EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: **CASE NO.**
EMPLOYEE - *appellant* RP951/2009

against

EMPLOYER - *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr P. Clarke

heard this appeal at Sligo on 3rd September 2009

Representation:

Appellant: Mr Padraig Peyton, S I P T U, Hanson Retail Park, Cleveragh, Sligo

Respondent: Mr. Terry MacNamara, IBEC 3rd Floor, Pier 1, Quay Street, Donegal Town

The decision of the Tribunal was as follows:

The Tribunal amended the T1-A to reflect the respondent's correct name.

Respondent's Case

The respondent's director of operations who manages the hospital gave evidence that the appellant was informed on the 13th February 2008 that her position as a nurse was to be made redundant with effect from 10th April 2008. As a consequence of this, the appellant's personnel file was reviewed to establish the appellant's service with the respondent. A letter of resignation from the appellant dated 1st October 1991 was on this file. This letter gave notice that the appellant would terminate her employment with the respondent on the 28th October 1991. The appellant recommenced employment with the respondent on the 1st August 1992. This established the appellant's commencement date for the purpose of redundancy as 1st August 1992.

The appellant disputed this and maintained that during the period of 28th October 1991 to 1st August 1992, she had been on a career break. This witness explained that at the time of the appellant's resignation, there was no career break policy in place. Also, during the transfer of the business from the religious order to the respondent, he never saw any record of a career break policy. He confirmed that the appellant had received her statutory redundancy based on the commencement date of 1st August 1992 and ex gratia payments by cheques. All these cheques were cashed. However the appellant refused to sign the RP50 form.

Under cross examination the witness was queried as to why a copy reference dated September 1991, in relation to the appellant was included in the book of documents. The witness replied that the reference was on the appellant's personnel file and should be taken at face value.

Appellant's Case

A religious sister (*hereinafter referred to SD*) who had previously held the position of matron in the hospital explained that in October 1991, the appellant was employed as a State Enrolled Nurse (SEN). At this time the appellant asked her for a break to enable her to go and study to achieve her State Registered Nurse (SRN) qualifications. SD thought that it was very important for the appellant to achieve this qualification, as it would be of benefit to the hospital. Career breaks at this time were not to be found in Ireland in private industry. SD discussed with the appellant as to how this break should take place. SD was advised that the appellant should hand in her notice and resign. However, at all times SD assured the appellant that her job would always be available to her in the hospital. The appellant went to work in Northern Ireland to gain more experience in the hope of obtaining a place on a conversion course from SEN to SRN. The appellant was not successful in achieving a place on the course, on her first attempt.

The appellant recommenced employment with the respondent on a part-time basis in 1992, and from 1996 to the date of her redundancy the appellant retained full-time duties.

Under cross-examination SD was referred to the reference of September 1991 that she had provided on behalf of the appellant. Within this reference, she had been asked to give the reason for the appellant leaving employment. In the referees report, SD's reply had said that "(*appellant)* is just seeking change in environment. There is absolutely no other reason for her leaving". SD confirmed that at the time of her resignation, the appellant had not been accepted for any course.

The appellant gave sworn evidence that she commenced employment with the hospital on the 4th April 1981 as a SEN. In October 1991, she decided to go to Northern Ireland to work, as she thought it would strengthen her chance of getting the course to achieve an SRN qualification. SD was aware of her intentions and was very encouraging. At all times, SD made it clear to her that her job would always be available to her. The appellant maintained that she had an understanding that she would always have a job with the respondent. She was unsuccessful in obtaining a place on the course on her first attempt and returned to work on a part-time basis with the respondent in 1992. She worked part-time until 1996 when full-time hours became available. The appellant qualified as an SRN in 2006.

Under cross-examination the appellant accepted that she resigned in October 1991. The appellant read in to evidence her letter of resignation of the 1st October 1991. She had never seen a career break policy and did not think, at that time, career breaks existed in private hospitals. However, this had not been an issue for SD and taking a break was the only way that she could work in Northern

Ireland.

Replying to questions from the Tribunal the appellant confirmed that she returned to work part-time with the respondent in 1992, as there was no full-time work available. Previously, she had worked full-time for the respondent.

Determination

The Tribunal by majority decision with Mr Clarke dissenting dismiss the appeal under the Redundancy Payments Acts, 1967 to 2007.

The following is the dissenting opinion of Mr Clarke

The sworn and uncontested evidence of the appellant and her then employer, a religious sister, concerning the events surrounding the absence from her employment was that it was a *career break.*

Such arrangements were introduced initially into the public service but were subsequently applied in the wider public sector, the semi-state sector and the private sector. The practice was most prevalent in the health and education sector, public and private. A feature of all such arrangements was that continuity of service was maintained and that there would be deemed to be no break in the service of the employee.

As this evidence as to the nature of the break was given in good faith, I can see no good reason why it should not be accepted in good faith.

The respondent's evidence was that they based their decision as to Ms Flannery's redundancy entitlements on "a review of the personnel file".

In all the circumstances, I can find no reason as to why the evidence of the respondent as to the nature of the break should be preferred to that of the two individuals (then employer and employee) who were party to the agreed arrangements and gave evidence to the Tribunal to that effect.

Accordingly it is my opinion that the appeal should succeed.

Majority Determination

The Tribunal carefully considered all the evidence presented and the submissions made. Evidence was given that the claimant had received statutory redundancy, together with an additional ex-gratia payment, based on her service from 1st August 1992. It was common case that she had been made redundant, and the only dispute between the parties was the date of commencement for the purposes of calculating her length of service in the redundancy calculation. The claimant maintained that her statutory redundancy should have been based on a commencement date of the 4th of April 1981, and that her break in service was by way of career break, and should have preserved her continuity of service. The respondent maintained that the claimant's letter of resignation given on 1st October 1991 meant her employment had ceased, and her subsequentemployment did not reinstate her earlier service.

Schedule 3 of the Redundancy Payment Act 1967, at paragraph 5, states

"Where an Employee's period of service has been broken by any of the following- (a) any period by reason of-……..(v) any cause (other than the voluntary leaving of the employment concerned by the employee) not mentioned in clauses (i) to (iv) but authorised by the employer……continuity of service shall not be broken by such interruption."

The act therefore contemplates maintaining continuity of service where an employee has been absent by authority of the employer, but excludes from that exception a situation where the employee has voluntarily left employment.

The claimant did not dispute that she had voluntarily resigned from her employment, and that when she returned it was initially, and for several years, on a part-time basis. She however maintained that the true situation was that she was on a career break, and was always promised her job back.

The Tribunal, on a majority basis find that the claimant voluntarily left her employment, and therefore her service prior to 1st August 1992 is not reckonable for Redundancy purposes.

The majority of the Tribunal therefore find that the claimant was made redundant but that her redundancy payment will be based on a commencement date of the 1st August 1992, and notes that she has already been paid statutory redundancy based on that commencement date

The appeal under the Redundancy Payments Acts, 1967 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sad.) _____
(CHAIRMAN)