THE HIGH COURT

[2020] IEHC 550

[RECORD NO. 2019 348 MCA]

IN THE MATTER OF SECTION 34 OF THE MATERNITY PROTECTION ACT 1994

BETWEEN:

THE BOARDS OF MANAGEMENT OF SCOIL AN CHROÍ RO NAOFA ÍOSA, ST PATRICK'S SENIOR NATIONAL SCHOOL, SACRED HEART OF JESUS NATIONAL SCHOOL, SCOIL NA MAINSTREACH, ASSUMPTION GIRLS' NATIONAL SCHOOL, SCOIL CHAITRÍONA JUNIOR, NORTH DUBLIN NATIONAL SCHOOL PROJECT AND SCOIL THOMAIS AND THE MINISTER FOR EDUCATION AND SKILLS

APPELLANTS

AND

HELEN DONNELLY, CIARA FITZGERALD, DOIREANN SHERIDAN, SINEAD FAGAN, CLAIRE BROWNE, GRAINNE MURRAY, SARAH GROGAN, ROISIN DOOLEY AND ALMA BRADY

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 2 November 2020

Introduction

1. This is an appeal by the Minister for Education against a Decision of the Employment Appeal Tribunal (the "Tribunal") of 23 October 2019 whereby it upheld a complaint by nine teachers who, by virtue of the introduction of a circular governing maternity leave in 2013 (Circular 0009/2013 hereafter described as the "2013 Circular"), were obliged to take leave accruing to them during their maternity leave during school closure periods rather than during term time. They objected to this on the basis that the 2013 Circular was introduced when all of them were already pregnant and had notified their schools of their pregnancy. Indeed, one was already on maternity leave at the time of the introduction of the Circular. They argued that their rights existing under the previous circular (Circular 0011/2011, hereafter described as the "2011 Circular") that allowed such leave to be taken during term time, could not be removed by the 2013 Circular, given that they had an expectation their maternity leave for the extant pregnancies would be governed by the 2011 Circular.

2. The nine teachers lost before the Rights Commissioner but succeeded before the Tribunal on the basis that the new arrangement introduced by the 2013 Circular constituted a breach of s.22(4) of the Maternity Protection Act 1994 as amended (the "1994 Act").

3. The Minister (who took over the proceedings from the various Boards of Management) has appealed on the following point of law:

> "*The correct interpretation of section 22(4) in the case of the nine Respondents, teachers employed in recognised schools, and, in particular the question of whether, in the case of such teachers, all periods of school closure qualify as "other leave (including sick leave or annual leave) to which the employee concerned is entitled" for the purpose of the said section".*

4. For the reasons set out in this judgment, I am satisfied that the Tribunal made an error of law in finding that s.22(4) of the 1994 Act was breached and I am accordingly remitting the matter back to the Tribunal.

Jurisdiction of the Court:

5. This is an appeal on a point of law pursuant to s. 34 of the 1994 Act, which provides as follows:

> *34.-(1) …*
>
> *(2) A party to proceedings before the Tribunal under this Part may appeal to the High Court from a determination of the Tribunal on a point of law.*

6. The ambit of an appeal on a point of law has been comprehensively described in *Attorney General v. Davis* [2018] 2 I.R. 357, following *Fitzgibbon v. Law Society* [2015] 1 I.R. 516, as including errors of law as generally understood, errors such as would give rise to judicial review, procedural errors of some significance, errors in the exercise of discretion that were plainly wrong notwithstanding the latitude inherent in such exercise and errors of fact in very limited circumstances.

Relevant legislative provisions

7. There are four legal instruments potentially relevant to the Decision of the Tribunal, two EU Directives and two national implementing provisions. The first is Directive 92/85/EEC of 19 October 1992 (the "Pregnancy Directive"). This Directive was designed to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth. Article 8 deals with maternity leave and identifies that workers are to be entitled to a continuous period of at least 14 weeks maternity leave. Article 11 (headed up "Employment rights") provides in relevant part:

> *In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:*
>
> *…*
>
> *2. in the case referred to in Article 8, the following must be ensured:*
>
> *(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;*
>
> *(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;*

8. The Pregnancy Directive was implemented in Ireland by the 1994 Act. Section 22(4) of the 1994 Act, found by the Tribunal to have been breached, prohibits a period of absence from work while on protective leave (which includes maternity leave) from being treated as part of any other leave (including sick leave or annual leave) to which the employee is entitled.

9. The second Directive is Directive 93/104/EC of 23 November 1993 on the organisation of working time (the "Working Time Directive"). Article 7 provides that Member States

should take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.

10. That was implemented in Ireland by the Organisation of Working Time Act 1997 as amended, which provides at s.19(1) that each worker is entitled to paid annual leave equal to four working weeks for each leave year.

11. In Case C-342/01 *Gomez* [2004] ECR I-02605, the Court of Justice held that the purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave, which protects a woman's biological condition during and after pregnancy and the special relationship between a woman and her child over the period following pregnancy and childbirth. It concluded that Article 7 of the Working Time Directive must be interpreted as meaning that where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the Directive relating to paid annual leave could not be regarded as met. It further referred to Article 11(2)(a) of the Pregnancy Directive and noted that the entitlement to paid annual leave must be ensured in the case of maternity leave. The Court went on to refer to Article 5(1) of Directive 76/207 on equal treatment, interpreting it as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, even where the period of maternity leave coincides with a general period of annual leave fixed by collective agreement for the entire workforce. The Court concluded that the combined effect of the three Directives meant that a worker had to be able to take her annual leave during a period other than the period of her maternity leave, irrespective of when the collective agreement dictated leave should be taken.

12. In fact, this principle had already been identified in Irish law by way of s.22(4) which, as noted above, prohibited a worker's annual leave being treated as having been taken during maternity leave.

The 2013 Circular

13. The Circular is entitled "Maternity Protection Entitlements for Registered Teachers in Recognised Primary and Post Primary Schools". It is stated to supersede all previous circulars. Managers of schools are asked to bring it to the attention of all teachers in their employment including those on leave of absence.

14. Under the heading "Statutory Annual Leave/Public Holiday Entitlement", the Circular provides:

> *"8.1 In general full time employees are entitled to 20 days annual leave. Employees who work less than full hours are entitled to annual leave on a pro rata basis.*
>
> *8.2 Any entitlements in respect of public holidays occurring while on maternity leave will be addressed by additional maternity leave.*
>
> *8.3 These annual leave entitlements are to be taken on existing school closure days that occur in the leave year in question i.e. both before and after the maternity*

leave period. Annual leave entitlements are to be taken at a time outside of the period of maternity leave.

8.4 When availing of statutory maternity leave and there are not enough school closure days in the leave year to absorb all annual leave entitlements, it is permitted to take the necessary days immediately before the maternity leave in the same leave year. Alternatively, teachers will be permitted to carry the balance forward to the following leave year but must then take these days during school closures."

15. I attach as an Annex to this judgment a very helpful worked example jointly provided by the parties in respect of Ms. Donnelly, one of the respondent teachers, to allow readers to understand the detail of how the regime introduced by the 2013 Circular altered the position that had previously been in place under the 2011 Circular. In summary, the net effect of the change was to require teachers to take leave accumulated during their maternity leave during school closure periods rather than term time. Understandably, this change was not welcomed by the teachers.

Decision of Tribunal

16. The challenge to the 2013 Circular was first heard and determined by John Walsh, Rights Commissioner on 30 March 2015 against the teachers. The hearing of the appeal against that finding took place on 20 June 2019 before the Tribunal. There had previously been a hearing on 8 May 2019 in relation to time limits where the Tribunal heard oral evidence from two of the teachers. No oral evidence was given at the hearing on 20 June. The Tribunal referred to counsel for both parties submitting written submissions, case law and making lengthy oral submissions. The arguments of both parties were summarised in bullet proof form by the Tribunal. Confusingly, when summarising the teachers' position, the Tribunal identified *inter alia* the following arguments:

- *"S.22 of the OWT protects rights including contractual rights;*
- *The appellants were entitled to refer to the OWT Act and its provisions although there were no claims brought under that Act because it was their case that there was no compliance with that Act;*
- *The previous position agreement prior to May 2013 on S.22 was the only way that it was fully implemented by the Department. Otherwise the person taking maternity leave lost out on annual leave because of school closures. The circular prior to May 2013 specifically dealt with S.22."*

17. In fact, s.22 of the Organisation of Working Time Act 1997 deals with the rate at which an employee is paid in respect of a day off and seems to have no relevance to this case. It is true that s.22 refers to s.19 which in turn refers to an employee being entitled to paid annual leave equal to 4 working weeks in a leave year so perhaps the Tribunal were intending to refer to that section. Nor is it the case that the 2011 Circular referred to s.22 of the 1994 Act, nor indeed s.22 of the Organisation of Working Time Act 1997.

18. Under the summary of the Minister's arguments, the Tribunal identifies the following:

- *"The 15 weeks of school closures were more than adequate to meet the annual leave and public holiday entitlements.*

  …

- *The closure of the school does not mean annual leave.*

- *Counsel stated that there was no overlap between maternity leave and annual leave in these cases."*

19. On the 3rd page, there is a heading entitled "Determination". This is so short that it merits being quoted in extenso:

> *"Prior to the 1st May 2013 where a teacher's statutory paid maternity leave overlapped with planned school closures, e.g. Christmas/Easter/Summer/Mid-term, Public and Religious Holidays, the teacher was entitled to leave in respect of such days, which overlapped, subject to a maximum of thirty working days. The Tribunal further notes that where a teacher's statutory additional unpaid maternity leave overlapped with public holidays, the teacher was entitled to leave in lieu for all such public holidays.*
>
> *Arising from Circular 0009/2013 the Tribunal notes that from 1st May 2013, teachers cease to have any entitlement to time in lieu, for annual leave days and public holidays, that fall during their periods of statutory paid and unpaid maternity leave.*
>
> *Section 22(4) of the Maternity Protection Act 1994 states that: "A period of absence from work while on protective leave shall not be treated as part of any other leave (including sick leave or annual leave) to which the employee concerned is entitled".*
>
> *Leave in lieu of holidays is in contravention of the Pregnancy Directive and, in particular, Section 22(2) of the Maternity Protection Acts, in that these days are rights conferred or imposed by statute, and related to the employees' employment.*
>
> *Having considered the matter carefully, the Tribunal is satisfied that the new arrangement set out in Circular 0009/2013, is in contravention of Section 22(4) of the 1994 Act and the Pregnancy Directive 92/85/EEC. Both the Act and the Directive ensure that the rights connected with the employment contract are preserved other than in relation to pay. Such rights include statutory entitlements to paid annual leave in accordance with the Working Time Directive and the Charter of Fundamental Rights.*
>
> *Having further considered the lengthy oral and written submissions the Tribunal finds the appeal is upheld".*

20. By way of compensation, the Tribunal awarded variable amounts of days "in lieu" to the nine teachers depending on the agreed figures submitted plus 50%.

21. The determination section of the Decision is very hard to decipher. It is devoid of reasons to explain its conclusion that the 2013 Circular is in breach of s.22(4) and the Pregnancy Directive. It correctly notes that the Pregnancy Directive ensures rights connected with the employment contract are preserved other than in relation to pay, including statutory entitlements to paid annual leave under the Working Time Directive. But it then moves to a conclusion that the appeal is upheld without explaining the nature of the breach or how it contravened either s.22(4) or any specific provision of the Pregnancy Directive.

22. Strangely, the fourth paragraph of the determination section of the Decision states that "*leave in lieu of holidays is in contravention of the Pregnancy Directive and in particular s.22(2) of the Maternity Protection Acts*". That may have been intended to be a reference to s.22(4) as s.22(2) refers to continuity of employment, a matter unrelated to what the Tribunal was being asked to decide. However, even leaving aside that erroneous reference, leave in lieu of holidays (where those holidays occur during maternity leave) is precisely what the 2011 Circular provided to teachers and what the teachers complained about being withdrawn from them by the 2013 Circular.

Arguments of the Parties

23. Counsel for the Minister argued strongly that the Decision of the Tribunal was erroneous insofar as it identified a breach of s.22(4), whether based on a finding that the entirety of school closures equalled annual leave or not. It was argued that school closures could not be treated as equalling annual leave. Relying on *Davis*, it was asserted that the Tribunal's conclusions constituted an error of law, an error as would give rise to judicial review and an error of fact as there was no evidence before the Tribunal to support the finding that the effect of the 2013 Circular was to end any entitlement of teachers to time in lieu of holidays accrued during maternity leave. I deal with that argument below.

24. Counsel for the teachers, having carefully placed the Tribunal Decision in context having regard to the case argued before it, made an attractive argument that in fact the Tribunal were deciding that s.22(1) of the 1994 Act, or more probably, Article 11(2)(a) of the Pregnancy Directive, had been breached. In summary, the latter obliges Member States to ensure that the rights connected with the employment contract of workers must be ensured while workers are on maternity leave. Her justification for intuiting that this was the justification for the Tribunal's Decision was that this was the case made to the Tribunal: that the nine teachers in question were all already pregnant or on maternity leave at the time the 2013 Circular was introduced; that they had existing rights and/or benefits arising out of the 2011 Circular (whether characterised as contractual or by way of legitimate expectation) to leave during term time that could not be removed by the 2013 Circular; and that such existing rights/benefits were protected by Article 11(2)(a). For ease of reference I will describe this as the "legitimate expectation argument".

25. She identified that no case had been made to the Tribunal that the entirety of school closures constituted annual leave and argued that I should not decide the case upon this basis. In relation to the finding of breach of s.22(4), counsel suggested that if I concluded that finding did not fit in with the wording of the section, I should turn to the Pregnancy Directive and, if necessary, prefer the finding of the Tribunal based on the Directive.

26. Counsel for the teachers stressed the importance of interpreting the determination section of the Decision having regard to the entirety of the material contained therein, rather than focusing on a single sentence. She focused on the line of case law, including *Davis,* which identifies that a finding of fact should only be overturned in limited circumstances. She submitted the Tribunal did not make a finding that school closures amounted to annual leave and that the Court could not categorise the Tribunal's Decision as including any such finding. It was noted that Mr. Barrett's Affidavit of 11 November 2019 sworn on behalf of the Minister exhibited evidence not put before the Tribunal and that the Minister had failed to engage with what the Tribunal had decided.

27. In response to the argument that the Tribunal had, looked at in the round, made a Decision that was referable to the legitimate expectations of the teachers, counsel for the Minister responded that this could not be the case given that: (a) the Decision did not refer to the factual circumstances of the teachers; (b) it was not possible to understand whether the Tribunal considered the operative date in respect of the pregnancy to be the date it commenced or the date it was notified to the school; (c) it was not possible to understand whether the operative date in respect of the 2013 Circular was the date of the press release announcing it, the date it was provided to the schools, or the date it came into force: (d) it was not possible to understand whether the Tribunal had arrived at its conclusion on the basis of rights or benefits connected with the employment contract; and (e) it was not possible to understand whether the Decision was based on contractual rights or legitimate expectations.

Legitimate expectation argument

28. I fully accept that, had the Tribunal arrived at its Decision on the legitimate expectation argument, after having addressed all relevant matters, presumably including:

    - the relevant provisions of the Directive and/or the 1994 Act,
    - the facts applicable to the of each of the nine teachers including the date on which notification of pregnancy was given to the school in question and the date upon which the Circular was either notified to schools or came into effect,
    - the legal effect of the 2011 and the 2013 Circulars, and
    - the nature of the rights of the teachers potentially affected by the 2013 Circular;

    then the legitimate expectation argument might well provide the basis for a decision upholding the appeal.

29. However, there is no element of the Tribunal Decision, whether in its summaries of the arguments of each party, or in the dispositive part of its Decision, that identifies, even glancingly, either the requisite factual context of the dispute or the legal basis necessary to ground a conclusion on the basis of the legitimate expectation argument. A reader coming cold to the Tribunal Decision, as I did on the first day of hearing this case, would have no idea that the nine teachers were pregnant when the 2013 Circular was adopted; that one of them was already on maternity leave; that the core case of the teachers was

that they had contractual and/or legitimate expectation rights under the 2011 Circular that could not be affected by the introduction of the 2013 Circular; that the Tribunal were (possibly) invoking s.22(1) and Article 11(2)(a) of the Pregnancy Directive; and that their conclusion was based, not on s.22(4) as the Tribunal explicitly stated but either on Article 11(2)(a) which protects rights connected with the employment contract of workers in the context of maternity leave or s.22(1) of the 1994 Act.

30. Accordingly, I cannot accept that the Tribunal in fact made their decision on the basis of the legitimate expectation argument as the Decision contains none of the necessary elements that would allow me to arrive at such a conclusion. The Tribunal's Decision must be taken at face value: and the Tribunal has concluded on the face of its Decision that what it refers to as the "*new arrangement set out in Circular 0009/2013 is in contravention of Section 22(4) of the 1994 Act and the Pregnancy Directive 92/85/EEC*". Having regard to that wording, and contrary to what is advanced by counsel for the teachers, I cannot agree that the Decision cannot be read to condemn the 2013 Circular. There is a clear finding that s.22(4) and the Pregnancy Directive have been breached by the arrangement introduced by the Circular. The finding in respect of breach of s.22(4) is inescapable and cannot be brushed aside by reference to the invocation of the Pregnancy Directive by the Tribunal; and I must therefore consider whether there is an error of law in that conclusion.

Breach of Section 22(4)

31. As identified above, the Tribunal held that the requirement that annual leave and public holidays accrued during maternity leave be taken during school closure periods was a breach of s.22(4). A brief examination of s.22(4) demonstrates that this is a manifest error of law.

32. Section 22(4) may be found in Part IV of the Act dealing with employment protection. The margin note to s.22 refers to "*preservation or suspension of certain rights etc. while on protective leave etc*." Section 22(1) provides that during a period of absence from work while on*, inter alia,* maternity leave:

> *.. the employee shall be deemed to have been in the employment of the employer and, accordingly, while so absent, the employee shall … be treated as if she had not been so absent; and such absence shall not affect any right … whether conferred by statute, contract or otherwise, and related to the employee's employment.*

33. The detailed application of that principle in the context of leave may be found in s. 22(4), which provides:

> *(4) A period of absence from work while on protective leave shall not be treated as part of any other leave (including sick leave or annual leave) to which the employee concerned is entitled.*

34. That is an easy prohibition to understand. If an employee is on maternity leave, they cannot be taken to be on any other kind of leave to which they are entitled. So, for

example, if a woman is entitled to 20 days annual leave per calendar year and she is out on maternity leave for six months from 1 January to 30 June, she is treated as if she has been in the workplace and thus accumulates her annual leave. When she returns on 1 July she cannot, for example, be deemed to have already taken 10 of her 20 days of annual leave while she was on maternity leave as this would mean that, for those 10 days, her annual leave would overlap with her maternity leave. That would be in breach of s.22(4) as it would mean her maternity leave was being treated as part of her annual leave.

35. In this case, the teachers still were expressly permitted to accumulate their annual leave (including that derived from public holidays) to be taken after their maternity leave ended so there was no question of their maternity leave being treated as part of that annual leave. Nonetheless, the Tribunal concluded there was a breach of s.22(4). It appears that the Tribunal could only have taken that view on the basis of two alternate approaches.

36. The first is that leave during school closure periods did not constitute leave at all. Counsel for the Minister focused very heavily on the following sentence in the determination section (quoted above) as support for his argument that this was explicitly what the Tribunal had found:

> *"Arising from Circular 0009/2013 the Tribunal notes that from 1st May 2013, teachers cease to have any entitlement to time in lieu, for annual leave days and public holidays, that fall during their periods of statutory paid and unpaid maternity leave."*

37. Counsel for the teachers urged me to simply treat that sentence as reflecting the wording in the 2013 Circular at paragraph 8.3 i.e. as simply declaratory of the change effected by the 2013 Circular but not reflecting a finding by the Tribunal that leave during school closure periods did not constitute leave at all. She argued that as this was not the case made by the teachers, it could not have been the finding arrived at by the Tribunal. She submitted that the true rationale for the Tribunal finding was that which I described above, i.e. that the teachers had a right under the 2011 Circular to take accumulated leave during term time because they were all pregnant when the 2013 Circular came into force, that the Tribunal's reliance on s.22(4) was effectively incidental and what I should focus upon was the reference in the dispositive paragraph to the 1994 Act and the Pregnancy Directive.

38. I have no problem treating the reference in the Tribunal's Decision to teachers ceasing *"to have any entitlement to time in lieu, for annual leave days and public holidays, that fall during their periods of statutory paid and unpaid maternity leave*" not as a finding by the Tribunal that their leave periods had been removed but rather a description of what the 2013 Circular had effected i.e. that those leave periods could no longer be taken in term time. After all, the 2011 Circular referred to teachers being entitled to "*leave in lieu*" where maternity leave overlapped with scheduled school holidays (paragraph 5.1) and providing that "*leave in lieu can only be taken on working days*" (paragraph 5.3). It was explained to me at the hearing that working days meant term time days. The 2013

Circular had clearly changed that position radically, requiring that leave could only be taken during school closures.

39. But construing that sentence as simply a description of the change effected by the 2013 Circular as opposed to a substantive finding that the teachers' rights to leave were lost does not explain away the problem with the reference by the Tribunal to s.22(4). It is not possible to get away from the fact that the Tribunal concluded that s.22(4) had been breached.

40. One way they could have arrived at that finding was if they were treating the entirety of school closure times as being annual leave. If that was the case, then for example a teacher who had been on maternity leave from 1 January to 31 August would be entitled to the combined total of any closures during half term, Easter holidays, summer holidays and all public holidays during that period. The totality of that would not be possible to take during school closure periods because there would simply not be enough time to do so. Accordingly, that would be a breach of s.22(4) since it would require some portion of maternity leave to be treated as part of any annual leave.

41. If that was the rationale for the Tribunal's approach, treating the entirety of school closure times as being annual leave constitutes an error of law for the reasons set out below.

42. First, it was not the case made by the teachers when they first brought the case to the Rights Commissioner. The complaint forms were carefully opened to me by counsel for both sides and they clearly set out the factual situation of the teachers and the fact that they were pregnant when the 2013 Circular was introduced and that this was the basis of the challenge brought by the teachers. Both Mr. Barrett in his Affidavit sworn 11 November 2019 and Ms. Lyne in her Affidavit sworn 22 January 2020 on behalf of the teachers agree that the case made to the Tribunal was that the teachers were entitled to the arrangements in being at the time they became pregnant. Moreover, it is clear from the detailed note of the oral submissions made to the Tribunal by counsel for the teachers that no case was made that the entirety of school closures constituted annual leave.

43. Second, there is no legal or factual basis identified in the Decision of the Tribunal that might justify them concluding that the entirety of school closure days constitute annual leave for teachers. It is agreed between the parties that the teachers have contracts of employment with their employing schools and that the terms and conditions of teachers in recognised schools are subject to, *inter alia*, Department Circulars (see paragraph 5 of the Affidavit of Ms. Lyne sworn 22 January 2020). Both the 2011 Circular and the 2013 Circular are examples of such circulars.

44. It is obvious from the terms of the 2011 Circular that even at that stage, it was not envisaged that the entirety of school closure constituted annual leave. This may be seen from the fact that where maternity leave overlapped with planned school closures such as Christmas, Easter, mid-term, summer break, public holidays and, where appropriate, religious holidays, a teacher was entitled to leave in lieu for all such days which overlap

subject to a maximum of 30 working days (my emphasis). If the entirety of school closure days were annual leave, then there is no explanation of the ceiling of 30 working days. No other circular or legislative provision was pointed to by the Tribunal as the basis for a finding that a teacher's annual leave was made up of the entirety of school closure time.

45. Even if the situation prior to the 2013 Circular had permitted school closure times to be treated as annual leave, the 2013 Circular made it quite clear that teachers were only entitled to 20 days annual leave. (The figure of 20 days annual leave comes of course from the Organisation of Working Time Act as identified above). As noted above, the Circular provides inter alia:

> *"8.1 In general full-time employees are entitled to 20 days annual leave. Employees who work less than full hours are entitled to annual leave on a pro rata basis."*

46. Thus paragraph 8.1 makes it clear, possibly for the first time, that teachers are only entitled to 20 days annual leave. As averred to in Mr. Barrett's Affidavit, a similar provision has been included in other circulars dealing with other types of leave since then, including Circular 0018/2013 on adoptive leave entitlements for registered teachers, Circular 0026/2013 on parental leave entitlements for registered teachers, Circular 0059/2014 on sick leave scheme for registered teachers, and Circular 0057/2016 on paternity leave scheme for registered teachers. The teachers have complained that certain evidence was put before this court that had not been put before the Tribunal. However, by letter of 29 June 2016, the CSSO provided copies of the parental and sick leave Circulars to the Tribunal and so I am satisfied it is appropriate to take at least those two Circulars into account.

47. The Tribunal does not set out any basis for explaining why the Minister was not entitled to prescribe the period of annual leave for teachers at 20 days by way of the 2013 Circular. Indeed, in the last substantive paragraph of the determination of the Decision, the Tribunal refers to "*statutory entitlements to paid annual leave in accordance with the Working Time Directive*". That suggests the Tribunal is in fact accepting that the entitlement of the teachers is to the 20 days paid annual leave provided by the Working Time Directive rather than the 70 plus days of school closures. I should observe in this context that it was undisputed between the parties that requiring teachers to take their leave during school closure periods gave them sufficient time to take all their annual leave plus public holidays (totalling 29 days in total) during school closure periods, (totalling over 70 days per year), in almost all cases. Where that is not possible within a school year (which runs from 1 September to 31 August) teachers are exceptionally allowed to take time off during term time.

48. Finally, the Tribunal did not engage with the averment at paragraph 29 of Mr. Barrett's Affidavit to the effect that under the Croke Park agreement, teachers in recognised primary schools may be required to carry out some activities including school planning, continuous professional development, induction, policy development, staff meetings and in-service during school closure periods, subject to a maximum of 36 hours. There is no

dispute but that was before the Tribunal, as it was referred to by counsel for the teachers in her submission to the Tribunal.

49. For all those reasons, if the Tribunal's (unstated) justification for finding the 2013 Circular unlawful was because requiring accumulated leave to be taken during school closure days meant that s.22(4) would inevitably be breached, then I am satisfied this was an error of law. This is because, as per the analysis above, it was not the case made by the teachers, there is no legal basis identified for such a conclusion and it is incompatible with the evidence identified in this judgment before the Tribunal, in particular the 2011 Circular, the 2013 Circular, the Circulars on parental leave and sick leave, and the Croke Park Agreement.

50. Finally, it is true that the Tribunal identified a breach of s.22(4) and the Pregnancy Directive. But in circumstances where no provision of Pregnancy Directive was identified as having been breached, and no explanation was given as to why the entire Directive had apparently been breached, that fleeting reference to same cannot operate to provide a justification for the determination section of the Decision.

51. I identified above that the Tribunal could only have upheld the appeal on the basis of two alternate approaches. The first was leave during school closure periods did not constitute leave at all and I have dealt with that above. The second is that they did not reach such a conclusion and decided s.22(4) was breached for some other reason. But if that is the case, it is not possible to understand why they concluded that the teachers' rights had been breached under s.22(4) since, as noted above, the new regime introduced by the 2013 Circular ensures that the 20 days plus public holidays can be taken during school closures, with a fall-back arrangement for some days to be taken in term where that is not possible. The arrangements introduced by the 2013 Circular do not necessitate maternity leave being treated as any other kind of leave. Annual leave is taken during school closure periods, not during maternity leave. Therefore, any such conclusion by the Tribunal would also constitute an error of law.

52. In summary, whether one treats the finding of breach of s.22(4) as being based on an assumption that the entirety of school closure was annual leave or based on some other assumption, the Tribunal have made an error of law.

53. Various cases have been cited to me in respect of the duty of a court when determining an appeal on a point of law, including; the deference required to be given to an expert tribunal; the very narrow circumstances in which a court should overturn a finding of fact; the entitlement to overturn an error of law; and the obligation to give reasons, including: *Attorney General v. Davis; Nano Nagle School v. Daly* [2019] 30 E.L.R. 221; *Karpenko v. Freshcut Food Services Ltd.* [2019] IEHC 693 ; *Earagail Eisc Teoranta v. Ann Marie Doherty* [2015] IEHC 347, and *Transdev Ireland Ltd v. Caplis* [2020] IEHC 403.

54. The principles in these cases are well established and I do not propose to rehearse them in any detail. I fully accept that I should only quash a decision of an expert tribunal where either the Tribunal has got the law wrong or where it has made an error of fact in the

circumstances identified by McKechnie J. in *Attorney General v. Davis*. I accept that here I should defer to the undoubted specialist expertise of the Tribunal in employment matters, including maternity leave and I note the comments of Baker J. in *HSE v. Raouf Sallam* [2014] IEHC 298 that the High Court must show appropriate curial deference to the Labour Court but such deference arises when the Labour Court deploys its particular expertise on industrial relations issues. However, here there is a clear error of law for the reasons identified above. The case law makes it manifest that no deference is due to a specialist tribunal on an error of law for obvious reasons. Accordingly, nothing in the case law cited by both parties indicates that I ought to abstain from quashing an obvious error of law, such as exists here in respect of the finding of breach of s.22(4). I accordingly quash the Decision of the Tribunal for error of law.

55. Separately I should identify my approach to a matter that was in contention between the parties, being the Minister's attempt to rely on various decisions of Equality Officer/Adjudication Officer McGrath of 2018. Those decisions followed claims made by teachers (including the teachers who have brought the instant case) in respect of the introduction of the 2013 Circular but based on an alleged breach of the Employment Equality Acts 1998-2011 and the Recast Equality Directive 2006/54/EC of 5 July 2006. Those claims were unsuccessful and the decisions were not appealed. The decisions addressed, *inter alia,* the issue of whether school closures constituted annual leave. Sustained objection was taken by counsel for the teachers on the reliance sought to be placed on the reasoning in these decisions, on the basis that they concerned the adjudication of a different claim pursuant to different statutory enactments (see for example paragraph 9 of the Affidavit of Ms. Lyne sworn on behalf of the teachers). I agree with the teachers in this respect. The decisions cannot be considered persuasive in respect of the matters I am called upon to decide given that the question the Equality Officer was required to determine was whether or not the teachers in question had been discriminated against on the ground of gender as compared to non-pregnant colleagues. That is quite a different legal issue to the question at hand here i.e. an alleged breach of the 1994 Act and/or the Pregnancy Directive. The fact that these decisions had been opened to the Tribunal – the foundation for the argument by the Minister that they were relevant to this hearing – does not alter my view given the very different inquiry the Equality Officer was conducting.

Tribunal's failure to give reasons for Decision

56. It was valiantly submitted by counsel for the teachers that the Decision does not fail to enable the parties to understand why they lost the case, so as to permit them to craft an appeal. I cannot agree. The necessity for attempting to divine the intention of the Tribunal in the way I have been obliged to do above comes from the wholesale failure of the Tribunal to explain the basis for their Decision, even in the most rudimentary way.

57. However, the Minister did not identify as a point of law that the Tribunal had failed to give adequate reasons for its Decision. The Minister sought to introduce the lack of reasons as a ground of complaint in the legal submissions of 5 October 2020 (see paragraph 6). Not surprisingly, the teachers vigorously object to their effort to introduce this ground into the

case. In response to this objection, the Minister invoked the lack of prejudice to the teachers in this point being allowed, and identified that in the Affidavit of Mr. Barrett sworn 11 November 2019 he identified at paragraph 47 that no reasoning was provided by the Tribunal for their Decision and he did not know the basis upon which the Tribunal made its decision that the 2013 Circular was in contravention of the 1997 Act and the Pregnancy Directive. The second Affidavit of Ms. Williams sworn 14 February 2020 was also relied upon where she averred that the Court has jurisdiction to consider whether the impugned Decision was tainted by defective or no reasoning (paragraph 9). Affidavits should be used to provide evidence to the court and not legal submissions and so I disregard this last averment of Ms. Williams.

58. In this type of statutory appeal, there is no requirement for a statement of grounds. Rather the point of law must simply be introduced in a notice of motion. The Minister was admirably succinct in her identification of same. Nonetheless, given that the jurisdiction of the court exists exclusively in relation to a point of law identified by an appellant under s. 34(2), I only have jurisdiction in relation to the point of law identified in the notice of motion. The four walls of the court's jurisdiction are delineated by the point of law identified. I do not have jurisdiction to extend the statutory appeal to points not encompassed by the point of law identified. No matter how widely I interpret the point of law in this case, I cannot define it to include a failure to give reasons. Averments that include a complaint about a factual situation cannot be the basis for an implicit amendment of the points of law the subject of the appeal.

59. However, I should add that in this case, the fact that the Minister is precluded from arguing the reasons ground does not mean the lack of reasons is irrelevant to the outcome of this case. This is because, as identified above, the Tribunal arrived at a conclusion that s.22(4) and the Pregnancy Directive had been breached. I have found s.22(4) was not breached by the adoption of the 2013 Circular. Counsel for the teachers argued that even if the Tribunal was wrong about this, it does not matter since there was a basis for its Decision as discussed above, i.e. that the Tribunal in fact decided the case on the legitimate expectation argument. That may have been in the mind of the Tribunal when arriving at their Decision. But there is not one iota of reasoning in the Tribunal's Decision that would allow me to decide that this was in fact the basis for their conclusion. The lack of reasons provided by the Tribunal, even bare reasons that simply communicated the gist of the Decision (as identified in *Earagail Eisc Teoranta* following the decision in *Faulkner v. the Minister for Industry and Commerce* (Unreported, High Court, 25 June 1993)), prevented me from potentially concluding that there was indeed a lawful basis for the Decision.

Remittal

60. Given that I have decided to quash the Decision, the question then arises as to what remedy should be provided. There is a stark dispute between the parties on this point: the teachers argue strongly for remittal if the Decision is quashed, while the Minister argues strongly against remittal. I am persuaded by the arguments of counsel for the teachers in this respect, and her reliance upon the Supreme Court decision in *Nano Nagle*.

She says that where the Tribunal has erred in making its decision, it is for the Tribunal to fix its error, and that the declaratory relief sought by the Minister is outside the jurisdiction conferred on the High Court.

61. This approach was disputed by counsel for the Minister, who said that I should quash the Decision of the Tribunal thus ensuring that the decision of the Rights Commissioner would stand. The Minister argued against remittal on the basis that it would be time consuming and costly. There was a significant argument between the parties as to whether those factors were appropriate ones to consider when deciding whether to remit a matter back to the Tribunal. Counsel for the Minister invoked the decision of Kelly J. in *Usk District Residents Association Ltd v. Environmental Protection Agency* [2007] IEHC 86 which discusses the invocation of the discretion to remit; and counsel for the teachers countered that in employment cases, the appropriate remedy was always remittal where the decision of the Tribunal had been quashed. This is an interesting debate that might require to be resolved in the future; but here, I do not need to resolve it as I am satisfied that this matter should be remitted for the following reasons.

62. In *Nano Nagle*, McKechnie J. observed as follows:

> *"111. … While the Labour Court determination did not comply with the statute, what occurred can, in fact, and in law, be addressed. But, to my mind, it can only be remedied by remitting the appeal to the legal forum charged under the statute with evaluating the evidence in accordance with law – and applying the law to the facts…. This court should not act as a surrogate Labour Court, which is charged with carrying out a statutory function".*

63. Here, the Tribunal should be given an opportunity to identify the appropriate factual basis and legal basis for their decision; and the only way to achieve same is to remit it back to the Tribunal. If, as counsel for the teachers asserts, the Tribunal did not intend to make a decision on the basis of s.22(4) but in fact intended to do so on the basis of the particular position of the teachers at the time of the introduction of the 2013 Circular, they can make that clear in a new decision, giving adequate reasons for same.

64. For that reason, I am satisfied that remittal is the appropriate course despite the long period of delay since this matter first commenced in 2012 (some of which was entirely outside the control of either party) and the desirability of bringing finality to this matter.

Conclusion

65. For the reasons set out above, I quash the Decision of the Tribunal of 23 October 2019 and remit the matter back to whatever composition of the Tribunal are in a position to adjudicate on same, given that the Tribunal is now in run off mode.