① period reduced because employee willing to work notice.
② the different onus of proof on leaving voluntarily & constructive dismissal — if employee gives notice, s/he has resigned; even if period of notice altered by employer it does not then become a dismissal.

32/95

MJG/SH/4

Commissioner's File: CU/151/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 26 May 1993 as that decision is erroneous in law and I set it aside. My decision is as follows:-

(a) The claimant left her employment voluntarily on 11 December 1992 in pursuance of her four weeks' notice to terminate her employment, given to her employer on 9 December 1992;

(b) The claimant has not shown "just cause" for leaving her employment voluntarily and is therefore subject to disqualification for receiving unemployment benefit: Social Security Contributions and Benefits Act 1992, section 28(1)(a);

(c) The appropriate period of disqualification is one week as from and including 14 January 1993.

2. This is an appeal to the Commissioner by the claimant, a young woman who was employed as a Nursery Assistant from 14 September 1992 to 11 December 1992. The appeal is against the unanimous decision of a social security appeal tribunal dated 26 May 1993, which dismissed the claimant's appeal from a decision of the local adjudication officer as follows,

> "[The claimant] would have been disqualified for receiving unemployment benefit from 14/Jan/93 to 08/Mar/93 (both dates included) if she had otherwise had a right to it. This is because she voluntarily left her employment without just cause."

3. The appeal has been the subject of detailed written

submissions both by the adjudication officer now concerned and by the claimant's representative (a member of the Free Representation Unit). Considerable reference has been made to cases on employment law including decisions of the Employment Appeal Tribunal and of the Court of Appeal. I have of course paid heed to that case law. The position as to precedent is that of course I recognise the persuasive authority of decisions of the Employment Appeal Tribunal, but those decisions are not technically binding on me in the same way that decisions of the Court of Appeal on principles of law are binding. However, I do not find anything in the Employment Appeal Tribunal cases cited to me which is necessarily conclusive of the issues in this case.

4. The detailed grounds of appeal put forward on behalf of the claimant can be summarised as follows: It is contended that the tribunal erred in law by holding that the claimant was <u>not</u> dismissed but left her employment voluntarily. That is put on an alternative footing. First, it is said that the circumstances of her leaving were such as to constitute "constructive dismissal" within the meaning eg. of section 55(2)(c) of the Employment Protection (Consolidation) Act 1978. Then it is said that, if there were no constructive dismissal, although the claimant initially gave in, on 9 December 1992, her four weeks' notice and was prepared to work them out, her employer refused to allow her to do so and made her leave on Friday 11 December 1992 and thus the employer dismissed her on 11 December 1992 by an actual dismissal.

5. The claimant's representative then contends that, even if the claimant did leave voluntarily, the tribunal did not clearly show in their reasons for decision that they had taken her willingness to work out her 4 weeks' notice as a mitigating factor in reducing the period of disqualification. I can say at once that I accept this particular ground of appeal as being correct. Despite the tribunal's careful and detailed record of decision, I am not entirely satisfied that they took this particular factor fully into account. That is why in paragraph 1(c) of this decision I have reduced the period of disqualification from 8 weeks to 1 week. I consider the fact that the claimant was willing to work out her 4 weeks' notice and that she might have found other employment during that time to be an important factor. I should, however, add that I do not consider the personal difficulties that she was having at work were sufficient to merit her giving in her notice at the time when she did. Therefore some period of disqualification is merited. To that extent I agree with the tribunal.

6. I now turn to the difficult legal question in this case of whether the claimant's employment terminated (i) because she voluntarily left it, in which case (provided the adjudication officer showed that there was voluntary leaving) the onus would then shift to her to show "just cause" for leaving <u>or</u> (ii) because of a dismissal, actual or constructive, by the employer. If the latter were the case, she could not be disqualified unless it was shown that the dismissal was by reason of "misconduct" (see section 28(1)(a) of the 1992 Act). There is no suggestion

in this case that the claimant was guilty of any kind of misconduct. Therefore, if there were a dismissal, no disqualification would be appropriate.

7. On this particular matter the tribunal made the following findings of fact,

> "On Wednesday 9.12.92 the claimant, after having been off work sick for about 2 weeks (for which she provided [her employer] with a medical certificate) and having been back at her work at the Nursery for about a week, decided on the spur of the moment to give [the employer] notice that she would be leaving her job in 4 weeks' time, that being the period of notice she was entitled to. She gave [her employer] her 4 weeks' notice of intention to leave at about 9.15 am on Wednesday 9.12.92 orally. [Her employer] at first tried to persuade the claimant to stay on and provided her, for the first time, with a set of keys to the Nursery, but when the claimant declined to stay on and return the keys to [her employer] he told her on Thursday 10.12.92 that she was to leave the next day Friday 11.12.92. The claimant left the employment on Friday 11.12.92 after completing her morning's work and received from [her employer] her wages for the week she had just worked to 11.12.92 plus an extra week's wages."

8. In the first of their reasons for decision the tribunal state, "The claimant has conceded she left her employment at the .. Nursery voluntarily". The chairman's note of evidence records the claimant's representative as conceding that she left her employment voluntarily. However, it appears that this concession was either misunderstood or made by mistake by the claimant's representative because it is clear that the issue of whether the claimant was dismissed or whether she left her employment voluntarily was in fact considered by the tribunal. They said in their reasons for decision,

> "The tribunal do not accept that when the claimant herself initiated her departure by giving oral notice to leave on Wednesday 9.12.92 that simply because her employer then asked her to leave on the Friday 11.12.92 and did not permit her to work out the 4 weeks' notice she gave on 9.12.92, that the employer can be accurately described as having sacked her. But for her own action in giving notice on 9.12.92 the employment would not have been terminated and would have continued for at least another 26 weeks (see Form UB85)."

9. The claimant's representative contends, citing a number of employment law cases and principally British Midland Airways v. Lewis [1978] I.C.R. 782 (Employment Appeal Tribunal), ".. that where an employee gives notice, but the employer gives counter-notice effective at an earlier date then, if the employee does not agree to that date, the employer has dismissed the employee within the meaning of the Trade Union and Labour Relations Act 1974" (it should be noted that the relevant legislation is

now section 55(2) of the Employment Protection (Consolidation) Act 1978).

10. The adjudication officer now concerned does not accept that the British Midland Airways case necessarily carries this proposition. On a careful examination by me of the report of the case, especially at page 786B-E. I agree with the adjudication officer. It seems to me that the whole matter was in a state of flux in that case and it was only on the facts that British Midland Airways were taken to have dismissed the applicant. In my judgment, the law on this matter, certainly in the social security context, was accurately laid down in reported Commissioners' decisions CU/155/50 and R(U) 2/54. In the latter case the learned Commissioner said (paragraph 9),

> "I entertain no doubt that the claimant terminated her employment by the action that she took in giving notice to leave. The fact that her employer forestalled her action and gave her notice to leave immediately, instead of allowing her to stay until the following Thursday is not to the point."

11. In paragraphs 18 and 19 of his submission of 14 September 1994 the claimant's representative says of those two cases,

> "On the facts of CU/155/50 and R(U) 2/54, it is not clear whether the Commissioners held that the employers have given counter-notice or simply allowed the employees not to work out their notice. The use of the words 'told her to leave' by the Commissioner who gave the decision in CU/155/50 and the phrase 'gave notice to leave immediately' may be read both as giving notice of the contract and permitting the employee not to return. It is submitted that, since in each case the employers paid the employee for the period still to run until the end of the notice period, the facts are consistent with them not advancing the date of termination, but merely not requiring the claimants to work out their notice. If this factual basis is correct, the Commissioners were holding that an employee whose notice is accepted by the employer but who is not required to work out her leave, has left that employment voluntarily. Alternatively, if the proposition on counter-notice is inconsistent with CU/155/50 and R(U) 2/54, the Commissioner is invited not to follow those decisions, but to prefer the approach of the Employment Appeal Tribunal in Lewis."

12. I have already indicated above that I do not consider that the Lewis decision lays down any categorical proposition of law but on this point is merely a decision affirming the factual ruling of the industrial tribunal as to dismissal. It should be borne in mind that an appeal from an industrial tribunal to the Employment Appeal Tribunal lies only on questions of law. I n my view the ruling in CU/155/50 and R(U) 2/54 that there is a voluntary leaving applies equally, whether it is a case of an

employer not allowing an employee to work out his or her notice or whether it is a case of an actual notice to leave given first by the employee, followed by a notice of termination given during the currency of the employee's notice by the employer. In the latter case, once the employee has given in his notice to leave it is a unilateral termination of the employment contract and cannot be withdrawn without the consent of the employer (Riordan v. War Office [1959] 1 W.L.R. 1046). It follows that in the present case, when the claimant gave her four weeks' notice in on the Wednesday 9 December 1992 she had herself terminated the employment and thereby left it voluntarily. Even if what the employer did on Friday 11 December 1992 can be construed as giving in a counter-notice requiring her to leave on that day and not to work out her four weeks notice, that does not, in my view, alter the fact that the effective termination of the employment was a voluntary leaving by the claimant. The fact that she was not allowed to work out her four weeks' notice is however, as I have indicated above, a highly cogent factor in deciding the length of any period of disqualification.

(Signed) M.J. Goodman
Commissioner

(Date) 25 April 1995