

EMPLOYMENT APPEALS TRIBUNAL

Appeal of:

Employee

CASE NO.

UD1066/07

against the recommendation of the Rights Commissioner in the case of:

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. R. O'Flynn BL

Members: Mr. D. Hegarty
Mr. K. O'Connor

heard this appeal at Cork on 30th June 2008.

Representation:

Appellant: In person

Respondent: Mr. Eddie Farrelly BL instructed by Ms. Denise Fanning of DAS Group,
12 Duke Lane, Dublin 2.

The case came to the Tribunal by way of an appeal against the Rights Commissioner's recommendation reference r-048979-ud-07/MMG.

The determination of the Tribunal was as follows:

Appellant's Case:

The Appellant gave evidence. She started work in the respondent's shop as a general sales assistant in January 2006. She liked her job. In February 2006 she knew she was pregnant. She told her supervisor that she would work as long as she could.

On the 10th May her manager said that her money was in error. He gave her a verbal warning. She spoke to the HR manager, who reduced the verbal warning to an advisory notice and suggested that the appellant undergo further training. The training was never received.

Late in May she felt unwell and went to her doctor. On 24 May 2006 she went to the hospital and certified unfit for work. She moved to Limerick because she no longer felt safe living alone because of her medical condition. She informed the respondent of her new address.

The appellant emailed the respondent's HR manager on 17 June 2006, the email contained her postal address. She was concerned about her job. The HR manager phoned her but she preferred to communicate by email. The appellant again emailed the HR director on 24 May 2006, she enquired about holiday pay and about the possibility of obtaining work in Limerick. She thought to return to work in November following the birth of her baby. During a telephone call with the HR manager she did not quit her job.

She was shocked and upset when she received her P45 on or about 15th August 2006 and there was no cover letter accompanying the P45. She did not contact her employers as she felt that they did not want her any more. If the discussion had been by email and not over the phone there would have been no confusion. The Appellant gave birth on 5th October 2006. The Appellant commenced a FAS scheme in March 2007 and in June 2007.

Respondent's Case

The HR manager gave evidence. There are procedures in place to look after a pregnant employee. A risk assessment is completed; in this case she completed it with the store manager. A letter is sent to the employee giving details of maternity leave.

When the HR manager received the email from the appellant on 17th July 2006, she assumed that the appellant would not return to work before the birth of her baby. The respondent does not have a store in Limerick so the appellant could not be placed there. She telephoned the appellant because she felt it would be easier to discuss matters rather than communicate by email.

The appellant would not get holiday pay while she was on sick leave. The HR manager understood the appellant resigned. Then her holiday pay was processed and sent to her. The p.45 was processed and sent separately at a later date. No covering letter issued with the p.45. Until she received the letter from the Citizens Information Centre on behalf of the appellant, as far as she knew everything was fine. Then, she assumed that they had misunderstood each other.

The HR manager wrote to the appellant on 25th September 2006 that she could return to her job after her maternity leave ended. She did not receive a reply to the letter. The appellant's job remains open to her.

Counsel for the Respondent submitted that the issuance of a P45 dated 29th July 2006 and the termination of the appellant's employment from that date was void, by virtue of Section 18 of the Maternity Protection of Employees Act, 1981.

Determination

The Appellant in her evidence denied that on 24th July 2006, or at any other time was it her intention to resign from her employment. The HR Manager gave evidence that she understood from a telephone conversation of 24th July 2006 with the Appellant, that the Appellant wished to resign so as to move to Limerick and/or for financial reasons.

There was substantial conflict in the evidence. However, the Tribunal is satisfied as to the bona fides of both the Appellant and the Respondent's HR Manager. Having regard to all the circumstances and having heard the evidence, the Tribunal is satisfied that the issuance of the P45 arose from a significant, yet genuine misunderstanding, on the part of both the Appellant and the Respondent.

On the evidence adduced, the Tribunal is satisfied that both the intention and effect of the Respondent's conduct in so issuing a P45 and holiday pay, was to terminate the Appellant's employment, albeit that the Respondent was genuinely mistaken as to the agreement purportedly reached by the Appellant and the HR Manager during a telephone conversation which took place on or about 24th July 2006.

The Tribunal is satisfied that the Appellant received the P45 on or about the 15th August 2006. The Tribunal is satisfied that the termination of the Appellant's employment is not void, as whilst the Appellant was pregnant, she was not at that time on obligatory maternity leave.

Having due regard to the evidence adduced at the hearing, the Tribunal is satisfied that the reason for termination of the Appellant's employment was not wholly or mainly for reasons of pregnancy or matters connected therewith, pursuant to section 6 (2)(f) of the Unfair Dismissals Act 1977. Accordingly, the termination of the Appellant's employment was not unfair pursuant to the provisions of the Unfair Dismissal Act 1977.

Given that the Appellant commenced employment in January 2006 and her employment ended in early August 2006, the Appellant has not attained one year's continuous service pursuant to section 2(1) (a) of the Unfair Dismissals Act 1977. The Tribunal does not have jurisdiction to address any other aspect of the Appellant's claim other than the alleged breach of section 6 (2)(f) of the Unfair Dismissals Act.

The Tribunal notes that the first time the Respondent became aware that the termination of the Appellant's employment was at variance with what had purportedly been agreed, was when the Respondent received correspondence from the Citizens Information Service on behalf of the Appellant, in early September 2006. Upon being so notified of the Appellant's dissatisfaction, the Respondent almost immediately offered to re-employ the Appellant, by letter dated 25th September 2006. The Tribunal also notes that on the 4th July 2007 on the occasion of the Rights Commissioner Hearing, the Respondent again offered to re-employ the Appellant. The Tribunal notes that the Appellant declined both offers of re-employment.

Accordingly, the appeal fails. The recommendation of the Rights Commissioner is upheld, in so far as the dismissal was held not to be unfair.

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Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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Employment Appeals Tribunal

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(CHAIRMAN)