EMPLOYMENT APPEALS TRIBUNAL

Claim Of:	Case No.
Employee	UD501/2007
	MN351/2007
	WT151/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes B.L.

Members: Ms. J. Winters
Ms. M. Mulcahy

heard this claim at Dublin on 20th September 2007

Representation:

Claimant: Mr. Liam F. Coughlan, Liam F. Coghlan & Co., Solicitors, "Woodhaven", Ballycasheen Upper, Killarney, Co Kerry

Respondent: Ms. P. O'Rourke B.L. instructed by Ms. O' Malley, McCann Fitzgerald, Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2

Determination on Preliminary Point:

The Claimant was employed by the Respondent as a counsellor. She resigned her employment in the autumn of 2006 and subsequently initiated a claim for unfair dismissal on the basis that she had been constructively dismissed. The Tribunal received the Claimant's T1A on the 21st May 2007. There is a dispute between the parties as to the date of dismissal. The Respondent has raised as a preliminary issue that the claim was initiated outside the time allowed by s.8(2) of the Unfair Dismissals Acts, 1977 to 2001.

The essential facts for the purpose of this application are these:

1. On the 2nd October 2006 the Claimant wrote to the respondent in the following terms:

> "It is with reluctance and regret that I submit my resignation from post of counsellor with the Northern Area Healthboard based in Blanchardstown. Having twice requested an

unpaid leave of absence, twice requested a transfer and separately requested a career break **it was abundantly clear I wanted to not resign** and instead avail of one of these options. I am aware that colleagues of mine in similar counselling posts in the NAH have recently secured both career break and transfer from facilities also short of staff. **With this in mind I resign under duress** as I have no income and will need to apply for unemployment benefit. And so this situation may have to be reviewed again." (Claimant's emphasis)

2. On the 12th October 2006 the Respondent replied in the following terms:

"I received your letter this morning in which you submit your resignation from your post as counsellor in the HSE Addiction Service based in Blanchardstown. I note your statement of continued dissatisfaction with the response to your applications for special leave. As was clearly explained to you in previous correspondence and at our meeting on September 14th neither of your applications have fulfilled the criteria as stated in the special leave directive. For sake of equity and fairness among staff I base all decisions on these criteria without acceptation (sic). Regarding your transfer requests, I remind you that requests for transfer outside of this Addiction Service are not within my remit or responsibility to progress. I have advised you of the process by which transfer protocols within the HSE will be agreed at a later date. As explained again at our meeting of September 14th 2006 and previously, a transfer from Blanchardstown within our service is not in the interest of the Service at this time. Your continued unauthorised absence since September 18th is seriously affecting the provision of appropriate services to clients and demonstrates serious insubordination and dereliction of your duties. In light of your assertion that this resignation is submitted under duress, I invite you meet with me and our Area Operations Manager at Phibsboro Tower on Friday October 27th at 2.00pm. The purpose of this meeting is to afford you further opportunity to address your dissatisfactions, non-attendance at work and claim of duress. You may be accompanied at the meeting by a union representative or a colleague. Meanwhile, I defer acceptance of your resignation." (sic)

3. On the 20th October 2006, the Claimant replied in the following terms:

"In response to your invitation to again discuss my work situation I am unable to attend this Friday for a meeting. I am happy to attend a meeting at a later date following sufficient time to get advice on this matter and convene a time that suits the person that will accompany me."
The Respondent sent a letter dated the 26th October 2006 to the Claimant. This letter was sent by registered post and was returned to the Respondent on the 9th November 2006 as it has not been collected by the Claimant.

4. Having not heard from the Claimant, the Respondent wrote to the Claimant on the 17th November 2006 in the following terms:

> "In light of your failure to substantiate your note about resigning "under duress" I can no longer defer acceptance of your resignation. In relation to your note of resignation dated October 2nd 2006, I must make it clear that this position is no longer open to review and your resignation is formally accepted by me as of close of business today."
>
> This letter was not posted until the 24th November 2006 and could not have been received by the Claimant before the 27th November.

It is the Claimant's case that her date of dismissal was the 27th November 2006, when she received notification of the Respondent's acceptance of her resignation. If this is the case then her claim was initiated within the required six months.

It is the Respondent's case that the date of dismissal is the date upon which the Claimant submitted her resignation. If that is the case then the claim has been made out of time and the Tribunal will have to consider an application to extend time.

The Respondent submitted, in the alternative, that if the Respondent is required to accept the resignation then the operative date is the date on which the resignation was accepted rather than the date on which the Claimant was notified of the acceptance. This cannot be. If the Respondent is required to accept the resignation then the time can only run once the Claimant has been notified of the acceptance. Otherwise an employer could defeat a claim by accepting the resignation but not telling the employee that the resignation had been accepted.

The question that the Tribunal has, in essence, to answer is whether a resignation only becomes effective when it is accepted by the employer. In other words, does an employer have to accept a notice of resignation before an employee can resign his employment?

This question has been considered by the Labour Court in Millett v. Shinkwin [2004] ELR 319, 328-9. It was suggested, inter alia, by the Complainant in that case that her resignation had been withdrawn before it had been accepted by the Respondent and, relying on the ordinary contractual rules of offer and acceptance, submitted that the resignation never, therefore, took effect. The Labour Court rejected this reasoning, saying:

> "A resignation is a unilateral act which, if expressed in unambiguous and unconditional terms, brings a contract of employment to an end. The contract cannot be reconstructed by the subsequent unilateral withdrawal of the resignation."

The Labour Court also said that:

> "The acceptance of the resignation by the employer is not required in order to determine the contract."

It seems to the Tribunal that this is a correct statement of the law. Just as an employer's notice of dismissal takes effect without the employee having to accept it, a notice of resignation must take effect without the employer having to accept it. To hold otherwise would be to give employers an unreasonable degree of control over when employees could resign.

The Labour Court then went on to consider what it called "a significant body of authority for the proposition that there are exceptions to this general rule and that there are occasions in which an apparently unconditional and unambiguous resignation can be vitiated by the circumstances in

which it is proffered." Redmond, in her book Dismissal Law in Ireland suggests that "context is everything. A resignation should not be taken at face value where in the circumstances there were heated exchanges or where the employee was unwell at the time."

It is clear that where an employee seeks to withdraw a resignation and special circumstances exist, an employer should not unreasonably refuse to allow the resignation to be withdrawn.

In the instant case, it was not suggested that the resignation fell into this category of special circumstances. Although if it did, the Respondent was attempting to give the Claimant an opportunity to discuss her dissatisfactions and, impliedly, the opportunity to withdraw her resignation should any discussions conclude satisfactorily. At no stage does it appear that the Claimant sought to withdraw her resignation.

It is the determination of the Tribunal that the date of dismissal, if there was in fact a dismissal, was the 2nd October 2006, being the date upon which the Claimant submitted her resignation in unambiguous and unconditional terms.

Counsel for the Respondent referred the Tribunal to the unreported case of Stamp v, McGrath (UD 1243/1983). This held that, in a case of constructive dismissal, the relevant notice period should not be taken into account in determining the date of dismissal. The Claimant's contract of employment required that she give two weeks' notice of the termination of her employment. The T1A was furnished to the Tribunal on the 21st May 2007, six weeks and five days outside the time allowed by statute. Accordingly, the Tribunal does not need to rely on Stamp v. McGrath.

As the claim was initiated in excess of six months after the date of dismissal, the Tribunal must consider whether, in accordance with s.8(2)(b) of the Act, there existed exceptional circumstances that prevented the lodging of the claim within the initial six month period. S.8(2)(b) has been considered by the Tribunal many times, perhaps seminally in the case of Byrne v. PJ Quigley Ltd. [1995] ELR 205. The Tribunal has held that the words "exceptional circumstances" are strong words that mean something out of the ordinary, something quite unusual. It has also been held that the exceptional circumstances must have arisen during the initial six months and that they must have prevented the lodging of the claim.

It was submitted on the Claimant's behalf that a claimant is allowed six months within which to prepare his claim. On receipt of the Respondent's letter dated the 17th November 2006 (which letter could not have been received before the 27th November 2006), the Claimant's Solicitor wrote to the Respondent essentially seeking discovery of a number of matters. This was followed by reminders on the 2nd February 2007 and the 22nd March 2007. The documents were finally received on the 3rd April 2007, which was actually two days after the expiry of the initial six month period. It was submitted that the Claimant could not properly bring her claim for constructive dismissal without the discovery that had been sought. It was also submitted that much of the six month period allowed to the Claimant to prepare her claim was consumed by the Respondent's delays.

A claimant is not allowed six months within which to prepare his claim. He is allowed six months within which to initiate his claim. This does not require the case to be ready for hearing at that stage. It should also be noted that, to bring a claim for constructive dismissal, an employee must have resigned in circumstances where either there has been a fundamental breach of the contract of employment or the employer has acted so unreasonably that the employee is compelled to resign. Should an employee resign in either of those circumstances, he must know why he has resigned without having to be told the reasons or without having to investigate the reasons. It is certainly

reasonable to suggest that, in a case such as this, discovery would be required in order to properly prepare for the hearing of the claim. However, the Claimant must have had sufficient knowledge of the reasons for her resignation as would have allowed her claim to have been initiated. It is noteworthy that discovery is not available in the Courts before the institution of proceedings and indeed only exceptionally before the closure of pleadings.

The Tribunal is not satisfied that the failure to secure discovery and consequent delay was an exceptional circumstance or that it prevented the lodgement of the claim. In these circumstances there are no grounds upon which the Tribunal can extend the time allowed for the giving of notice of the claim to the Tribunal. As the required notice was not given within six months of the date of dismissal the Respondent's preliminary application must succeed.

As this is a claim for constructive dismissal the question of Minimum Notice does not arise.

These claims are therefore dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)