EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE –**Claimant** UD331/2010

against

EMPLOYER - **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Horan
Mr F Keoghan

heard this claim at Dublin on 18th May 2011

Representation:

Claimants:
Ms Lorna Lynch BL instructed by Mr Patrick Branigan,
Phelan Branigan Solicitors, Teach An Chúinne, Dyer Street, Drogheda, County Louth

Respondent:
Ms Dawn Noble, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Preliminary Issue

The claimant was employed as an office administrator by the respondent. There is a dispute between the parties as to whether the claimant's employment began in 2006 or 2007. In early 2009the claimant informed the respondent of that she was pregnant. The claimant took protective leaveunder the Maternity Protection Acts commencing on 3rd August 2009 and this period of leave wasscheduled to end on 29th January 2010.

On 23rd December 2009 the claimant's solicitor wrote to the respondent alleging that due to the behaviour of the respondent the claimant had no option but to consider herself constructively dismissed. According to this letter maternity leave was due to end on 31st January 2010.

On 7th January 2010 the general manager of the respondent replied to this letter stating, *inter alia*, that as the claimant was on maternity leave it would be unlawful for the respondent to accept any resignation during such period. It went on to state that should the claimant wish to confirm her resignation at the conclusion of the maternity leave the respondent would comply with the request for her P45.

On 13th January 2010 the claimant's solicitor again wrote to the respondent confirming that the Form T1A had now been sent to the Tribunal. This form was received by the Tribunal the following day and gives 4th January 2010 as the date employment ended.

It was submitted on behalf of the respondent that as section 23 of the Maternity Protection Acts, 1994 to 2004 provides

"Each of the following shall be void:

> *(a) any purported termination of an employee's employment while the employee is absentfrom work on protective leave*
> *(c) any notice of termination of an employee's employment given while the employee is absent from work on protective leave and expiring subsequent to such a period of absence"*

then as both the letter of 23rd December 2009 giving notice of termination of the employment by way of a constructive dismissal and the Form T1A which cites the end of the employment as being on 4th January 2010 both came within the period of protective leave the notice of termination and the termination of the employment itself was void such that there was no dismissal meaning that the Tribunal had no jurisdiction to hear the claim.

It was submitted on behalf of the claimant that as she was on paid maternity leave until 31st January 2010 the employment ended on 1st February 2010 and that statement in the Form T1A that the employment ended on 4th January 2010 was a mere error.

It was then further submitted on behalf of the respondent that, if the date of dismissal was now going to be 1st February 2010, this meant that the claim for unfair dismissal had not been lodged in accordance with section 8(2)(a) of the Unfair Dismissals Acts which provides

"A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made for the purposes of subsection (8) of this section) to a Rights Commissioner or the Tribunal, as the case may be-

> *(a) within the period of 6 months beginning on the date of the relevant dismissal"*

and again there was no jurisdiction to hear the claim.

Determination:

Both parties provided the Tribunal with extensive written submissions after the hearing date.

It is common case that the claimant was on maternity leave when her solicitor wrote to her

employer the respondent stating that the claimant considered herself constructively dismissed and that shortly thereafter the solicitor for the claimant filed a Form T1A claiming unfair dismissal. The Tribunal accepts that both the letter and the form were served during the period of protective leave under the Maternity Protection Acts. Arising out of these facts the preliminary points have been raised by the respondent that the notice of termination of employment was invalid and that there was no dismissal and also that the Form T1A was not served within time.

The respondent has argued that the purported termination of employment occurred during the period of protective leave contrary to section 23(a) of the Maternity Protection Acts, 1994 to 2004. The Tribunal upholds the respondent's argument and finds that there was no termination of the claimant's employment within the period of protective leave.

The respondent has argued that the notice of termination of employment was given during the period of protective leave and therefore the notice is invalid as being contrary to section 23(c) ofthe Maternity Protection Acts, 1994 to 2004 or otherwise. The Tribunal notes that section 23(c) refers to a purported notice given during the period of protective leave and expiring subsequent tothe period of protective leave but that the notice given by the claimant was due to expire during theperiod of protective leave. The Tribunal therefore upholds the respondent's argument and finds thatthe notice of termination of employment was invalid in that the purported termination ofemployment was due to occur during the period of protective leave contrary to section 23(a) of theMaternity Protection Acts, 1994 to 2004. Therefore the termination of employment was withoutnotice for the purposes of law.

It is the respondent's case that no termination of employment could have occurred on the 4th January 2010 as claimed in the Form T1A and the claimant accepts that this date was stated in error. The Tribunal accepts the now uncontroverted view that no termination of employment occurred on 4th January 2010.

It is common case that the claimant had been employed by the respondent and had been absent on protective leave and failed to return to work at the end of the period of protective leave or subsequently. The Tribunal therefore finds that there was a termination of the claimant's employment at or subsequent to the expiry of the period of protective leave. Whether the termination of employment was by way of constructive dismissal as alleged by the claimant or by way of resignation as alleged by the respondent or otherwise is a matter of fact yet to be resolved.

That the date of termination employment is stated incorrectly in the Form T1A does not of itself prohibit the Tribunal from hearing a case. The Tribunal has the power to amend the Form T1A and exercises this power very frequently.

The Tribunal accepts as a matter of uncontroverted fact that this claim of unfair dismissal was initiated by the claimant filing a notice in writing with the Tribunal prior to the date of dismissal.

Section 7(a) of the Unfair Dismissals (Amendment) Act 1993 [Number 22/1993] amends section 8 of the Unfair Dismissals Act 1977 [Number 10/1977] by substituting the following subsection:

(2) A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made forthe purposes of subsection (8) of this section) to a rights commissioner or the Tribunal, as the casemay be—
(a) within the period of 6 months beginning on the date of the relevant dismissal, or

(b) if the rights commissioner or the Tribunal, as the case may be, is satisfied that exceptional circumstances prevented the giving of the notice within the period aforesaid, then, within such period not exceeding 12 months from the date aforesaid as the rights commissioner or the Tribunal, as the case may be, considers reasonable,
and a copy of the notice shall be given by the rights commissioner or the Tribunal, as the case may be, to the employer concerned as soon as may be after the receipt of the notice by the rights commissioner or the Tribunal.

The Tribunal holds that the filing of a notice in writing with the Tribunal prior to the date of termination of employment and therefore prior to the period of six months beginning on the date of dismissal but not withdrawn prior to the date of termination of employment constitutes the giving of notice in compliance with section 8 of the Unfair Dismissals Acts. The case may now proceed to a full hearing.

The Tribunal finds that by leaving the Form T1A with the secretariat to the Tribunal prior to the commencement of the statutory period the form was with the secretariat at the commencement of the statutory period and throughout that period. Therefore the claimant had given notice within the statutory period as well as for an additional period and the Tribunal finds that the giving of additional notice does not invalidate the required notice.

The Tribunal understands that the giving of notice involves placing the notice party in a state of knowledge. By filing the form in advance of the date of dismissal the Tribunal was placed in the requisite state of knowledge within the period of six months commencing on the date of dismissal as well as to having knowledge of the claim prior to the date of date of dismissal.

The Tribunal has had regard to the extensive, detailed and carefully researched arguments of the parties but does not propose to reiterate each argument here in this determination or deal directly with each on a point by point basis as the Tribunal's reasoning has been set out above and the impact of the other submissions on the Tribunal's determination is clear by implication. However some of the arguments merit specific comment.

The claimant has advanced an argument that section 5 of the Interpretation Act 2005 permits the Tribunal to give a construction of the provision which reflects the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole in circumstances where the provision is obscure or ambiguous or would on a literal interpretation be absurd. The Tribunal finds that section 8 of the Unfair Dismissals Acts is not obscure or ambiguous or would on a literal interpretation be absurd and therefore the Tribunal does not regard itself as empowered to interpret the provision accordingly.

The claimant has argued that from consideration of the long title of the Unfair Dismissals Act 1977 and otherwise that the clear intention of the Oireachtas is "to provide for redress for employees unfairly dismissed ... to provide for the determination of claims ... by the Tribunal" and therefore the Tribunal should interpret section 8(2)(a) of the Unfair Dismissals Acts "in a purposive manner to permit the claim in this case". The Tribunal rejects this argument and finds that the intention of the legislature in 8(2)(a) is clearly expressed and it is to place some limits as to time in relation to the bringing of a claim against an employer.

The Tribunal has considered the claimant's submission in relation to the case of JH v Lawlor & others [2008] IR 476 where notice was considered in the context of detention under the Mental Health Act 2001 and where Peart J stated "... that a purposive approach to the interpretation of the

Act, consistent with its paternalistic and protective nature, must be adopted by this court ..." and that (according to the claimant) "a statutory time limit ... may be interpreted in a purposive manner and that decisions/claims which appear to fall outside the literal interpretation of the time limit will be interpreted. The Tribunal is of the view that it being a mere statutory tribunal does not have a like discretion to the High Court, which is a court of inherent jurisdiction under the constitution. The Tribunal is a statutory tribunal and its jurisdiction is founded on service and to interpret the time limit as urged by the claimant would involve the Tribunal in extending its own jurisdiction without any basis in law or regard to the Oireachtas. The Tribunal does not regard the Unfair Dismissals Acts and the Maternity Protection Acts as being paternalistic and protective in the same sense as the Mental Health Act and does not find the analogy apposite.

The claimant has also argued that since section 8(2)(b) of the Unfair Dismissals Acts does not contain the word "beginning" then the Tribunal is empowered in exceptional circumstances to extend the period for the giving of notice within such period not exceeding twelve months and that period, according to the claimant's submissions, the twelve months are an "outer limit" and the provision "clearly permits the Tribunal to extend time to include claims filed prior to the date of dismissal." The Tribunal rejects this argument and has had regard to the phrases in the subsection "period aforesaid" and "such period" and interprets them as referring to the period beginning on the date of dismissal and implying that the permissible period for an extension of time begins on the date of dismissal and forwards in time only.

The respondent has opened to the Tribunal the case of Davoren v Flair International Limited UD236/97 RP106/97 MN406/97 in which the employer argued that the claims were filed prior to the date of the dismissal and therefore not in compliance with the provisions of the relevant acts such that the Tribunal did not have the relevant jurisdiction to hear the case. In Davoren the Tribunal accepted this argument. However, it is noteworthy that the Tribunal then indicated that it would accede to an application to extend time in circumstances whereby the employee could file a new Form T1A after the decision in relation to the preliminary point, correcting the employee's position by filing after the date of dismissal and being on time as the new Form T1A would be filed within the period of twelve months as extended such that the claim could still proceed against the employer therein. This division notes that in Davoren the Tribunal gave some consideration to establish that the date of dismissal occurred prior to the service of notice but did not give any reasons as to why it regarded the early service of the notice as be not in compliance with the statutory provisions. This division can only presume that by dealing with the case in the manner in which it did the Tribunal in Davoren permitted the employee to proceed with her claim regardless of the employer's argument and therefore this division regards the finding that that the Tribunal had no jurisdiction to hear the matter to be merely *obiter dicta*. A decision by one division of the Tribunal does not bind another Tribunal but it is to be preferred to maintain consistency between divisions; however the pursuit of consistency should not justify the continuation of an error.

Gaynor v Wesley College UD 1247/2009 RP1421/2009 is another case opened by the respondent in which the Tribunal held that it had no jurisdiction to hear the claims as they were made outside the times allowed by the legislation in that they were made prior to the date of termination of the employment. However the determination lacks detailed consideration of the issue as to whether early filing actually is in breach of the relevant provisions, the matter is merely presumed.

There is a similar lack of reasoned consideration of the issue in the Rights Commissioner recommendation r-065331-ud-08/SR and the Rights Commissioner recommendation r-063780-ud-08/RG in which the Rights Commissioner declined to hear these two cases due to the

filing of the complaints prior to the date of dismissal. In the latter case the complaint was filed after the claimant had been informed by her employer that her final appeal against dismissal on notice had failed and a mere four day before the expiry of her statutory minimum notice period. The Tribunal case of Albulescu v the recommendation of the Rights Commissioner in the case of Cuan Tamhnaigh Teoranta U552/2005 makes an identical finding to the above reccommendations and is also lacking on any consideration of the appropriate interpretation of section 8(2) of the Unfair Dismissals Acts.

The Tribunal notes that it is a requirement under the Maternity Protection Acts that as a condition precedent to the return to work a person on protective leave must provide their employer with four weeks' notice of their expected date of return. It is therefore understandable that a person on maternity leave contemplating circumstances which could amount to a constructive dismissal might feel it necessary to decide if she intends to return to work at least four weeks in advance of the date of the end of the maternity leave period. If she were to leave it any later her option to return to work will have expired. The fact that she made up her mind four weeks before the end of leave is understandable and the fact that she then let her employer know is a mere courtesy. By informing her employer in advance her employment terminated without notice in law, but it is usual in constructive dismissal cases for the employee to terminate the relationship without given statutory notice.

This Tribunal finds nothing in the Unfair Dismissals Acts which indicates an intention to prohibit or penalise a person who provides greater notice than is require by law. It is very frequently the case that employees know in advance that their employment to an end, for example either by planning a suitable point in time to exit from circumstances which they believe amount to an unfair dismissal or by bringing a prolonged period of layoff to an end. There are nowadays long delays in bringing cases to hearing before the Tribunal and there appears to be no public interest served in discouraging claimants from getting their cases on as soon as they can. In this case there has been no evidence of prejudice to the employer by the giving of greater notice of the unfair dismissal claim than is required by law.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)