EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO. UD301/2011

EMPLOYEE – ***claimant***

against

EMPLOYER – ***respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)
Chairman: Mr D. Hayes BL
Members: Mr N. Ormond
Mr J. Maher

heard this claim at Dublin on 5th June, 5th September 2012 & 10th December 2012

Representation:
Claimant: Mr Breiffni O'Neill Employment Consultant,
12 Halcam Court, 61 Pembroke Road, Dublin 4

Respondent: On Days 1 & 2:
Ms Niamh McGowan BL instructed by Ms Louise O'Byrne
Of Arthur Cox Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2
On Day 3:
No appearance or representation

Determination of Preliminary Issue:

The Tribunal was of the view that certain aspects of the question of loss should be dealt with by way of a preliminary issue. The evidence in this regard was heard and submissions made on days 1 and 2 of the hearing. In dealing with the submissions it was made clear to both parties that this would be done without prejudice to the manner in which either would deal with the substantive issues, should the need arise. Similarly, in its ruling, the Tribunal will deal with the issues but without making any finding on the substantive issues that might later arise to be dealt with. This ruling will indicate how the Tribunal will deal with the issue of loss if, firstly, it later makes a finding of unfair dismissal and, secondly, it determines that compensation is the appropriate remedy. To be clear, nothing in this ruling will constitute a finding either way in respect of unfair dismissal.
The Tribunal is grateful to the respondent for having furnished detailed written submissions. The claimant declined the opportunity to do similarly.

The Tribunal heard evidence from the claimant. In late 2009 she sought a change to a four-day week and this was agreed to and began at the start of 2010. At that time her gross weekly pay was

€1,093.29. In August 2010 she was given notice of redundancy and was dismissed by reason ofredundancy in October 2010. After having received notice she registered with three employmentagencies and also applied for approximately ten further jobs. She was interviewed in respect of twojobs and accepted an offer of employment and commenced further employment on 14th December2010. This was on a four-month fixed term contract. Almost halfway through this contract she wasoffered further employment, with the same employer, for another six months. This subsequentemployment came to an end on 12th October 2011. At this time she was eight months pregnant andconsequently did not look for further employment. For the next six months she was in receipt ofSocial Welfare maternity benefit. She told the Tribunal that she had made no effort to seek furtheremployment during the ten months of her subsequent employment. Her explanation was that shehad wanted to give 100% to her employer and that she knew that her employment would end inmid-October, with her baby being due in mid-November. During the currency of what she calledher maternity leave, the claimant took no steps to mitigate her loss. Subsequent to the expiry of hermaternity benefit, the claimant decided not to sign up with any more employment agencies becauseshe felt that they tended to push one towards unsuitable jobs. This was notwithstanding the successthat she had previously enjoyed with employment agencies. She told the Tribunal that she hadapplied for approximately thirty jobs since May 2012. However, evidence was only produced ofseven. The claimant told the Tribunal that she was not surprised that, in mid-June 2012, oneemployment agency carried advertisements for sixty-two accountancy vacancies. The Tribunaldoes not accept the explanation proffered by her representative that it is well known that many suchvacancies are, in reality, fictional.

The respondent submitted that the subsequent employment in December 2010 was a *novus actus interveniens* and that any losses subsequent to the ending of that employment could not be attributable to the dismissal from employment with the respondent. Counsel for the respondent relied on a decision of the English Employment Appeals Tribunal in Courtaulds Northern Spinning Ltd. V. Moosa [1984] IRLR 43 in which it was held that the dismissal from the new employment was the cause of the subsequent loss. In that case the second employment had lasted for nearly eighteen months. The English EAT held:

> *"In our judgement, therefore, loss of wages should only have been awarded in the present case down to 1/10/79 when Mr Moosa obtained his new employment with Fashion Flow. On the facts known to the Industrial Tribunal at the date of assessment, Mr Moosa's employment with Fashion Flow had been permanent in the sense that he had been employed for more than 52 weeks, i.e. long enough to secure the limited security in his employment with Fashion Flow afforded by the right not to be unfairly dismissed. What would have happened if Mr Moosa had been unfairly dismissed by Fashion Flow? Would he have had the right to compensation both from Courtaulds and from Fashion Flow? As we have said, in our judgement the loss after his dismissal by Fashion Flow is attributable not to any action of Courtaulds but to the actions of Fashion Flow."*

It was further held:

> *"But if … another case occurs in which the delay is so great that at the time of assessment it is clear that the new employment has endured long enough to be protected by the unfair dismissal legislation the Industrial Tribunal should treat the loss flowing from the original dismissal as coming to an end at the start of the new employment."*

Courtaulds makes it clear that the loss stops once further permanent employment is secured. It is clearly suggested that further employment will be considered permanent once "it has endured long enough to be protected by the unfair dismissal legislation". It seems to the Tribunal that this is a useful guide when considering the permanence of further employment, particularly when taken in conjunction with the principles already used to determine what constitutes continuous employment.

This is not to say that subsequent employment will only stop loss accruing once the claimant has acquired the protection of unfair dismissal legislation. Instances could clearly arise where seemingly permanent employment ends before such protection is acquired and where continuing loss should not be counted against the first dismissal. For example, where a claimant obtained further permanent employment but was dismissed within a year on the grounds of gross misconduct, it would be hard to see why the first employer would have any subsequent liability.

The Tribunal is satisfied that the claimant's subsequent employment was not permanent in nature in that it consisted of two fixed-term contracts that jointly amounted to ten months in total. This subsequent employment was merely an instance of the claimant mitigating her loss. Had the claimant refused to take this employment on the basis that, while not permanent, it would constitutea *novus actus interveniens* thereby disentitling her to further redress, the respondent would havebeen entitled, with considerable justification, to submit that she had failed to mitigate her loss.

The Tribunal is satisfied that a new employment only stops loss once it is permanent and on comparable terms to the employment from which a claimant is unfairly dismissed. The subsequent employment is this case was not such. While it did not act to stop the loss, account must be taken of the amount of earnings during that period in assessing loss.

It was submitted by the respondent that the claimant was unavailable for work during much of the loss period. Specifically, she had not looked for work between October 2011, when the subsequent employment came to an end, and November 2011, when her baby was born. It was acknowledged that her pregnancy may have had a bearing on this. However, it was submitted that where a claimant was not available for work due to pregnancy, it was not a loss attributable to dismissal.

It was further submitted that, if the claimant was unable to work during the period that she called maternity leave, she was not entitled to be compensated for that period. The period of six months was not a period of maternity leave as statutorily defined, there having been no employment from which to take leave.

The Tribunal was referred to a number of authorities for the proposition that, where a claimant is operating under a disability or is certified sick during a loss period, such a claimant is not entitled to recover for the period when unavailable for work due to the disability or illness on the basis that any loss during that period is attributable to the disability or illness rather than the dismissal. It is correct to state that where a complainant is unavailable for work due to disability or illness that any loss attributable to such period does not arise as a result of the dismissal.

The Tribunal was referred to Redmond on Dismissal Law in Ireland (2nd ed.) at paragraph 23.50 where Dr Redmond notes the case of Corcoran v. Kelly & Barry Associates (UD 174/1978) as authority for the proposition for the authority that receipt of disability benefit in general disentitles an employee to compensation in respect of future or prospective loss. This is, undoubtedly, correct. However, the claimant in the instant case was not in receipt of disability benefit. A period analogous to maternity leave is not equivalent to a period of disability.

It was further submitted by the respondent that a claimant is under an on-going duty to mitigate loss. This, too, is undoubtedly correct.

However, had the claimant in this case not been dismissed by the respondent, she would have been entitled to avail a of contractual maternity leave scheme under which she would have received 70% of her salary. It was held by the Tribunal in Fox v. Europ Assistance Holdings Ltd (UD 538/2004) that where it was a term of an employee's contract of employment that he be paid under permanent health insurance, loss of payments under the said plan was a loss attributable to dismissal. Fox is referred to by Dr Redmond at paragraph 23.35 of her book. It must follow that the loss of a contractual entitlement to maternity leave payments is a loss attributable to dismissal.

It was submitted by the respondent that the claimant's subsequent employment prevents a claim that the loss of maternity payment was a loss attributable to her dismissal. For the reasons set out above, the Tribunal does not accept this proposition.

While the Tribunal is satisfied that the claimant is entitled to claim the loss of maternity payments as a loss attributable to her dismissal, it is also satisfied that it does not remove the obligation on her to seek to mitigate her loss. While a Tribunal might not expect as concentrated an effort subsequent to the birth of a child, it does not entitle a claimant to suspend all effort. This is particularly so as the period of maternity payments draws to a close.

Subsequent to the cessation of her Social Welfare maternity benefit, the claimant began to seek further employment. Although it had been previously successful, the claimant decided not to engage the assistance of employment agencies. Further, while there might have been up to thirty job applications, evidence was only produced of seven. The Tribunal is satisfied that this is an insufficient attempt to mitigate loss.

The claimant told the Tribunal that during her time in the subsequent employment, she had not been looking for any further employment. In part this was because she wanted to give 100% effort to the employment that she was in. In the ordinary course this is not an acceptable proposition. Of course when in employment one must give every effort, but where a term of employment is finite, a claimant must prepare for its ending. It is not relevant to the Tribunal in this case because the Tribunal is satisfied that, at least for much of the subsequent employment, the claimant was aware that that it was due to finish in close proximity to her due date.

The Tribunal in this ruling can do no more than make findings in relation to certain categories of loss. It cannot quantify the loss at this time. The Tribunal is satisfied that the claimant made good efforts to mitigate her loss following her dismissal. The Tribunal is satisfied that the subsequent employment was a part of her mitigation of loss and was not a new permanent employment such that it would act to put an end to the loss attributable to her dismissal by the respondent. The Tribunal is satisfied that the loss of the benefit of her contractual maternity leave entitlements was a loss attributable to her dismissal. The Tribunal is satisfied that there has not been sufficient effort to mitigate loss incurred since May 2012. The Tribunal is satisfied that, in assessing loss, account should be taken of the redundancy payment made at the time of her dismissal. As noted at the outset, none of this constitutes a finding that there has been a loss arising from an unfair dismissal. The Tribunal has yet to make a finding that the dismissal by reason of redundancy constituted an unfair dismissal within the meaning of the Unfair Dismissals Acts. Secondly, the Tribunal is not yet in a position to make a finding in respect of the available position for which the claimant did not apply, whether such failure was justified and the degree of impact, if any, that the failure might

have on the quantum of loss.

Determination of Claim:

In the period intervening between days 2 and 3 it transpired that the respondent had gone into liquidation. Accordingly, it was indicated to the Tribunal that the Solicitors and Counsel previously representing the respondent no longer had instructions and they came off record. It was indicated by the liquidator that he did not intend to appear at the hearing on day 3.

The claimant gave evidence to the Tribunal of having been dismissed by reason of redundancy in October 2010. She gave evidence that she was unfairly selected for redundancy. Three roles were being reduced into two and she was only invited to apply for one of the new roles. She gave evidence that she was better qualified and had longer service than her fellow employee to whom the position was offered. She appealed this decision to no avail.

In addition to the evidence of loss previously given, the Tribunal was told that the claimant had secured permanent alternative employment which had commenced on 17th September 2012 but which was at a lower rate of pay than her employment with the respondent had been. However, the Tribunal must also take into account that the respondent has gone into liquidation and that she would, in any event, had been made redundant in or about September 2012.

Pursuant to the provisions of the Unfair Dismissals Acts, a dismissal is deemed to be unfair until the employer shows that there were substantial grounds justifying the dismissal. The Tribunal heard evidence that the claimant was dismissed but heard no evidence tending to show any grounds justifying the dismissal. Further, the Tribunal heard evidence that the claimant was only invited to apply for one of the two available positions and heard no evidence to counter this suggestion. Therefore, the question of whether her failure to apply for the second position would have any impact on the quantum of loss does not arise. In the circumstances, , the Tribunal must be satisfied that the dismissal was unfair. The appropriate remedy in this case is compensation. Having regard to its earlier findings in respect of loss and the further evidence heard on day 3, the Tribunal awards to the claimant compensation in the amount of €32,000 as being just and equitable in the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _________________________

(Sgd.) _________________________
(CHAIRMAN)