was that rumours and reports circulated about him ranging from possibly being involved in fraud to participation in a tiger kidnapping.

41. Thus, even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process. Indeed, this is explicitly recognised by the bank's own disciplinary procedures in force at the relevant time. The procedures provide, under the heading "Special Paid Leave", as follows:

> "An employee may be placed on special paid leave in order to facilitate the proper conduct of the disciplinary procedures."

42. The corollary presumably therefore is that an employee ought not be suspended where suspension is not necessary to facilitate these matters.

43. In the present case, the circumstances surrounding the decision to suspend Mr. Reilly are far from clear. As previously noted, three staff members including Mr. Reilly were suspended and two were not, where all five were being investigated for breach of the bank's email policy.

44. Mr. Kelly's evidence was that neither he, Ms. Keogh, their immediate superior Mr. Fagan, head of EAS, or his superior Mr. Mitchell, head of GIR, made the decision to suspend the three staff members. It would not be within their competence to do so. Mr. Kelly was adamant that all the relevant decisions were made by Mr. Macken, with whom he had no contact at that juncture. Neither Mr. Fagan or Mr. Mitchell was called to give evidence in this case. Mr. Kelly said in evidence that he had no involvement in the matter prior to Mr. Reilly being suspended on the 18th of February, 2009. He said Ms. Keogh was the person who had viewed the mailboxes in question and extracted the sample emails. Ms. Keogh was not called to give evidence at the EAT or Circuit Court although she was present at both.

45. When Mr. Macken gave evidence, he was asked in cross-examination when he first became involved in the matter and he said that it was when he got a call from Gerry Mitchell. In the course of that call, Mr. Macken established that there was a problem with misuse of the email system in the Blanchardstown branch and that it was serious. Following the call, Mr. Macken then contacted the branch manager, Mr. Donnelly, with instructions to immediately suspend three of the five staff members concerned.

46. When Mr. Donnelly summoned Mr. Reilly later that day, the only thing he was able to tell Mr. Reilly about the reason for the suspension was that it was to do with email usage. Mr. Reilly's evidence in that regard was uncontroverted, as neither Mr. Donnelly or Ms. Byrne, who was also present, were called to give evidence.

47. Later in his evidence, Mr. Macken confirmed that the first time he actually saw the material in issue upon which he decided to dismiss Mr. Reilly was when he received Mr. Lonergan's report some six weeks later. Consequently, when Mr. Macken made the decision to suspend Mr. Reilly, all he knew about the case was what Mr. Mitchell told him. Mr. Mitchell in turn presumably only knew what he had been told by Ms. Keogh either directly or through Mr. Fagan unless he viewed all the emails and images himself, although there is no evidence of that.

48. What seems all the more remarkable about Mr. Macken's decision, made in the absence of access to any of the relevant evidence, was that he felt able to come to the conclusion that where five people were being investigated in Blanchardstown for the same

offence, i.e. breach of the email policy, three of them required to be suspended to facilitate that investigation and two did not. Furthermore, to my mind it has not been demonstrated by the bank how Mr. Reilly's suspension was necessary in order to facilitate the proper conduct of the disciplinary procedures. None of the factors I have identified above were present in his case. The mailbox with the offending emails was forensically frozen and could not be further interfered with by Mr. Reilly. Nobody had complained about Mr. Reilly's conduct and indeed it seems likely that nobody knew about it other than those in receipt of the relevant emails. None of those individuals were called to give evidence. It seems highly probable that the danger of repetition of the conduct complained of was to all intents and purposes nil once Mr. Reilly had been made aware of the issue. Mr. Reilly was evidently mystified, not to say shocked, by the suspension as was Mr. Mahon after him. Mr. Mahon is an extremely experienced bank official and union representative whose evidence impressed me. He was diligent and conscientious about his duties and was careful to keep a journal in relation to all relevant events in the cases he was handling. When I asked him about Mr. Reilly's suspension, he said:

> "So I just couldn't see what the logic was of sending people home to aid an investigation. It didn't aid an investigation."

49. Like Mr. Mahon, I can perceive no logic in the course adopted by Mr. Macken. No evidence has been adduced by the bank as to why it was necessary to suspend Mr. Reilly, less still justify the manner in which it was done. After an exemplary career in the bank, Mr. Reilly was summoned at a moment's notice by the manager to be told he was being suspended. Mr. Donnelly gave him virtually no information as to the reason other than saying he was acting on the instructions of Head Office and it was something to do with emails and without being afforded even the most basic opportunity to offer an explanation or defend himself, he was marched out the door never to return. Indeed, even if Mr. Reilly had a valid explanation, there was little point in him proffering it to Mr. Donnelly, who had been presented with a fait accompli by Head Office. I cannot accept the proposition advanced by counsel for the bank that Mr. Reilly had no entitlement to natural justice or fair procedures in any shape or form at this stage of the proceedings. Whilst of course it must be correct to say that the full panoply of fair procedures may not have been engaged at that stage, I cannot accept that basic fairness did not require at least a rudimentary explanation of the reason for the suspension which admitted of the possibility of some exculpatory response.

50. In the light of the foregoing, I cannot conceive how Mr. Macken could have independently arrived at the decision to suspend Mr. Reilly and two others whilst not suspending a further two staff members accused of the same misconduct. It seems to me that the conclusion is irresistible that either somebody else made the decision and directed Mr. Macken to implement it or alternatively it was suggested to him as the appropriate thing to do and he simply accepted that without further ado. Furthermore, the only possible explanation for selecting three out of the five employees concerned for suspension was that the view was taken that the contents of their mailboxes represented more serious misconduct than that of the two who were not suspended. If that is so, it must follow as a logical consequence that the suspensions were nothing to do with the pending investigation and disciplinary process but rather were an expression by the bank of its view of the seriousness of the matter and its resolve to punish those responsible accordingly.

51. That conclusion is supported by the evidence of Mr. Mahon and Mr. Kelly about their first meeting on the 27th February, 2009 about Mr. Reilly's case, when Mr. Kelly said that the bank was taking a serious view of the matter which was a rising trend. That comment, when seen against the background of the events of the previous ten days or so, suggests to me that the bank had already determined to make an example of Mr. Reilly.

Discussion

52. The bank's disciplinary procedures quoted above refer to the concept of gross misconduct which may include breach of the group email policy. Of course, every breach could not constitute gross misconduct, or perhaps misconduct at all, and it is a question of degree in each case. The evidence suggests that the bank took the view from the outset that gross misconduct was involved. Mr. Reilly was quite unaware of this and his evidence was that whilst the matters complained of might amount to misconduct, they were certainly not gross misconduct. Mr. Macken took a different view, concluding that Mr. Reilly's breach of the email policy did constitute gross misconduct of a degree which warranted dismissal. However, the first time that gross misconduct was mentioned to Mr. Reilly was in Mr. Macken's letter of the 5th of May, 2009, advising him that he would be dismissed unless he could persuade Mr. Macken otherwise at the stage two meeting. Whether the behaviour complained of was gross misconduct or simply misconduct is clearly a qualitative judgment in much the same way as is an assessment of the content of the emails. Whilst classifying the conduct as falling into a particular category may be viewed by the bank as relevant to the sanction it may impose within the framework of its own procedures, it is, in my view, of limited assistance in determining whether there were substantial grounds justifying the dismissal. In coming to a view on that issue, it is necessary to examine the factual background against which the conduct in issue arose.

53. Mr. Reilly's evidence was that the practice of circulating these inappropriate emails was widespread. The evidence put before me certainly demonstrated significant evidence of the circulation of this type of material not only within the bank but throughout a large number of public companies and state and semi-state bodies. No evidence was led by the bank to contradict Mr. Reilly's evidence on this point, which I accept. Mr. Reilly struck me as an honest and truthful witness not given to exaggeration or hyperbole. I also believe that the bank was well aware of the practice. The bank itself relied on the IBOA circular of November, 2006 addressed to breaches of the email policy. I also accept Mr. Reilly's evidence that he was not aware of this circular although as I have said, the bank certainly was. Further Mr. Kelly's comment to Mr. Mahon that this was a rising trend indicates a degree of prior knowledge.

54. Despite this knowledge, there was no evidence of any significant attempt by the bank to address this issue. If it was a rising trend as Mr. Kelly said, it seems to me that steps could have been taken whether by way of circular notices, team briefings or whatever method to ensure that staff were left in no doubt as to the bank's attitude and the likely sanctions that might be imposed for a breach of the policy. In the absence of any such steps by the bank, its employees, whilst aware in general terms of the policy, might well have concluded that it was more honoured in the breach than in the observance. Mr. Mahon's uncontroverted evidence was that up to the time that Mr. Reilly was suspended, nobody had ever been either suspended or dismissed for breach of the email policy. Some dismissals did occur in the bank's subsidiary, the ICS and although events were unfolding at that time, the dismissals did not actually occur until post-February, 2009.

55. It seems to me that if a policy of zero tolerance was going to be adopted by the bank to breach of its email policy, its employees were entitled to some notice of this policy shift. This would not have been difficult to achieve. From Mr. Reilly's perspective, it clearly never occurred to him that in sending on chain emails, he was potentially exposing himself to dismissal. I have no doubt that had he known, he is very unlikely to have engaged in this conduct. He certainly had little reason to anticipate what occurred. His evidence, again undisputed, was that there was a pornographic calendar hanging in the men's bathroom at the Blanchardstown branch for years without any attempt by management to remove it. This smacks somewhat of a double standard within the bank.

56. In assessing the reasonableness of the employer's conduct in relation to the dismissal herein, it seems to me that such an assessment must have regard to the surrounding circumstances, including the impact of the conduct on the employer as against the impact of the dismissal on the employee to determine the proportionality of the employer's response.

57. There is no doubting the inappropriateness of the emails and even Mr. Reilly appears to accept that sending them constituted misconduct deserving of some sanction. It is ultimately a matter of opinion as to whether some or all of the images were pornographic, obscene and so forth but certainly the bank were entitled to come to a view on this. Whether it is a view shared by the court or anyone else is not material as the authorities suggest. The same considerations apply to whether they ought to be regarded as offensive and certainly to some, perhaps most, people that would undoubtedly be the case. However, the fact remains that there is no evidence that anybody was actually offended by any of these emails. Nobody complained. The bank did not call any recipient to give his or her opinion on them. The bank say that they had the potential to reflect unfavourably on it and perhaps even for it to be sued. That may well be so but none of this actually happened over a fairly long period, perhaps because those in receipt of the emails either wanted to receive them or acquiesced in receiving them. Indeed, as the evidence makes clear, it was by mere chance that Mr. Reilly's behaviour was even detected. In short, there is no evidence that the bank suffered any loss, damage or detriment whatsoever as a result of the conduct complained of.

58. It should also be borne in mind that none of the emails in question originated with Mr. Reilly, with the sole exception of the one he accidentally sent to his bank email and forwarded only to himself. The number of emails was relatively small – 29 over a two year period out of a total outbox of 1139. I think it is also of some significance that there is at least some evidence that Mr. Reilly was not treated on a like footing to others in the bank similarly implicated. Thus, with regard to the "Anything to Declare" email, regarded as the most serious by Mr. Lonergan, despite clear evidence that this originated in Head Office and was sent on by an official subsequently promoted, no steps appear to have been taken by the bank to even investigate the other employees concerned. Furthermore, it seems that the bank went to considerable lengths to conceal the provenance of this email.

59. As against all this, the effect of the dismissal on Mr. Reilly must be considered. At the time of his dismissal, the country had just been plunged into the worst economic catastrophe in its history, brought about in no small measure it must be said, by the activities of our banks. Mr. Reilly's prospects of re-employment were extremely poor, as turned out to be the case, and as the bank well knew before it dismissed him. He had in the recent past purchased a house close to his parents in Blanchardstown with the benefit of a mortgage from the bank which he now found himself unable to repay. It is clear from his evidence that these events had a catastrophic effect on him and as he says, destroyed his life and ruined his career. Indeed, this was one of the submissions made by Mr. Mahon to Mr. Macken but unfortunately it fell on deaf ears.

60. Having regard to all of the foregoing, I am satisfied that the conduct of the bank in relation to Mr. Reilly's dismissal and the events leading up to it could not by any objective standard be described as reasonable. The evidence has driven me to the conclusion that at a very early juncture, probably on the 17th of February, 2009, a decision was made within the hierarchy of the bank to make an example of Mr. Reilly in order to deter others from similar behaviour in the future. That decision may or may not have been made by GIR, but as a minimum was strongly influenced by it. Whilst lip service was paid to observance of procedures, it is clear that there was only ever going to be one outcome. The bank's response in this case was entirely disproportionate and could not in my view be regarded as falling within the range of reasonable responses of a reasonable employer to the conduct in issue.

61. Accordingly, I am satisfied that the bank has failed to discharge the onus of establishing that there were substantial grounds justifying the dismissal in this case.

Remedy

62. Counsel for Mr. Reilly, Mr. Banim SC, submits that the only remedy which will do justice in this case is re-instatement, as ordered by the EAT. For the bank, Mr. Connaughton SC submits that such a remedy would be wholly inappropriate because Mr. Reilly, by his conduct, must be held to have substantially contributed to his dismissal. That contribution must be considered in determining the remedy and in that regard, the bank rely on the judgment of Carroll J. in *Memorex World Trade Corporation v. Employment Appeals Tribunal* [1990] 2 I.R. 184. That was a case in which the employer sought to judicially review a decision of the EAT on the grounds that it had failed to hear all the evidence and had decided the case effectively at the end of the employer's case. The court accepted that the hearing was unsatisfactory for these reasons but declined an order of *certiorari* on the basis that the EAT had erred within jurisdiction and in any event, the appeal procedure that was available was an adequate remedy. It seems therefore that the court considered that its discretion should not be exercised in favour of granting judicial review. In the course of her judgment, Carroll J., in commenting upon the conduct of the case before the EAT, said (at p. 188):

> "The Tribunal should hear all evidence available relating to the dismissal not only to determine whether there were substantial grounds but also because the extent to which an employee contributes to his dismissal is a matter which has to be taken into account in determining the appropriate remedy."

63. It is clear that these remarks by Carroll J. were *obiter* as they were not directed to the substantive issue in the case which she had already at that point in her judgment decided. Further, there is nothing from the Law Report to suggest that this point was argued before her in any depth or indeed at all as it did not form the basis for the arguments being advanced by either side.

64. In my view therefore, the court did not intend to lay down any rule of general application in making these remarks and in any event, for the reasons already explained, I do not believe I am bound by them.

65. It will be seen from the express wording of s. 7 that the concept of the conduct of the employee contributing to the dismissal is confined to situations where the court considers that compensation is the appropriate remedy. Thus, in *McCabe v. Lisney* (Unreported, High Court, 16th March, 1981) and *Carney v. Balkan Tours* [1997] 1 I.R. 153, the court was in each case concerned with a reduction in the award of compensation having regard to the extent of the employee's contribution to the dismissal. It would of course be unreal to suggest that the court could not have regard to the conduct of the employee in considering in a general sense whether the remedies of re-instatement or re-engagement were appropriate. However, in my view, it is equally true that the mere fact that the employee may have been guilty of some degree of misconduct, even if that were felt to have contributed to the dismissal, cannot of itself preclude the possibility of those remedies being invoked. At the end of the day, the court has to grant the remedy which will do justice between the parties.

66. I have already concluded that the bank's conduct in this case was unreasonable and disproportionate. I would add to that by saying that the manner in which it predetermined and manipulated the entire process from the outset reflects little credit on it and visited a very grave injustice on Mr. Reilly.

67. In my view, an award of compensation would fall far short of providing adequate redress in this case and the only appropriate remedy is re-instatement.