Neutral Citation: [2017] IEHC 567

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 158 J.R.]

BETWEEN

UPC COMMUNICATIONS IRELAND LIMITED

(NOW VIRGIN MEDIA IRELAND LIMITED)

APPLICANT

AND

EMPLOYMENT APPEALS TRIBUNAL

RESPONDENT

AND

ANN MARIE RYAN

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of October, 2017

1. The applicant, UPC Communications Limited (UPC) seeks a declaration that the respondent erred in law in holding that it had jurisdiction to hear and determine an unfair dismissal claim by the notice party, Ann Marie Ryan, because it was instituted outside the time limit prescribed by the Unfair Dismissals Acts 1977 to 2007. The applicant also seeks an order of *certiorari* quashing the respondent's determination dated 18th February, 2015, that it had jurisdiction to hear and determine the said claim notwithstanding the fact that it was not initiated until 7th January, 2013, in excess of twelve months following the date of dismissal being 18th October, 2011.

2. In the alternative, an order is sought quashing the determination on the grounds that the Tribunal purported to reach conclusions of fact without hearing any testimony and having refused to hear evidence despite being requested to do so by the applicant. A further order was sought restraining the respondent from continuing to hear the Notice Party's claim.

Background

3. The applicant employed the notice party from 27th February, 2008 until her dismissal by letter dated 18th October, 2011, on grounds of serious misconduct following an investigation. The letter of dismissal stated that the conduct complained of justified summary termination with effect from that date, but that the applicant would pay the notice party one month's salary in lieu of notice.

4. By letter dated 20th October, 2011, the solicitors for the notice party wrote to the applicant stating their intention to appeal the dismissal decision and requesting information pursuant to the Data Protection Act. However, it is claimed that this letter was never received by the applicant. The applicant alleges that no communication took place between Ms. Ryan, her solicitors and the applicant until 23rd January, 2012. In the meantime, the sum due in respect of the one month's salary and a P45 was sent to Ms. Ryan under cover of a letter dated 14th November, 2011.

5. On 23rd January, 2012, the notice party's solicitor wrote to the applicant again requesting information stating that if it were not furnished within seven days it would refer the matter to the Data Protection Commissioner. A date for the intended appeal against the dismissal decision was also requested.

6. The facts concerning the non-receipt of the letter of 20th October, 2011, were never addressed, it was claimed, because of the Tribunal's alleged failure to hear oral evidence on the matter. It is denied by Ms. Ryan that the Tribunal was ever requested by the applicant to hear oral evidence.

7. An internal appeal hearing took place on 6th September, 2012, and the decision to dismiss Ms. Ryan was upheld. This was confirmed to her in a letter dated 12th September.

8. The applicant maintains that at no time did it ever represent to the notice party or her solicitors that the decision to dismiss her would not take effect pending the internal appeal, nor did the notice party contend that the dismissal was ineffective until the claim was initiated under the Unfair Dismissal Acts, in a Workplace Relations Complaint Form on or about 7th January, 2013, in which a dismissal date of 18th September, 2012, was relied upon .

9. At the time Ms. Ryan submitted her claim to the Employment Appeals Tribunal (hereinafter EAT) on 7th January, 2013 it was clear that the claim had been initiated outside the mandatory six month period prescribed by s.8(2) of the Unfair Dismissals Act 1977 (as amended), and the maximum period of twelve months if the date of dismissal is taken to be 18th October, 2011 but not if the date of dismissal was taken to be 18th September 2012. The period of twelve months would only apply upon proof of exceptional circumstances that would have prevented Ms. Ryan from taking her claim within six months, pursuant to s.8(2)(b) of the Act. In any event, the Notice Party did not seek to rely upon the twelve month period but on the submission that the claim was made within six months of notification of the internal appeal decision.

10. The matter came before the respondent sitting in Limerick on 24th September, 2014. The applicant raised a preliminary issue by way of written submission challenging the respondent's jurisdiction to entertain the claim in advance of the hearing date. These submissions were furnished to the Tribunal Members in the course of oral submissions on the day of the hearing. Ms. Ryan's legal representatives made oral submissions but were requested then to provide written legal submissions.

11. These were furnished to the applicant on 6th November, 2014. The applicant then wrote to the respondent on 21st November, expressing the view that its position had been clearly set out in its written and oral submissions and that the notice party's

submissions were inaccurate and irrelevant. It did not request that the respondent relist the matter to hear oral testimony.

12. The respondent issued its determination on the preliminary matter on 10th February, 2015. It held that the dismissal did not take effect until the appeal process had concluded and that the claim was initiated within the six-month time limit.

13. The applicant was granted leave to apply for judicial review (Noonan J.) on 23rd March, 2015.

Determination of the Employment Appeals Tribunal on the Preliminary Issue
14. At the Tribunal hearing UPC relied upon the fact that Form T1A which indicated that the notice party's claim for unfair dismissal had been received on 7th January, 2013. This was outside the period of twelve months from the date of the termination of the claimant's employment, the 18th October 2011. It was therefore claimed that the EAT had no jurisdiction to receive or determine the notice party's claim.

15. The notice party claimed that the internal appeal acted as a stay on dismissal. It was submitted on her behalf that s.1 of the Unfair Dismissals Act 1977, defines dismissal and that it was within the respondent's jurisdiction to determine the relevant date of dismissal in any particular case in accordance with the statute.

16. In its determination of 10th February, 2015, the Tribunal held that under the Unfair Dismissals Acts 1977 – 2007, the Notice Party/claimant was entitled to proceed with her claim. It ruled that the applicant should have dealt with the initial hearing of the appeal expeditiously, that the delay was largely the applicant's fault and contrary to the claimant's entitlement to natural, speedy and effective justice. It also found that the terms of employment led to a lack of clarity on the implications and effectiveness of the initial dismissal. The Tribunal accepted the claimant's submission that her dismissal was stayed pending the outcome of the internal appeal. The Tribunal also held that the claimant had lodged her appeal with the EAT within time and directed that the case proceed on the substantive issues. It ruled as follows:

> "Having carefully considered this issue and the submissions made , the Tribunal finds that under the Unfair Dismissal Acts 1977 to 2007, that the Claimant is entitled to proceed with her claim and is not precluded from prosecuting same on the basis of the following:
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> 1. The respondent should have dealt with the initial hearing of dismissal and the appeal arising from same and the issuing of the decisions in relation to same expeditiously, which was not the case here, and more especially in relation to the hearing of the Appeal. In consequence the Tribunal finds that the delays which arose in the conduct and completion of such processes by and large lay at the feet of the respondent and were contrary to the Claimant's entitlement to natural speedy and effective justice.2. The Terms of Employment were silent on the implications and effectiveness of the dismissal once issued and that when an appeal was lodged this did not act as a stay on such dismissal, then in that event, the Tribunal believes this led to lack of clarity and in consequence created ambiguity which resulted in the Claimant believing that her dismissal was stayed pending the outcome of the appeal. The Tribunal support her view.
>
> The Tribunal finds that the Claimant has lodged her claim with the...Tribunal in time and directs the case proceed on the substantive issues."

The Applicant's Submissions
17. It is submitted on behalf of the applicant that the determination of the Tribunal was made following an oral hearing during which the Tribunal heard legal submissions only. The Tribunal failed to address the specific submissions made on behalf of the applicant. It purported to make findings of fact against the applicant without hearing evidence when there was a conflict of fact which had to be determined and upon which its ruling depended. It did so notwithstanding a request to hear such evidence by the applicant. The Tribunal purported to decide an issue of law without any proper consideration of the facts and without any apparent consideration of relevant case law.

18. It was submitted that pursuant to the definition of "dismissal" under s.1 of the Act, and the definition of "date of dismissal", the date of dismissal must be considered to be the date when the period of notice required to bring the contract to an end expires or, where no notice is given, the date when that notice ought to have expired.

19. The applicant claims that the question as to whether a claim is made within time together with the issue of whether an employee has a relevant period of service before submitting a claim for dismissal are all matters which constitute "conditions precedent to jurisdiction" and are universally accepted as such. It was submitted that a claim must be submitted within six months of dismissal before jurisdiction may be accepted by the Tribunal *(IBM Ireland Limited v. Employment Appeals Tribunal (O'Briain)* [1984] ILRM 31).

20. The applicant also claims that the Tribunal's jurisdiction is not comparable to the circumstances considered by the Supreme Court in *Clarke v. O'Gorman* [2014] IESC 72. It was submitted that the Tribunal has no original jurisdiction and is a creature of statute and accordingly could only act within the confines of the jurisdiction conferred upon it. In this regard, the Unfair Dismissals Act 1977 was amended in 1993, whereby under s.8(2)(b), the Tribunal was vested with a power to extend the time within which to bring a claim of unfair dismissal from six to twelve months in "exceptional circumstances".

21. The applicant also submitted that there was no authority for the proposition that the date of dismissal is the date upon which notice party's appeal failed. It was submitted that relying upon the relevant jurisprudence and undisputed facts confirming the date of dismissal, namely the 18th October, 2011, there was no basis upon which the Tribunal could have reached its conclusion. It was submitted that the dismissal was effective immediately and that a P45 issued under cover of letter dated 14th November, 2011, confirmed the date of dismissal as 18th October, 2011. The applicant therefore submits that the notice party should have submitted a claim within six months of 18th October , 2011, or alternatively, she would have to demonstrate "exceptional circumstances" as provided under section 8(2)(b) which was never relied upon.

The Notice Party's Submissions
22. The notice party submits, *inter alia*, that the relevant dismissal date is 18th September, 2012, and that it was reasonable for the notice party to presume that this was so. The respondent had discretion in each case to determine on its facts the date upon which the relevant dismissal occurred.

23. The notice party furnished the applicant with detailed written submissions in the course of the Tribunal hearing. The applicant chose not to respond to them expressing the view that they were inaccurate and irrelevant in a letter of 21st November, 2014. It is

submitted, therefore, that the applicant had an adequate opportunity to make representations to the Tribunal and to reply to the notice party's written submissions and if necessary, to adduce such evidence as it wished in relation to these matters. The notice party also submits that the statement of grounds fails to identify the precise basis upon which there is said to be a conflict of fact relevant to the preliminary issue to be determined by the Tribunal.

24. The notice party also submits that the Tribunal had sufficient material to reach its conclusion. The respondent was furnished with comprehensive legal submissions. There was no breach of the applicant's right to an oral hearing which may be limited according to the circumstances of the case (*Potts v. Minister for Defence* [2005] 2 ILRM 517 and *Mooney v. An Post* [1998] 4 I.R. 288).

The Time Limit

25. Section 7 of the Unfair Dismissals (Amendment) Act 1993, amending s.8 of the principal Act, provides:-

> "(1) A claim by an employee against an employer for redress under this Act for unfair dismissal may be brought by the employee before a rights commissioner or the Tribunal and the commissioner or Tribunal shall hear the parties and any evidence relevant to the claim tendered by them and, in the case of a rights commissioner, shall make a recommendation in relation to the claim, and, in the case of the Tribunal, shall make a determination in relation to the claim.
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> …
>
> (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 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 six months beginning on the date of the relevant dismissal, or
>
> (b) if the rights commission 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 twelve 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 rights commissioner or the Tribunal."

26. Section 1 of the principal Act as amended provides that "date of dismissal" means:

> (a) where prior notice of the termination of the contract is given and it complies with the provisions of that contract and of the Minimum Notice and Terms of Employment [Acts 1973 to 1991], the date on which that notice expires,
>
> (b) where either prior notice of such termination is not given or the notice does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment [Acts]...the date upon which such a notice would have expired if it had been given on the date of such termination and had been expressed to expire on the later of the following dates-
>
> (i) the earliest date that would be in compliance with the provisions of the contract of employment,
>
> (ii) the earliest date that would be in compliance with the provisions of the Minimum Notice and Terms of Employments [Acts]..."

27. The Act defines "dismissal" in so far as it is relevant to this case as

> "(a) the termination by his employer of the employee's contract of employment with the employer, whether prior notice of the termination was or was not given to the employee..."

Time Limit and Jurisdiction

28. A number of earlier High Court decisions were relied upon by the applicant in support of the proposition that the failure to initiate a claim for redress within the six month period provided for under s.8(2) deprived the Tribunal of jurisdiction to hear the claim. It was submitted that the requirements of the section were distinguishable from the time limits applicable under the Statutes of Limitation in the initiation of civil proceedings before a court of competent jurisdiction. If the defendant wished to raise the issue that civil proceedings had been initiated outside the limitation period that was clearly a matter of defence and did not go to the jurisdiction of the court to hear the case. It was submitted that the Tribunal had no jurisdiction in respect of any claim which was not initiated within the time provided under the section: since its jurisdiction derived from statute the Tribunal should have ruled that it had no jurisdiction in the case which was clearly initiated outside the six month period.

29. In *IBM Limited v. Feeney* [1983] ILRM 50, an appeal to the Circuit Court from the Employment Appeals Tribunal, the respondent brought a claim for compensation against his former employer, the appellant. Counsel for the employer sought a ruling from the EAT that the claim was "time barred" because it was not sent to the employer within six months of his dismissal though it had been sent to the Tribunal within that period. The Tribunal ruled that the word "shall" in the subparagraph relating to the service of the notice of claim on the Tribunal was mandatory but when used in relation to the service of a copy of the notice on the employer was regulatory in nature. The Circuit Court (His Honour Judge Ryan) held that the service clause in respect of the employer was also mandatory. In a short discussion of the matter, the learned judge noted that a claim must be served upon the Tribunal within six months of the date of the relevant dismissal if it is to be validly initiated. The requirement to give notice to the employer was a mandatory requirement (later altered by statute) which obliged the employee to serve the necessary notice on the employer within the same six month period. The learned judge did not specifically address the issue of jurisdiction in the course of his short judgment. As is clear from his reliance upon the decision in *Howard v. Boddington* (1877) 2 P.D. 203, the issue raised concerned the statutory construction of section 8(1) and (2).

30. In *The State (IBM) v. EAT & O'Briain* [1984] ILRM 31, the notice party, Mr. O'Briain, gave the EAT a notice in writing of his claim within the six month period of dismissal. The Tribunal then furnished the employer (the prosecutor) with a copy of the notice within

the required period. It was submitted to the Tribunal that it had no jurisdiction to hear and determine the claim made under the Act because the failure by the employee to give the requisite notice in writing to the employer deprived the Tribunal of jurisdiction. The Tribunal held that it had jurisdiction to hear the claim. An order of *certiorari* was sought quashing this decision. The issue considered was whether s. 8(2) of the 1977 Act, as amended, required that a copy notice must be served by the employee or his agent on the employer or whether the requirement of s. 8(2) was fulfilled once the employer was given a copy by any person such as the Tribunal.

31. Hamilton J. (as he then was) held that the Tribunal had jurisdiction to determine the claim and it did not matter who served the employer with a copy of the notice, whether the client or the Tribunal. The learned judge summarised the question for consideration as follows at p. 33:-

> "The basic question for determination is whether, in view of the failure by the second named respondent to give to the prosecutor a copy of the notice in writing initiating his claim within six months of the date of his dismissal, the first named respondent has jurisdiction to hear and determine his claim.
>
> The rights conferred by the Unfair Dismissals Act 1977 are statutory rights; the powers conferred on the first named respondent are statutory powers and in connection with their exercise the statutory requirement of the Act must be complied with."

32. Having considered the judgment in the *Feeney* case, the learned judge stated at p. 34:-

> "Before either the rights commissioner or the tribunal can deal with a claim for redress, a notice in writing of the claim must be given to them within six months of the date of the relevant dismissal and a copy of the notice must be given to the employer concerned within the same period *viz*, six months of the date of the relevant dismissal.
>
> It is of course the responsibility of the dismissed employee to ensure that these statutory requirements are complied with because if they are not, the rights commissioner or the tribunal has no jurisdiction to hear and determine his claim."

33. This judgment was considered and applied by Ó Caoimh J. in *Bank of Scotland (Ireland) v. Employment Appeals Tribunal & Prisca Grady* [2002] IEHC 119, (Unreported, High Court, Ó Caoimh J., 15th July, 2002). Ó Caoimh J. held that the Tribunal did not have jurisdiction to determine a claim unless it was brought within the period prescribed by statute namely the period of six months provided under s. 8(2)(a) of the Unfair Dismissals Act 1977 (as amended) or within a period of twelve months under s.8(2)(b) provided the Tribunal was satisfied that exceptional circumstances prevented the giving of the notice within six months. The court was satisfied that unless the Tribunal determined that the claim was made within the statutory period it did not have jurisdiction to determine it.

34. In reaching that conclusion, the learned judge noted that the case was not one in which there was a conflict of evidence. The essential factual matrix was not in issue. On the undisputed facts in the case, the Tribunal did not have jurisdiction to proceed to hear the case. It was a condition precedent to the continuation of the proceedings before the Tribunal that the claim be initiated within the six month period thereby vesting jurisdiction in the Tribunal. The learned judge also rejected the submission that he should refuse relief on the basis that the error was one made within jurisdiction and that the appropriate remedy for the applicant was by way of appeal. Reliance had been placed upon the decision of Barron J. in *Nova Colour Graphic Supplies Limited v. Employment Appeals Tribunal* [1987] I.R. 426, in which the issue was whether the claimant had the requisite continuity of service to ground a claim under the Act. In the course of his judgment, Barron J. stated at p. 429:-

> "Whether there has been a continuity of service bringing the second respondent within the provisions of the Unfair Dismissals Act, 1977, is a question of fact which the Tribunal has jurisdiction to determine and this it has exercised. If it is wrong in its determination, then this can be remedied by appeal, which is clearly the appropriate manner in which its decision should be challenged. An appeal lies under s. 10, sub-s. 4 from any determination of the Tribunal in relation to a claim for redress under this Act. So, even if it had been that there was no basis in fact for the decision of the Tribunal on the evidence before it, nevertheless an appeal would lie, in the course of which the appellant would not be limited to such evidence. In these circumstances, no useful purpose would be served in any event by granting discretionary relief since ultimately the matter could always be heard afresh on appeal."

35. Reliance had also been placed upon *Memorex World Trade Corporation v. Employment Appeals Tribunal* [1990] 2 I.R. 184; *Harte v. Labour Court* [1996] 2 I.R. 171; *Rajah v. Royal College of Surgeons* [1994] 1 I.R. 384; and *The State (Davidson) v. Farrell* [1960] I.R. 438. However, O'Caoimh J. was satisfied that since there was no conflict of evidence the only issue was whether on the established facts the respondent had jurisdiction to determine the claim. The authorities cited did not provide a sufficient reason in that case to refuse relief when the facts relating to the issue were undisputed.

36. In *Clarke v. O'Gorman* [2014] IESC 72, the Supreme Court considered whether the failure by a plaintiff seeking damages for personal injuries to make an initial application to PIAB deprived the High Court of jurisdiction to hear the claim. O'Donnell J. (delivering the judgment of the court) held that a failure to follow the PIAB process did not necessarily deprive the High Court of jurisdiction to hear the case but, if properly raised, might amount to a defence to a claim for damages for personal injuries. The learned judge stated:-

> "37 In my view, s.12 does not operate as a jurisdictional provision. The very concept of jurisdiction is sometimes a broad one, but in this case, I think the word is used in its narrowest and purest sense. The defendant can only succeed here, given the manner in which the application was made and its timing, if the Act deprives the court of jurisdiction to hear and determine the claim. Section 12 is certainly significant. It imposes a legal prohibition. But it is significant that the prohibition is not directed towards the court, but rather towards the parties, and in particular the plaintiff. The operative part of the section provides that 'no proceedings may be brought' in respect of any such claim without an authorisation. Manifestly it is the plaintiff who brings proceedings to whom this prohibition is directed. If the section said, as it could have, that unless and until an application was made to the Board and an authorisation granted, a plaintiff or intending plaintiff could not bring proceedings in respect of any claim, the meaning of the section would, in my view, be identical, but it would be more difficult to contend that the impact of the section deprived the court of jurisdiction, rather than imposing a restriction on the right of a plaintiff to bring a claim."

37. At para. 38, he states:-

> "…The significance of this statutory language is considerable. It is well established that the provisions of the Statute of Limitations, framed in this way for over a century, operate to bar the remedy and not to extinguish the right. Thus, as set

out in Brady and Kerr, The Limitation of Actions (Dublin; Incorporated Law Society of Ireland; 2nd Edition; 1994) it is well established that the Limitations Acts in most cases go only to the conduct of the suit leaving the claimants rights otherwise untouched. The authors continue at pages 4 and 5:

'In this sense the Statutes are procedural. If, however, at the expiration of a period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished such a limitation goes to the cause of action itself and is thus substantive…

The Statutes must be specifically pleaded. In other words, a defence under the Statutes must be raised or waived by the defendant as a matter of choice. It is only with jurisdictional provisions that the court will formally raise the matter of time on its own motion. Since it is for the defendant to plead the statute, if he wishes to avail himself of it, it would appear to follow that it is the defendant who has the burden of proving that the plaintiff's claim is statute barred."

38. He continued at para. 41:-

"…It is not necessary to resolve the question whether even if this were a jurisdictional provision it would fall into this category, and even if it did not, whether that is a matter required to be raised by the pleadings under Order 19, Rule 15. It is sufficient to observe that it is not a provision which seeks to control the right to recover damages for a personal injury itself but rather controls part of the manner in which a claim may be brought and compensation received."

39. At para. 42 he states:-

"…Accordingly, I am not persuaded that to interpret the Act as creating a matter of defence rather than jurisdiction would undermine the efficacy of the Act."

40. In these proceedings, relying by analogy on the *Clarke* decision and other judicial review authorities the notice party submits that this application is misconceived. The issue as to whether the claim for unfair dismissal is made within time is a matter which can be raised by way of defence before the Tribunal. It is a matter for the Tribunal to determine whether the claim has been made within time or whether it should, if requested, on the basis that there are "exceptional circumstances" as to why the claim was not brought within time, extend the time for the bringing of the claim. The latter provision does not arise in this case because no such application was made. It is clear from s.8(2) that a claim is initiated by a claimant or on his or her behalf by giving notice in writing of a claim for redress in the form prescribed in the Regulations "within the period of six months beginning on the date of the relevant dismissal" or "within such period not exceeding twelve months from the date (of the relevant dismissal) as the Tribunal may consider reasonable". It is also clear that the initiative for the bringing of the claim for redress lies upon the claimant. The Tribunal may receive the form containing the claim for redress and hear any relevant application thereafter in relation to any issue arising thereunder including the issue as to whether it was brought within time. A statutory right has been vested in the claimant to claim redress for unfair dismissal.

41. The court is not satisfied that s. 8(2)(a) or (b) is a provision which seeks to control the right to claim redress. It sets a time limit within which the claim must be initiated. The Tribunal is not specifically prohibited from dealing with a claim in respect of which notice in writing has not been given to the Tribunal within the period of six months. The court notes that unlike s.3 of the Principal Act which prohibits a rights commissioner from hearing a case in certain circumstances and s.41(6) of the Workplace Relations Act, 2015 which provides that an adjudication officer "shall not entertain a complaint...if it has been presented after the expiration of the period of six months..", s.8 is not specifically directed towards the decision-maker (see para. 37 of the judgment of O'Donnell J. quoted above). However, the claim for redress must fail if it was not initiated by the claimant within time. It is a matter for the Tribunal to consider whether the claim for redress has been made within the appropriate period by exercising its statutory jurisdiction so to do. If the undisputed facts of and legal principles applicable to the case clearly and unambiguously establish that the claim was out of time but the Tribunal nevertheless proceeds to hear and determine the claim the earlier High Court authorities cited above indicate that such an error may constitute an error of jurisdiction which is challengeable by way of judicial review. If, on the other hand the issue is not clear-cut by reason of the existence of a real issue of fact and/or law which the tribunal is obliged to address, the resulting determination is in my view not one that is or ought normally to be the subject of judicial review proceedings but should be considered and determined by the Tribunal and is then subject to the normal appeal regime under the statutory scheme prescribed for that purpose. The court is satisfied that in those circumstances "the default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings"(*EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] 2 I.R. 669).

The Tribunal Hearing

42. In the course of submissions to the Tribunal, the claimant set out a number of facts which were said to be agreed. The following facts were said not to be in dispute:-

"(a) the claimant commenced employment on 27th February, 2008;

(b) by letter dated 18th March, 2011, the claimant was informed that she was going to be the subject of an investigation in accordance with the respondent's disciplinary procedures concerning an alleged breach of the respondent's e-mail usage policy and its code of conduct;

(c) the claimant was suspended from her employment pending the outcome of the investigation;

(d) the respondent's investigation into the claimant did not conclude until 11th May, 2011;

(e) the claimant was one of a number of employees who were subjected to a disciplinary proceeding arising out of a series of allegations concerning e-mail usage;

(f) on 20th May, 2011, a disciplinary hearing took place concerning the claimant;

(g) by letter dated 18th October, 2011, some seven months after investigation commenced, the claimant was notified of the respondent's decision to dismiss her;

(h) the said letter referred to the claimant's right of appeal from the respondent's decision to dismiss her;

(i) the claimant exercised her right of appeal and…both parties engaged in an appeals process;

(j) as stated, there is disagreement between the parties in relation to the period from 20th October [until] 23rd January,

2012;

(k) both parties agree that by letter dated 10th February, 2012, the respondent acknowledged the claimant's solicitor's letter dated 23rd January, 2012, seeking details about the appeals hearing;

(l) the respondent failed to confirm that the appeals process would be going ahead until its letter to this effect, dated 10th April, 2012;

(m) the said confirmation occurred some five months and 22 days after the decision to dismiss the complainant;

(n) following data access requests and a series of other delays, an appeal hearing was eventually held on 6th September, 2012;

(o) the claimant maintains that the appeals hearing was in effect a *de novo* hearing but this is denied by the respondent;

(p) by letter dated 18th September, 2012, the respondent notified the claimant of the outcome of her appeal; and

(q) on or around 7th January, 2013, the claimant lodged an unfair dismissal complaint pursuant to the UDA."

43. The submission noted that in cases of a serious offence or gross misconduct, the respondent's disciplinary and grievance procedures provided that the investigative process would take three days during which the employee would be suspended with pay for that period or any further period required for the purpose of the investigation. At each stage of the disciplinary process, the employee was vested with a right of appeal against the decision of the company. The Human Resource's director should be notified within five working days of the notification of any disciplinary action taken against the employee if an appeal is sought. The appeal is heard by a member of the Human Resources Department and a manager/director not involved in the disciplinary process which led to the initial disciplinary action. It is clear that the appeal procedure does not specifically address the status of the employee when appealing a dismissal decision.

44. The claimant submitted that the "relevant dismissal" for the purpose of calculating the appropriate time limit under s.8(2)(a) ran from the date of the appellate decision upholding the dismissal made on 18th October, 2011. It was claimed that failure to so regard the appellate decision as the relevant dismissal for the purposes of the Act would result in a forfeiture by the employee of a right to take an unfair dismissal claim if the appeal procedure did not conclude within six months of the initial decision to dismiss. If the claimant made an application for unfair dismissal and it was listed for hearing before the conclusion of an appeal process, she would be dependent upon a successful application for an adjournment in order to safeguard her entitlement to pursue her claim. To ensure access to the remedy under the Act, it was claimed that she would be obliged to forgo her contractual right to appeal. In addition it would be open to an employer to challenge the Tribunal's jurisdiction by arguing that the claim was premature where the appeal process had not yet concluded. It was submitted that if the respondent's interpretation of the time limit applicable was correct, the claimant had forgone her right under the Act by 17th April, 2012, notwithstanding the fact that the appeal hearing did not take place until 6th September, 2012. The Tribunal was invited to consider the consequences of the respective interpretations of the time limit under s. 8(2) for the claimant. It was invited to consider the intention of the legislature in framing the statutory remedy and the importance of fairness of procedures which was of central in the statutory framework for redress. It was submitted that the consequences for the claimant of adhering to the employer's submissions on the time limit applicable under s.8(2) was contrary to the purpose of the legislature and had the effect of depriving her of the benefit of both her statutory and contractual rights.

45. For its part, the employer submitted to the Tribunal that the provisions of the disciplinary code did not provide that the sanction of dismissal would not take effect pending the outcome of the appeal process and that in the absence of any such contractual term the dismissal must be taken as effective from the time the decision was taken. Hogan J. in *Wallace v. Irish Aviation Authority* [2012] IEHC 178, granted an interlocutory injunction restraining an employer for continuing a suspension which had been imposed pending her appeal against a recommendation of dismissal. However, this arose in circumstances where the disciplinary procedure stated in writing that a disciplinary sanction would not take effect pending the outcome of the appeal process. There was no such statement or assurance provided to employees contained in the disciplinary code in suit. The policy document was silent as to the consequences for the employee pending the determination of an internal appeal and in particular as to whether the dismissal took effect from the date of the initial decision.

46. The respondent relied upon three English authorities. In *J. Sainsbury Limited v. Savage* [1981] ICR 1, the English Court of Appeal held that a contract of employment terminates on the date of the original decision to dismiss. The court held that the contract could be "saved" if the appeal were successful. In that case, the procedure governing an internal appeal stated that pending the decision on that appeal the employee would be suspended without pay and if reinstated would receive full back pay for the period of suspension. The employee was dismissed but appealed against the decision. He applied to an Industrial Tribunal for compensation for unfair dismissal following notification that the appeal had been dismissed. The company took the preliminary point that the Industrial Tribunal had no jurisdiction to hear the claim because the applicant had not been continuously employed for a period of not less than 26 weeks ending with the effective date of termination provided for under the Trade Union and Labour Relations Act 1974 (United Kingdom). The employee contended that he remained an employee of the company until notified that his internal appeal had been unsuccessful and consequently had been in continuous employment for the requisite period. The Tribunal held the applicant was correct in this regard and entitled to proceed with his application. The Employment Appeals Tribunal allowed an appeal by the company. The employee's appeal was dismissed by the Court of Appeal which held that following the applicant's dismissal the provisions of his contract relating to the internal appeal procedure continued to apply so that he was to be treated as being suspended without pay pending the determination of the appeal. It was held that on dismissal of that appeal the applicant was then to be regarded as having being deprived of the right to both work and remuneration from the date he was dismissed from employment and, therefore, the date from which time began to run was the effective date of termination of the contract of employment i.e. the date of the dismissal prior to appeal. Brightman L.J. delivering the lead judgment of the court (Sir David Cairns and Roskill L.J. concurring) adopted the reasoning of the Employment Appeals Tribunal [1979] ICR 96 102 which stated:-

> "In our view, when a notice of immediate dismissal is given, the dismissal takes immediate effect. The provisions of this contract as to the appeal procedure continue to apply. If an appeal is entered then the dismissed employee is to be treated as being 'suspended' without pay during the determination of his appeal in the sense that if the appeal is successful then he is reinstated and he will receive full back pay for the period of the suspension. If the appeal is not successful and it is decided that the original decision of instant dismissal was right and is affirmed, then the dismissal takes effect on the original date. In our view, that is the date on which the termination takes effect for the purposes of the Act."

47. Brightman L.J. stated that the effective date of termination in the case of instant dismissal was the date upon which the termination of the contract takes effect. He noted that all submissions pointed to the proposition that the suspension of the contract of employment involved the continuation of the relationship of master and servant until the period of suspension had come to an end. Many of the arguments advanced in the course of that appeal reflect arguments advanced on behalf of the claimant before the Tribunal in this case. Brightman L.J. stated at p. 7:-

> "It seems to me clear, that to take an example, if an employee is dismissed on January 1, on the terms that he then ceases to have the right to work under the contract of employment, and that the employer ceases likewise to be under an obligation to pay the employee, the contract of employment is at an end. That must be the position in the present case unless paragraph 4.5 can be read as saving the contract of employment in all the circumstances pending conclusion of the appeal. In my view, the contract of employment is saved if the appeal succeeds, because the employee is reinstated with full back pay. But if the appeal fails, then the inevitable result is that the employee is not only to be deprived of his right to work as from January 1, but also of his right to remuneration from that date. If he has had no right to work after January 1 and no right to be paid after January 1, the contract of employment must have been determined as from January 1."

48. The House of Lords considered and applied the reasoning in the Sainsbury case in *West Midlands Cooperative Society Limited v. Tipton* [1986] ICR 192.

49. In *Roberts v. West Coast Trains Limited* [2004] EWCA Civ 900, the English Court of Appeal considered the case of a chef who was dismissed for alleged gross misconduct. Under the contractual disciplinary code, he appealed against the dismissal internally. He also initiated proceedings in the Employment Tribunal claiming unfair dismissal before the determination of the internal appeal. The internal appeal was successful in that the penalty of dismissal was reduced to demotion and the period between his dismissal and demotion was treated as a period of suspension without pay. The employee never returned to work and was treated as a person who had resigned from his employment. However, he continued to pursue his claim for unfair dismissal on the basis that his employment had been terminated by his initial dismissal which he had successfully appealed. He submitted that the effect of the decision on appeal was to offer him a new contract which he had chosen not to accept. An Employment Tribunal determined as a preliminary issue that he had not been dismissed and it therefore had no jurisdiction to consider his claim. The Employment Appeals Tribunal dismissed the employee's appeal against this finding holding that the decision to demote him did not involve the termination of his original contract or the entry into a new contract. The Tribunal determined that the decision on the internal appeal was not a matter of creating a new contract for a position but of giving effect to a decision to apply a different sanction specified in the existing contract than had been applied at first instance. The EAT rejected the submission that the jurisdiction of the Tribunal to hear the claim of unfair dismissal was established at the moment the application was presented and that nothing done by the internal appeal body altered that position at that date. It concluded that the decision of the appeal body to demote him had retrospective effect so that the employee was to be treated as if he had never been dismissed. The Court of Appeal, upheld this decision and determined that the applicant had not been dismissed by his employers so as to entitle him to pursue a complaint of unfair dismissal where within the terms of a contractual disciplinary procedure the initial sanction of dismissal had been reduced on internal appeal notwithstanding that he brought unfair dismissal proceedings before his appeal was allowed. The court considered the effect of the decision on the appeal and the nature and effect of the earlier dismissal. It held that where a contractual disciplinary procedure permits the employers on appeal to impose a sanction of demotion in place of an earlier decision to dismiss, that demotion does not involve the termination of the existing contract of employment or the entering into of a new contract. The effect of the decision on the appeal was to revive retrospectively the contract of employment terminated by the earlier decision to dismiss so as to treat the employee as if he had never been dismissed. The court noted that the imposition of the sanction of demotion and a period of suspension without pay on appeal was provided for in the agreed disciplinary procedures. Lord Justice Mummery stated:-

> "22. It was held by the Appeal Tribunal, correctly in my view, that the decision on the internal appeal was not a matter of creating a new contract for a new position: it was a question of giving effect to a decision to apply a different sanction on appeal than had been applied at first instance. The sanction applied on appeal was one specified in the existing contract. Within that existing contract it was possible to demote Mr Roberts without terminating his existing contract and without making an offer to enter into another contract re-engaging him into a different position.
>
> …
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> 27. The fact that he had made a complaint of unfair dismissal to the Tribunal at a date when he was still in a state of dismissal, and before the appeal had been heard, does not affect the legal position. It is legally irrelevant. It would have been relevant, if he had never instituted an appeal and/or if he had instituted an appeal, he had withdrawn his appeal before a decision was made. In such circumstances, the initial dismissal would have stood. I am unable to accept the submission made …that somehow the date of the issue of the proceedings freezes the position on jurisdiction, and that it is not permissible for the Employment Tribunal to look at the real world as it existed at the date when the case came on before them at the hearing."

50. It is noteworthy that the decision in *Feeney* and the English cases relied upon by the applicant were determined within the statutory framework of unfair dismissal provided for in the respective jurisdictions and the appellate regime applicable. In particular, emphasis was placed in each of the English decisions on the fact that each case differs from another and the limitations that apply in relying upon one decision concerning the statutory framework in support of a case which arises in different circumstances. This highlights the importance of adherence to the statutory framework and extensive appellate jurisdiction when considering cases of this kind (See Mummery L.J. in *Roberts* at para. 28 and Roskill L.J. in *Sainsbury* pp. 111 – 112) .

51. In addition, the point raised by the applicant in respect of jurisdiction before the Tribunal was one which had not been specifically addressed in this jurisdiction. While the English authorities may be of considerable persuasive authority when read with the academic commentaries relied upon, it should not be assumed that English authorities will be regarded as automatically applicable in this jurisdiction. The Employment Appeals Tribunal and the courts in this jurisdiction are of course not bound to follow English judicial decisions. Indeed the point is made that the English statutory framework is different to that applicable in Ireland. In that regard considerable emphasis was placed by the notice party on the importance of the phrase "relevant dismissal" in s.8(2) as a point of difference between the two statutory schemes when determining the date from which time runs in the submissions made to the Tribunal. In my view, the point relied upon by the applicant that the initial dismissal is the one from which time must be deemed to run has yet to be determined in this jurisdiction and is not at this stage to be regarded as clear-cut and well-settled as to justify the quashing of the Tribunal's decision. The issue falls to be determined definitively by the Employment Appeals Tribunal and, if appropriate, by the appellate courts in which the appropriate jurisdiction is vested by statute.

Fair procedures/grounds (vii), (viii), (xi), (xii) and (xiii)

52. The applicant relying upon these grounds challenges the Tribunal's decision on the basis that though it was informed that the applicant wished to call evidence in respect of the preliminary issue and cross-examine the claimant in respect of aspects thereof, the Tribunal following the hearing of the 24th September, 2014 failed to afford an opportunity to the applicant to adduce oral evidence or to cross-examine witnesses who ought to have been tendered on behalf of the claimant. It is claimed that the Tribunal wrongly based its findings on conclusions of fact in respect of matters concerning which there was a conflict of evidence. These conclusions are said to be based on inaccurate and incorrect findings of fact in the absence of any relevant evidence. The statement of grounds does not identify any relevant conflict of fact relied upon. It is clear that following receipt of the claimant's submissions which contained an outline of what were terms to be "agreed facts" and on which it was clearly submitted the Tribunal should rely, the applicant sent a rather terse response concerning the submissions and declined to make any further submissions. It is clear that at the conclusion of the hearing the Tribunal indicated that it required further submissions on the preliminary issue. These were furnished by the claimant on 6th November 2014. The applicant's letter dated 21st November states that it refutes the submissions made by the complainant "which we believe are entirely inaccurate and vastly irrelevant". The letter emphasises that the claim was made over twelve months out of time because it was lodged on 7th January, 2013 and the decision was made on 18th October, 2011. It points out that the complainant had also failed to acknowledge that she received her P45, payslip and notice payment from the employer under cover of a letter dated 14th November, 2011 as contained in the booklet of papers provided at the hearing. A cheque was cashed by the claimant within a couple of days of its receipt. The employer therefore claimed that the employee could not have believed that her employment continued after that date. The letter concluded:

> "We believe our position has been clearly submitted in our written and oral submissions. If, however, there is a specific point the Tribunal wish us to specifically clarify or address we would gladly assist the Tribunal and provide whatever additional information is required."

53. There was no further correspondence between the parties or with the Tribunal in respect of calling of any further evidence or convening a further hearing for that purpose nor was any dissatisfaction expressed on behalf of the applicant in that regard. It was the clear intention of the Tribunal to determine the matter on the basis of the submissions made and the material adduced during the course of the hearing on 24th September.

54. The original verifying affidavit in the application contains no reference to any specific conflict of fact thought to be relevant or important to the determination of the preliminary issue in respect of which oral evidence is said to be relevant.

55. A notice of opposition was delivered on 8th June, 2015. The notice party denied that the respondent refused to hear evidence despite being requested to do so by the applicant. The notice party stated that the applicant was aware that as of the date of the hearing following oral submissions on 24th September the respondent would not be hearing any evidence on disputed facts and that the preliminary issue be determined on the basis of the hearing and written submissions from the parties. The case was not re-listed for further hearing. Thus the notice party submits that the applicant had reasonable opportunity to make submissions of fact and law in the circumstances of the case. She also relies upon the fact that at no stage following the hearing was any application made for an opportunity to produce any evidence to the Tribunal by the applicant.

56. The first reference of a specific nature beyond the general complaint at grounds (vii) and (viii) in respect of this issue is contained in the supplemental affidavit of Peter McCarthy, solicitor sworn on the 6th July, 2015. At paras. 6 and 7 of the affidavit it is averred that Counsel on behalf of the applicant at the Tribunal hearing on 24th September made oral submissions. The Tribunal requested additional submissions on behalf of the claimant. Counsel for the applicant, it is claimed, then sought an opportunity to cross-examine Ms. Ryan's solicitor and Ms. Ryan "as there were several material questions of fact that need to be addressed". Only two such questions were raised in para. 7 these were:

> (a) the question why if an application had been prepared in October 2012, it was not made to the Tribunal before January 2013;
>
> (b) how it came to be that correspondence sent in October 2011 by the appellant solicitor had never actually been received by the applicant.

57. It is averred that the Tribunal did not then decline any opportunity to cross-examine but indicated that it would pause its deliberations, receive written submissions from the appellant and then review the position thereafter.

58. Mr. Ciaran O'Donnell solicitor in a replying affidavit of 20th July addressed this issue and exhibited a detailed attendance at the Tribunal which does not contain any reference to the issue concerning cross-examination said to have been raised on behalf of the applicant. Mr. O'Donnell states that his attendance and recollection differed substantially from that of Mr. McCarthy. He had no recollection of Counsel for the applicant seeking the opportunity to cross-examine Mr. Darcy, solicitor or the notice party in the context of the preliminary issue.

59. Mr. Darcy in an affidavit stated that he similarly had no recollection of Counsel seeking an opportunity to cross-examine him or the notice party and at no stage during the course of the hearing on 24th September did he believe that the outline of events given by the Counsel for the notice party concerning the correspondence would be open to cross-examination. He considered Mr. McCarthy to be mistaken. Mr. Darcy stated that the respondent was informed by the parties of potential difference between his assertion in respect of sending the internal appeal letter and the version of events proffered on behalf of the applicant that the letter was not received. Mr. Darcy and Ms. Sarah-Jane Cantwell, a member of the applicant's HR Department, confirmed that both would be prepared to swear to their respective versions of events. Mr. Darcy states that:

> "The respondent immediately indicated that there would be no need to receive sworn evidence in the context of the preliminary issue the subject of these proceedings and that it was satisfied that it understood the party's respective submissions on this discrete point."

60. Insofar as there is any conflict that might be relevant to the issue to be determined on this application, no application was made to cross-examine Mr. Darcy or Mr. O'Donnell by the applicant. In those circumstances having regard to the burden of proof, I am satisfied to proceed on the basis that no such application was made to adduce further evidence or to cross-examine any party and that the Tribunal was satisfied to proceed on the basis of the materials which had been submitted in the course of the hearing and on the written submissions made (see *Fearon v DPP* (Unreported, High Court, Ó Caoimh J., 24th July 2002), *Carey v Finn* [2003] I.L.R.M. 217 and *Conway v DPP* [2007] IEHC 434) . This view is supported by the failure by the applicant in its letter of 21st November 2014 to seek a further oral hearing or to adduce any evidence in support of the preliminary issue.

61. The court also notes that notwithstanding the applicant's suggestion that it never received the letter invoking the internal

appeals procedure, it nevertheless, following further correspondence agreed to accord the claimant an opportunity to appeal her dismissal internally which resulted in the decision rejecting that appeal and affirming her dismissal on 6th September, 2012. The further issue as to why an application prepared in October 2012 had not been made to the Tribunal before January 2013 does not in the court's view materially assist the applicant in relation to what is essentially a legal point upon which it relies namely, whether the first dismissal rather than the decision on appeal is the one in respect of which time should be deemed to run for the purposes of s. 8 of the Act. Consequently, I do not consider that, even if correct, the failure by the Tribunal to hear evidence on these matters prejudiced the applicant in respect of that issue. Therefore I am satisfied that the applicant is not entitled to relief on these grounds.

62. It is recognised in the statement of grounds upon which the applicant relies that the respondent determined that the dismissal was not to take effect until the appeal process had ended (ground viii). It is clear from the summary of facts and the legal submissions set out in the Tribunal's decision that it fully considered the facts, materials submitted and legal submissions made in the course of the oral hearing and subsequently concerning the date of the relevant dismissal. It found that the claimant was not precluded from prosecuting her claim because the terms of employment were silent on the implications and effectiveness of the dismissal once issued "and that when an appeal was lodged this did not act as a stay on such dismissal". It then noted that the Tribunal considered that this led to a lack of clarity and created ambiguity which resulted in the claimant's belief that her dismissal was stayed pending the outcome of the appeal. The Tribunal was satisfied that this was so. In reaching that conclusion it is clear that it rejected the submissions of the applicant and accepted the submissions of the claimant that the dismissal only became effective on the conclusion of the appeal. The claim was deemed to have been made within time and the claimant was permitted to pursue her claim. That claim still remains to be determined.

63. The court is satisfied for the reasons set out above that this decision was one reached within jurisdiction. If the applicant considers it to be incorrect in law, it has a right of appeal in accordance with the statutory framework provided for that purpose.

Conclusion
64. For all of the foregoing reasons the application is therefore refused.