EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD914/2006

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr E Handley
Mr P Woods

heard this claim in Dublin on 6th March 2007 and 24th May 2007 and 25th May 2007

Representation:

Appellant: Mr Frank Drumm BL instructed by Fiona Roche, Roche & Co., Solicitors, 34 Vevay Road, Bray, Co. Wicklow

Respondent: Mr Peter Somers BL instructed by Ms Mary Condell, Porter Morris & Co., Solicitors, 10 Clare Street, Dublin 2

The determination of the Tribunal was as follows:-

Background
The appellant claimed that she had been unfairly dismissed by way of a constructive dismissal. The fact of dismissal was in dispute and so the appellant proceeded first. Both parties availed of their statutory entitlement to make opening statements.

Counsel for the appellant explained that initially the appellant had been employed by a large company which was then taken over by the respondent in 2003. It was as a result of this takeover that the appellant came to be employed by the respondent. The appellant had been employed in the heavy freight area as a credit controller. At a later stage the respondent then acquired a smaller company. Difficulties began when the respondent took over the smaller company. The two companies had operated separate ledgers and different computer systems. The work that the appellant undertook became duplicated and the appellant became overstretched. As a result, the appellant became stressed and having sought medical advice took certified sick leave. The appellant was certified unfit for work due to work related stress. Counsel for the appellant accepted that the appellant did not bring this matter to the attention of the respondent at the time. It was only after the

appellant sent the medical certificate to the respondent that her employer became formally aware of the issue of work related stress, but the respondent had been aware of the appellant's difficulties prior to the sending of the sick certificate. The appellant had sought a meeting with the respondent's human resources officer, but this meeting did not occur. The respondent offered her an assistant, but the person offered was unsuitable. The appellant felt that the respondent was trying to edge her out and she felt that she had no option but to resign her employment.

Counsel for the respondent outlined to the Tribunal that there had been no evidence that the appellant suffered from work related stress. The first time the respondent was made aware of it was when the appellant furnished medical certificates to the respondent. A meeting was held with the appellant, who was offered assistance to ease her back to work. The focal point of the appellant's grievance was that the respondent did not grant to her sick pay. The appellant had been absent on sick leave the previous year. The respondent granted sick pay on discretionary basis and it was the policy of the respondent not pay for two periods of sick pay. The respondent wanted the appellant to return to work. The person who took over the appellant's job was a temporary replacement. A period of transition had taken place when the respondent acquired the second company and the appellant had been made aware of the nature of the transition. There was no notice to the respondent that the appellant was suffering from work related stress. It had been made clear to the appellant that the respondent wanted her to return.

Appellant's Case

The appellant told the Tribunal that she had started working with a large company which imported and exported by air, sea and road. The appellant had held the position of credit controller and had worked a four-day week. The appellant described herself as having been head-hunted from this position to the company which was later taken over by the respondent. The appellant said that she had been head-hunted by the person who is now the managing director of the respondent. The appellant had been made redundant from the large company in November 2001. The appellant had known the managing director since he was a sales manager and she received a telephone call from him in January 2002 with a view to taking up the position of credit controller with the respondent. The appellant met the managing director and the accountant, who was to be her line manager, in the boardroom. The appellant was informed that the accounts were in a bit of a state. The managing director suggested that the appellant reorganise the accounts and then the appellant could work a three-day week. The appellant worked from Monday to Thursday from 8am until 4pm. Her job was to sort out accounts which were outstanding for over ninety days and which had not been dealt with by the previous credit controller. The appellant allocated payments to the debtors' account, she liaised with the accountant, and she gave the accountant weekly cash forecasts of cheques expected in the following week. At the time when the appellant joined the respondent her line manager reported to the managing director. Ten people were employed in total and two other staff members were employed in accounts. The takeover by the respondent occurred in 2003. The takeover was a welcome event and it resulted in an injection of money into the company taken over. The increase in the appellant's workload was manageable. The respondent took over a smaller company in 2005. The accountant came to the office and informed staff that the smaller company's accounts were being handled in the United Kingdom and that Dublin office was not being affected. The situation changed, the debtors' accounts of the recently acquired company became part and parcel of the function of the respondent's office in Dublin and it was the appellant who had to take on this work. The appellant emphasised that the accountant had discussed the takeover with the three office staff in Dublin and had informed them that the takeover would not affect them in any way.

One employee, an accounts person who was not part of the office in Dublin, undertook the work of

the respondent in relation to the account of one large customer. It was sometime in March of 2005 that employees from the smaller company joined the respondent's employees in the office. When the smaller company joined the respondent, each company had its own computerised accounts system and there was no compatibility between the two systems. The appellant was given the role of credit controller for the smaller company in addition to her original job. The appellant had two desks, one for each system. The new system was completely different to that of the respondent. The accountant told her that the accounts were being handed over and that the two systems would merge eventually, but the goalposts continued to be moved. A sales representative asked the accountant when the move would be completed. It was clearly recognised that the appellant had double the work to undertake and this was discussed in the office. The accountant told her that the respondent could not be seen to take on additional staff when members of staff from the smaller company were employed. Another employee could have been of assistance to the appellant, but she undertook work on the large customer. The appellant commenced work at 8am and was due to finish at 4pm but she was always in work after 4.30pm. A temporary assistant, who had no experience of the new system, was offered to the appellant. The temporary assistant was of no benefit to the appellant and she would have to train her. The accountant told her the managing director did not want to retain her anyway. She turned down the person. He told her he would try and get a schoolgirl. The temporary assistant left while she the appellant was in employment. She did not go to the accountant for help, as she would have seen it as a flaw in herself.

In September 2005 the appellant was absent on sick leave and her husband made an appointment for her to go to the doctor. She had very high blood pressure and the doctor informed her that he was aware of her work situation. The doctor told her that she was clearly stressed out. She was signed out of work due to stress. She submitted medical certificates to the respondent. She did not want her illness documented on the medical certificate as she felt it showed a flaw in her. She was not happy when the doctor documented her illness on the medical certificates. The respondent did not contact her at all. She contacted the respondent in November. She became ill in September and on 25th September 2005 she realised that she was not paid her salary. She was shocked as she was always paid in the past. Two years prior to this she was absent for six weeks due to surgery and she was told to take whatever time she needed. The appellant was not requested to attend the respondent's doctor. The respondent had discretion to pay her sick pay. The appellant telephonedthe accountant in November to arrange a chat off site. The appellant explained that she felt absolutely worthless as the respondent did not see it fit not to pay her while she was absent on sickleave. The accountant told her that he was not aware that the sickness related to work. She reminded him of conversations with her and her two office colleagues and when she was in a badmood her colleagues told her that she was stressed. She felt that she must not have been considereda decent worker. She spoke to the accountant and he told her go back and discuss it with humanresources. The accountant told her that he hoped she would be back before the New Year and hetold her she would do the old role on the old system and maybe some accounts payable. The accountant asked her when she was coming back and she told him she was going back to the doctorand would have to do what he said. The accountant told her that the respondent policy now was thatthe respondent did not pay for sick leave anymore and it was at the discretion of the manager. Theappellant was absent due to stress from the additional work. The accountant told her he would check it out with the managing director and the human resources manager who was based in theUnited Kingdom. There was no human resources manager in Dublin. He did say that he was notpaying other employees who were absent on long-term sickness. She told him she was on long termsickness. She said she had no indication that it was a long illness. Members of staff from the smaller company were taken on when the respondent took over the smaller company and had nothing to do with the respondent's staff. She said this to the accountant and he told her to talk tothe managing director. She asked if her

pension was paid and he said no. She asked about incomeprotection plan and he said that it kicked in after twenty-six weeks. She asked if he could send herdetails of the income protection plan and he said he would sort it out.

The appellant asked to speak with the human resources manager. She asked the accountant if he would arrange a meeting with the human resources manager. The accountant told the appellant that the human resources manager would be in the office the following Friday but that did not happen. The following week the human resources manager telephoned her at home and she could not get a date in her diary to meet the appellant. This occurred at the end of November 2005. She spoke to the human resources manager on the telephone and told her that she would prefer to meet her in person. The appellant had to pursue her employers and they did not facilitate her at all. All she wanted to know was would she be paid and she ran after them. She asked them to telephone her doctor and they knew the state that she was in. A conference call was arranged for December 2005. The human resources manager suggested this to the accountant and the appellant. The appellant asked if she could bring her brother and this was not permitted. They told her it would have to be a member of staff. The human resources manager could not come to Dublin to meet her. The appellant wanted to sort out her sick pay and what she would do when she returned to work. The accountant informed her that it was in line with respondent policy that she would not be paid. She called the human resources manager who told the appellant that it was at the discretion of the accountant and the managing director. The human resources manager told her that things had changed in the United Kingdom. She did not receive anything in writing. The accountant suggested that she have an accounts payroll position and she told him she wanted her credit controller job back and he told her that was it. She would have been prepared to undertake both roles. While she was absent on sick leave training was provided on the new system. Prior to her illness she had received two days training in the United Kingdom. She was looking forward to the in-house training. A temporary assistant was hired in her office and she undertook some training with the accountant. The human resources manager told her that if she received training on the new system it would be of assistance. She said the accountant had told her that he would not be able to carry out training. She suggested the temporary assistant it was suggested to the appellant that she would have to return to the United Kingdom for training.

While the appellant was ill, her two colleagues helped out. A temporary member of staff was hired to undertake work as a credit controller. She said at the meeting that a temporary employee could do it. A temporary assistant undertook work on a five-day week. It was obvious that it took five days to complete the job. The appellant never said that she could manage it on a five-day week. At the conference call, issues which she had raised were not addressed. The meeting finished and human resources manager suggested that the accountant give her more training on the new system. The human resources manager did not say to her that she would have to go to the company director. She received a letter from the managing director in January 2006. She tendered her resignation in February 2006.

She then received a telephone call from the managing director, who asked her to give him a call. She telephoned him on the morning of 19th March 2006. He asked to meet her for a chat. She met him and they had a chat over lunch. She asked if she could bring her brother. The appellant agreed to a meeting with the managing director in Skerries on 29th March 2006. After have a general chat about the state of play in the company, the managing director asked what he could do to make the parting on good terms, as they knew each other for a long time. The appellant claimed that she was absolutely astounded the way the company turned around. She told him how disgusted she was. She was absent due to stress and she felt worthless. She had no preconceived ideas. He told her to go away and think about it. The managing director told her that she masked it very well if she was

stressed. He accepted her letter of resignation and there was no mention of counselling or easing back to work. Three days later she received a letter from the respondent acknowledging her resignation. He told her that he was sorry to see her go and that if the matter went to human resources it was out of his hands completely. She understood that this was what he talked about and he asked her to get back as soon as possible. She felt that if she told the managing director that she wanted to go back to work, that he would have facilitated her. She did not think that this was a matter for discussion at all.

The appellant did not obtain the benefit of the income protection plan. The appellant contacted the respondent to ask for a reference. She telephoned the accountant and she received a text from him that his wife had a baby and he told her to telephone the managing director. She received a reference two to three days later. She was shocked when she received the reference as it did not allude to her character and that she was a good timekeeper. The appellant said that could not use the reference in seeking alternative employment. She had always enjoyed her work. She subsequently took up a position that was entirely different. She obtained a job in a department store as a sales assistant in March 2006. She remained there for six months and then obtained a job as a casher accepting payments for services, customer's pay and debtor's accounts. She does not undertake credit control work. She deals with customers' payments and balances cash at the end of each day. She is still on medication for blood pressure and depression.

Under cross-examination the appellant agreed that she had had a good relationship with the managing director and that he was an approachable person. She agreed that prior to being sick she had applied to have her working days reduced from 4 days a week to 3 days a week and that she had asked the respondent to supply her with a letter saying she would now be working 3 days a week. This was in order to claim a social welfare payment for one day per week. She had been advised by the Department of Social Welfare that she would be entitled to this. However she had not told the Department of Social Welfare that she would be voluntarily working a three-day week. The respondent refused to give her this letter and she never went onto a three-day week.

Prior to visiting her doctor, the appellant did not recognise her symptoms as stress-related. She had been having trouble sleeping and was prone to breaking down in tears for a month prior to visiting her doctor. She did not go to her bosses with her problems, as the accountant already knew she was snowed under. He proposed getting in help but could not be seen to take on another employee when existing staff in the firm taken over should have the job. She denied that the extra work was just temporary until the two accounting systems merged. Staff did not know when the systems would merge. Her job involved chasing debtors, constant telephone calls and emails, dealing with customer queries, providing weekly cash forecasts and monthly statements etc. She denied that her earlier request for a three-day week implied there was some slack in the system. She agreed that the managing director had helped her to get summer work for her son. She had believed that she would be paid whilst sick as her illness was related to overwork. Not being paid added to the stress she was under. She had not even been told she would not be paid and had always been paid when she was sick in the past. There was no contact from the respondent after she was out sick. She initiated every single contact herself. It took a month from the time of her first request to speak to the human resources manager. She agreed that she knew of other members of staff who had not been paid whilst out sick and that she also knew that sick pay was discretionary. However, on a conference call with the appellant, human resources manager had stated that 'things have changed' with regard to the discretion of managers in paying staff out sick. It made her illness worse knowing that the accountant and the managing director did not want to pay her. Even after she told the accountant she would like to be contacted, there was still no contact from the respondent. She did not accept that the respondent's suggestions to ease her back to work were made in good faith. When she had

asked for her old job back the accountant had told her that was what had made her ill in the first place. She felt this as an added pressure. In the meeting with the managing director subsequent to her handing in her letter of resignation, the managing director had not suggested that she withdraw her resignation. The managing director had told her he would like to part on good terms and to get back to him. The managing director had given her no timescale in which to get back to him.

After her resignation she was employed as a retail assistant in a department store from 4th March 2006. This department store did not ask for a reference from a previous employer. She worked an average 24.5 hour week with the department store, this being a core of 3 half days with other shift hours changing each week. The work was less stressful than her previous employment. In October 2006 she left her employment with the department store and went to work for another company on a three-day week. She did not accept that the real reference system in Ireland is a telephone call and that if a potential employer had telephoned the managing director he would have given her a good verbal reference. Nor did she agree that there was no attempt to force her out of the company. The appellant had not been sent for counselling by her doctor or by the respondent. She is still on medication for stress-related symptoms. The appellant's doctor's report was submitted in evidence.The report records the appellant as having a history of hypertension. The appellant agreed that shesuffered from high blood pressure before her workload was increased. However, her blood pressuremedication was increased in strength from September 2005.

In response to questions from the Tribunal the appellant stated that she had wanted to return to credit control work, ideally her original, pre-merger job, but if this was not available then to the 'dual system' job. She had never considered a five-day week in order to deal with the pressure of the two systems. She was not aware of a company grievance procedure.

A former colleague of the appellant gave evidence for the appellant. The former colleague said that she had been aware that the appellant was suffering from pressure at work. She had been shocked to see the appellant crying at her desk when she had been used to seeing her as a strong person. The former colleague was currently absent from work with the respondent with a long-term illness. She had not been paid since the start of this illness. She had had three letters from, and two meetings with, respondent representatives since the start of her illness. These were initiated by the respondent, with a view to monitoring her situation and ascertaining how best to get her back to work. These letters had been sent to her after the date of the appellant's resignation. The former colleague had not been aware that she could be entitled to payment from the respondent's income protection policy until she heard about it at the Tribunal hearing. In the period between first and second hearings she had made a claim to be paid under the terms of this policy and was awaiting the result of her claim. If her claim is accepted she can expect to be paid 75% of her salary, less state disability benefit, until she becomes fit to work. Under cross-examination, the former colleague disputed that she had been paid for 41 sick days between 2001 and 2005. She did not recall being told personally by the managing director about the income protection policy.

A second ex-colleague of the appellant gave evidence that she had worked for the respondent from February 2001 to October 2005. She worked in the accounts department with the appellant. The atmosphere had been stressful and all staff had taken on extra work. She had seen the appellant in tears in work. After the merger the workload had doubled. Both she and the appellant had had two computers on each of their desks, one for each system. This witness had dreaded coming into work and had taken a lot of sick days and eventually resigned. She had talked to the accountant about the appellant. The accountant had asked her why the appellant was quiet and moody and she had responded that the appellant was stressed. The accountant had made no comment in response to this. She agreed, under cross-examination, that the respondent was not all bad; they had paid for her

to study on an accounting technician course. She had not been paid for the days she was sick.

Respondent's case

The accountant gave evidence for the respondent. He stated that he had been the financial controller with the respondent since February 2000. They had worked together in an open plan office. He had had a good relationship with the appellant. The merger had occurred when the respondent had acquired a smaller company in February 2005. On 31st July 2005 they had become one legal entity and the smaller company had ceased trading. The acquired company used a different system to the original company. In February 2005 accounts received in the acquired company had been controlled in the United Kingdom. In late March 2005 the Financial Manager from the acquired company had left and it was decided to bring accounts received to Ireland. The appellant's workload was temporarily increased whilst the existing system was integrated with this new one. He sent the appellant to the United Kingdom for two day's training in the new system in April 2005. An employee came over from the United Kingdom to work with the appellant on the system for a day. From 1st May 2005 the appellant took over the new system completely. She was still operating the old system. The additional workload comprised about 10 extra lodgements a day. Because the new system used a different methodology to the existing, two separate computer systems were required. The appellant did not complain to him in April or May of 2005. It was always going to be a temporary situation. A decision had been made to integrate the old system into the new system, which would have the effect of bringing the appellant's workload back to pre-merger levels. This integration has since progressed and currently 95% of work is on the new system. By March 2006 between 80% and 90% of the work was on the new system.

In August 2005, the accountant explained to the appellant that he did not expect her work to be to the same level as previously. He told her he understood some things would fall behind as the workload had temporarily increased. He was attempting to show light at the end of the tunnel. He had never seen the appellant crying at her desk and he had not been told she was feeling under stress.

In September 2005 the accountant received a note from the appellant saying she would be out sick for 2 weeks. He started recording lodgements himself and then he asked another employee to do it. He then contacted the United Kingdom office and asked them to take back this work temporarily. He asked one of the appellant's work colleagues and friend to text the appellant to tell her he had done this so that the appellant would know there was not a huge backlog forming. He did not want to contact the appellant himself as he felt this would create further stress. The appellant's medical certificate had cited "work-related stress" as the reason she was absent.

Two weeks after the appellant's first sick note, her husband telephoned to ask why she had not been paid. The accountant said this was a human resources decision. The appellant's husband said this could exacerbate the situation but did not indicate the likely duration of the illness. The accountant was concerned that someone should attend the pre-arranged training in the new system. The appellant had known this training was scheduled. On the 10th October 2005 the accountant employed a temporary employee from an employment agency to do the appellant's work. This employee attended the training course in the appellant's absence. This employee had previous experience in credit control but not in this system. The new employee got on with the job and no backlog built up.

In mid-November the accountant had a meeting off-site with the appellant at her own request. The appellant said she was disappointed there had been no communication from the respondent, and

that she had not been paid. She had medical bills of €600. She asked the accountant to go back to the managing director and human resources manager and ask them to pay her while she was sick. The accountant also discussed the possibility of the appellant returning to her old accounts received role on the old system (which was by then greatly reduced), in addition to some accounts payable work, as a temporary role to get her back into the workplace. He felt the appellant had a "mental block" about the new system and, between the reduced work on the old system and accounts payable, there was about four days work per week. He felt this would be a less stressful role to ease her back. Accounts payable used the old system. This suggestion was made in the light of the position in the company in November. The appellant said she would not return to work until her doctor certified her fit. The situation in the respondent was changing rapidly, with about 10% of accounts work moving to the new system per month.

The appellant asked for a meeting with the human resources manager. As the human resources manager was based in the United Kingdom, this was not possible. In December the accountant and the appellant had an after-hours meeting in his office. The appellant asked when she would be paid and the accountant told her she would be paid when she returned to work. This would not be retrospective. The appellant asked for human resources manager to be involved in the meeting by conference call and the accountant arranged this. The human resources manager mentioned further training. The appellant asked to be trained by the temporary employee currently doing her job. The accountant told her this was not possible at year-end. The accountant suggested the appellant should come into the office and take on accounts payable and revenue recovery and then train prior to transferring back to credit control. The appellant did not like this suggestion. She wanted her old, pre-merger role back. This was not possible, as by now there was less than one day's work in her old role. Credit control was now primarily in the new system and the appellant would have to train in this system. The appellant said the accountant was trying to force her out but the accountant said he was not; he wanted her back as she was a great worker. In 2002 the appellant had picked up a backlog when she joined the respondent and done a great job. There was no more to the meeting. In all the time the appellant worked for him, the accountant could only recall two instances of her staying in work after 4pm.

Under cross-examination, the accountant stated that when the appellant had joined the company she had asked to work a four-day week and, as they were having difficulty recruiting, the company had agreed. He had never seen any need to ask her to do a five-day week. He had never asked her to work late. The temporary employee recruited whilst the appellant was ill worked a five-day week as this was the industry norm. This employee looks after other functions as well as those the appellant looked after.

The respondent employs 39 people in Ireland and is a subsidiary of a larger company which is based in the United Kingdom and which employs around 900 people. There is also a larger Irish subsidiary of the parent company, which employs two human resources people. The accountant never tried to get human resources help from the other Irish company. The accountant agreed that at the November meeting with the appellant he had made the comment that it looked as if it would probably be the New Year before she would return to work. However, it would have been fine with him if she had said she would be back tomorrow. He did not entertain paying her medical bills and did not think she expected this. She was just pointing out that she had incurred costs whilst unpaid.

The managing director had made the decision not to pay the appellant. The accountant had discussed it on 23rd September 2005 with the managing director but it was ultimately the managing director's decision. The managing director has the discretion to pay for absences due to sickness or not. In practice, if an employee has a second long-term illness they are not paid. The

ccountantwould define a long-term sickness as more than one or two weeks. The accountant agreed that hehad also suggested at the November meeting with the appellant that another temporary employee,who had been covering the work of someone on maternity leave in accounts payable, could assistthe appellant with her work. The appellant said no. The accountant believed she did not like thisemployee. The accountant also agreed he had told the appellant her pension contributions were notbeing paid whilst she was out sick. He also told her about the respondent's income protection plan.This was an insurance policy from Irish Life, which could provide 75% of salary less state disability payment if an employee was unable to work for 26 weeks or more due to an illness. Theappellant asked for more details and the accountant said he would look into it. As the appellant hadnot yet been out for 26 weeks he did not see this as urgent but he subsequently wrote to the insurance company in January 2006 putting them on notice that the appellant may make a claim.

The accountant agreed that he had no issues with the appellant with regard to her work or timekeeping. He had been surprised, and had felt she had requested something unethical, in 2004 when she asked the respondent to provide a letter for Social Welfare saying she was to be put on a three-day week, when in fact this was her own request. He volunteered that perhaps the appellant had been misinformed by Social Welfare.

The accountant was surprised to hear that the appellant's colleague and friend had not sent her a text to tell her that no backlog would build up whilst she was absent.

There is now a new human resources person in the United Kingdom and this could explain any difference in the way the respondent treated the appellant's ex-colleague's long-term sickness compared to how they treated the appellant's. Retrospectively, the accountant did not see what he would have done differently in the appellant's case.

Responding to questions from the Tribunal, the accountant said that the temporary employee took over the two credit control systems immediately after one week's training. He agreed that this implied that the work was not onerous. He was never advised that the appellant had hypertension or was particularly vulnerable to stress. He had not considered an independent medical examination. He would have felt this would have questioned the appellant's integrity.

The managing director gave evidence on behalf of the respondent. He has been managing director of the respondent since 2002. He had worked with the appellant in another company between 1994 and 2000 and had approached her to take the job of credit controller in the respondent company. He had a very good relationship with the appellant. The appellant was approachable. When an employee became ill, the managing director would look at the absence record of the employee overthe previous two years. As a rule of thumb he would pay people for one long-term illness. When theappellant became ill in September 2005, she had already been paid for 39 days illness in the previous 22 months. When the appellant submitted her medical certificate, the managing directorhad been surprised that 'work-related stress' was cited, as she had never approached him about this.He decided not to contact the appellant as he took the view that, given the nature of her illness, anyapproach by the respondent could be misconstrued as subtle pressure no matter how well intentioned it was. In early October the managing director got a telephone call from the appellant'shusband, whom he knew well, asking him to change his mind about the sick pay policy. The managing director told the appellant's husband that he was operating a fair policy and the appellantwas not being treated differently to anyone else. At this, her husband stated that the appellant wouldbe out for six months. The managing director found this to be an incredible statement as her husband had no medical expertise. It would not be

sustainable for the respondent to pay anyone forsick leave for six months. The respondent operates its own profit and loss accounts. However, allabsences are reported to district and corporate level of the United Kingdom-based parent companyon a weekly basis and questions would be asked if the managing director authorised indefinite sickpay. The managing director gave the Tribunal a list current employees long-term sickness records,showing examples of other employees who had not been paid for a second period of illness. He explained that LK had been contacted during her long-term illness as it was not work-related, andthe respondent had not felt that contact could have any effect on her condition.

On 12th January 2006 the managing director wrote to the appellant, clarifying the respondent's position with regard to sick pay, offering to consider any assistance she needed to help her return to work and offering to meet her to discuss her concerns. The managing director received no response to this letter until late February 2006, when he received the appellant's letter of resignation. Before acknowledging the appellant's resignation, he arranged to meet her. He wanted to demonstrate to her that she had not been unfairly treated and to let her know that he would make any reasonable representations to the parent company on her behalf. At the meeting with the appellant, which tookplace off site on Tuesday 29th March 2006, the appellant stated at the outset that she was not reconsidering her resignation. The managing director told her he was under time pressure to respond to her letter of resignation, but that if she wanted him to make representations to the parentcompany on her behalf, she should let him know by the following Friday. After this, he would haveto respond to her letter and then things would be out of his hands. He did not suggest what these representations might be. He wanted the parting to be on good terms. He felt the appellant had usedthe respondent's grievance procedure informally i.e. she had contacted the accountant initially, thenshe had contacted the human resources department, then she had contacted a company director, themanaging director. The managing director waited until the next Monday, then, having heard nothing from the appellant, he issued a formal response to her resignation letter. With hindsight hebelieves that the appellant was an excellent worker, but when she was challenged by the extra workbrought on by the merger of the two companies, she was unwilling to meet this challenge. He feltthat this was not a criticism; the day will come when he will be unwilling to meet a challenge himself.

With regard to the appellant's reference, the official company policy was to confirm the start and end dates of employment and the title of the employee in a reference. The real reference system in Ireland operated by telephone, and he would have no problem giving the appellant a good reference over the telephone. However, in the interim between first and second days of the Tribunal hearing, he had issued a more detailed reference to the appellant in response to the concerns she had expressed on the first day regarding this issue.

The managing director reiterated that he had had no reason not to want the appellant back into the company. During the period when two systems were running in the company, he had been at pains to stress to all staff that he did not expect the same standards to apply during the changeover. Staff members throughout the company were trying to cope with operating two systems and he was expecting, and prepared to live with, a dip in standards. He had no expectation of the appellant's illness.

Under cross-examination, the managing director agreed that the disability benefit which covered long-term illness lasting more than 26 weeks had never been granted. All staff members were aware of the existence of this insurance policy and of how to apply for it. The insurance company had made a presentation about both disability cover and pension to staff when it was first introduced. All staff had been given an information pack and had had individual meetings with insurance

company personnel to discuss how it would apply to them. There was an annual update presentation to staff and individual updates to anyone who needed them. It was explicitly explained that the disability cover only kicked in after 26 weeks. The managing director had clarified in an early telephone call with the appellant's husband that there was no element of retrospective pay. In order to be paid under this policy, an employee would need to have a permanent disability as a result of serious illness. If a staff member was to be paid under the terms of this policy, the respondent company would facilitate payments through payroll system but the payments would come from the insurance company. The decision whether to pay or not would be the insurers. The managing director was not aware that according the insurance company documents, the respondent company should put the insurance company on notice that a claim was pending 70 days before the claim was due to be made. He felt this policy was not relevant to the appellant's situation as she had resigned before she was out ill for 26 weeks. He did not agree that the accountant had reneged on a commitment to give the appellant information about making a claim under this policy. The accountant had been waiting for the 26-week trigger and the managing director believes this was the correct approach. When the managing director met the appellant in March, he did not bring up the subject of this insurance policy, as he did not believe it was relevant. The managing director stated that at least two emails had issued to all staff pointing out that sick pay was at management discretion. The appellant was aware of this. It was also in the appellant's contract, which she had signed in the managing director's presence. The managing director had not agreed to have the appellant's brother present at their March meeting because he felt they would have a more free discussion with no one else present. He had been trying to help the appellant. He did not agree that he had been trying to buy her off. He did not recall ever having "done a deal" with a disgruntled employee or ex-employee. Once he had written to the appellant accepting her resignation he considered the matter closed.

A witness (EC) who replaced the appellant temporarily during her illness and permanently after her resignation gave evidence. He had never met the appellant. He had started working in the respondent company in October 2005 as a credit controller. He was paid by an employment agency at first but moved onto the respondent's payroll in April 2006. He had worked in credit control for 17 years but had had no previous experience of either system used in the respondent company. He received about 4 days training at the start of his employment and was able to work on both systems immediately. If he needed help he could contact the trainer by email. He had used this support 2-3 times. He worked 5 days a week for the respondent.

Determination

The essence of the appellant's case is the claim that the respondent subjected the appellant to an excessive workload which caused the appellant work related stress such that she was constructively dismissed by the respondent.

The appellant worked as a credit controller and she utilised a computerised accounting system in the course of her work. As a result of a merger with another company which had a different computerised accounting system the appellant was expected to carry out the same type of work as before and to operate on two different computer terminals with one terminal for each system. The appellant sought to characterise this requirement to operate two different systems as involving a duplication of her work. The Tribunal rejects this characterisation - the appellant used one system in respect of one of the pre-merger company's accounts and the other system in respect of the other pre-merger company's accounts and there was no requirement that the same debt be booked on both systems. The computerised accounting system was a tool of her employment and the requirement that she use one tool for some tasks and another tool for other tasks does not constitute a duplication of work over and above the pre-existing situation where one tool was used for all

tasks.

The appellant claimed that having to deal with the accounts of both pre-merger companies involved a major increase in her workload beyond that which had been required prior to the merger. The Tribunal does not doubt that as a result of the merger there was more credit control work to be done. However, it is the uncontroverted evidence of the parties that the appellant was told quite explicitly that she was not expected to achieve the same level in respect of the new work as previously. The appellant was merely expected to do her best and the respondent made it clear that it did not expect that matters could be kept up to date to the same extent as heretofore. There was more work to be done but the respondent had made it clear to the appellant that she was not required to do very much more work than she had been doing. The Tribunal further notes that there was not an iota of evidence to suggest that the respondent expressed any dissatisfaction with the level of performance achieved by the appellant after the merger. There was no evidence before the Tribunal to suggest that the respondent put the appellant under pressure in respect of the extra work which was available to be done. It was the appellant's own evidence that she herself found it difficult to let matters be dealt with at a lower standard than she had been used to achieving prior to the merger. The appellant's job involved pursuing amounts owing to the respondent and the respondent had made it clear to the appellant that it was acceptable for monies to remain outstanding to the respondent company for longer than had been usual prior to the merger. The Tribunal finds it far more probable that the appellant stressed herself out at the reduction in the quality of work required of her by the respondent rather than at any enhanced requirement as to quantity.

The Tribunal notes the appellant's own evidence that she had worked four days a week from 8am to 4pm and that there was little indication that she worked to any significant extent beyond those hours prior to the merger. The appellant claimed that after the merger she was at her desk for in excess of a further half hour each day. It was the respondent's case that the appellant did not work any additional hours and the Tribunal prefers the respondent's evidence on this point and finds that any increase in work carried out by the claimant was at the more modest end of the scale. Even had the Tribunal accepted the appellant's version of events and without deducting for lunch and other breaks the appellant attended at work for little more than thirty-four hours per week. The Tribunal does not accept that the appellant was overworked, particularly in circumstances where she herself accepted that she worked less than the normal working week.

It was the appellant's case that after having sought medical advice she took certified sick leave and never returned to work from that date until the date of her resignation. The appellant was certified by her general practitioner as being unfit for work due to work related stress. It was admitted by the appellant that she did not inform the respondent that she was overworked or stressed prior to her last day worked. It was only after the appellant had sent in the medical certificate to the respondent that her employer became formally aware of the issue of work related stress. It was claimed by counsel on behalf of the appellant the respondent had nonetheless been aware of the appellant's difficulties prior to the sending in of the sick certificate. Ultimately the Tribunal finds this claim that the respondent was independently aware that the appellant was overworked and stressed prior to being informed by the appellant herself is a claim which is unsupported by the preponderance of the evidence. It is the appellant's own testimony that she was unaware that she was suffering from work related stress until she attended at her general practitioner and further it was her evidence that she considered it a sign of weakness to admit to being unable to do the work required of her such that she did not complain of having too much to do. The respondent was not made aware by the appellant that she was suffering work related stress nor that she was unable to do her work to the standard required such that she might be caused to suffer work related stress. The Tribunal finds

that even had the appellant been overworked it was unnecessary for the appellant to resign her employment as the respondent at no stage displayed an unwillingness to deal with any issue of overwork or work related stress and any failure to resolve these issues lay with the unwillingness of the appellant to provide her employer with any opportunity to resolve them.

The Tribunal finds that a significant factor in the appellant's decision to resign was the refusal by the respondent to grant to the appellant sick payments. The Tribunal finds that the sick pay scheme operated by the respondent was a discretionary sick pay scheme, as sick pay schemes commonly are in the workplace. The Tribunal had no contractual or statutory entitlement to be paid sick pay during the relevant period and indeed there was no attempt by the appellant to claim otherwise. What was contended is that there was some unreasonableness in the exercise of the discretion. The Tribunal heard evidence from the respondent as to the criteria operated by the respondent and the Tribunal is satisfied that the criteria were not unfair to the appellant nor were the criteria either applied nor diverged from in such a manner as to show any attempt to treat the appellant unfairly. On the basis of the evidence tendered by the appellant herself it is manifest that the appellant was simply unwilling to return to work unless she was paid sick pay for the entire very prolonged period of absence from work.

The appellant was allegedly ill with work related stress such that she was unable to return to work at the time of her resignation. The Tribunal sees no necessity in a resignation at that time as she could have awaited the resolution of her illness and then tendered her resignation upon her return to work had the situation at work been unacceptable at that stage. The Tribunal accepts the uncontroverted evidence of the respondent that a temporary employee had been appointed during the absence from work of the appellant and that there had been no build up in work for the appellant to face on her return. The appellant was well aware that the basis of her alleged difficulty arose out of the transitional arrangements following on from a merger and yet the appellant was unwilling to return to the workplace to see if the position had ameliorated during the prolonged period of her absence.

The appellant claimed to have felt that the respondent deliberately sought to edge her out of her employment. The Tribunal is satisfied that there is no objective reality to this claim.

A number of medical certificates issued by a general practitioner in respect of the appellant were furnished to the Tribunal which certified that the appellant was unfit for work due to work related stress. It was argued on behalf of the appellant that in the absence of any contrary medical evidence the Tribunal was obliged to accept that the claimant suffered from work related stress. The Tribunal rejects this argument. The Tribunal is the ultimate arbiter of fact in respect of any matter before it. The Tribunal has carefully considered the medical reports accompanying the medical certificates. The appellant is a middle-aged woman who had suffered a prolapsed uterus and has suffered a long history of quite high blood pressure and high cholesterol which pre-exist the alleged period of overwork. The Tribunal also notes that the appellant suffered a sub-conjunctival haemorrhage and other symptoms of severe high blood pressure some six months after the appellant last attended at work. The Tribunal does not find credible the appellant's attribution of her symptoms to the stress caused by a brief period of alleged overwork. These symptoms predate the alleged period of alleged overwork and persist without significant improvement long after the exposure to alleged overwork. The Tribunal believes the fact that the appellant suffers from persistent high blood pressure and high cholesterol and the failure of her high blood pressure to respond to management and the risks which high blood pressure poses to her general health to be far more credible sources of stress than any act of the respondent. It appears to the Tribunal that this is a case of a former employee attributing her ills to that cause which is most productive of compensation. The reiteration of the

appellant's theory of causation by a general practitioner in a medical report does not make the appellant's attribution of blame a matter which the Tribunal must accept without demur.

The Tribunal heard much from the appellant about the respondent's permanent disability plan. It was alleged that the respondent failed to properly advise the appellant about the details of the plan which guarantees an income equivalent to 75% of the employee's salary through to retirement. In order to be entitled to the benefits of the plan the employee must be unable to attend to work and must not be undertaking any other occupation for profit or reward for a continuous period of 26 weeks. As a result of being unfamiliar with these details the appellant allegedly lost out on the benefits of the plan when she tendered her resignation and claimed constructive dismissal. The Tribunal received written submissions from the parties in relation to the permanent disability plan; which is also referred to as an income protection plan. The appellant went out on sick leave on 8th September 2005 and tendered a letter of resignation on 27th February 2006; which is somewhat short of the 26 weeks required for the benefit. Furthermore the appellant took up employment with other employers subsequent to her dismissal; employments of a type which appear inconsistent with the suffering of a permanent disability. The broad thrust of the appellant's claim in relation to the permanent disability plan appears to be more expressive of a sense of disgruntlement that her lack of understanding of the details of the plan deprived her of the opportunity to manage her circumstances such that she could receive its benefits.

The appellant's letter of resignation states that the appellant had been willing to return to work, but came to feel mistreated during her period of sick leave such that she felt she was left with no alternative but to resign with immediate effect. Specifically the appellant complained of the respondent's failure to pay sick leave and a lack of contact from the respondent. The Tribunal finds that the respondent did not act unreasonably in refusing to pay sick leave and further that the respondent acted reasonably in not subjecting an employee who had complained of work related stress to additional contact from work during the employee's period of recuperation. The Tribunal accepts this letter as strong evidence that the appellant resigned due the refusal of the employer to pay sick leave and return under her own terms and not because any persisting stress related illness.

The Tribunal notes that the appellant had asked her employer to provide her with a letter stating falsely that she was no longer required to work four days a week so that she could work three days a week and claim social welfare. The Tribunal is satisfied that the claimant was attempting to reduce her working week and maintain her income by deliberately misrepresenting her position to the Department of Social Welfare and had a sense of grievance towards the respondent due to the respondent's refusal to become complicit in her scheme. This request was made prior to the appellant deciding that she was overworked and is indicative of an unwillingness to continue working even to her usual level.

The Tribunal finds that the appellant was not unfairly dismissed and the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)