

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD1120/2007

MN868/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr S. Ó Riordain

Members: Mr J. Browne

Ms K. Garvey

heard this claim at Enniscorthy on 21st October 2008

Representation:

Claimant: Thomas E. Honan solicitor, Thomas E. Honan & Co., Solicitors,

Ferrybank, Arklow, Co. Wicklow

Respondent: Pat Morissey solicitor, Peter Crane solicitors, Estate House,

Castlehill, Enniscorthy, Co. Wexford

Background:

The respondent is a furniture sales company.

The representative for the claimant opening: The case before the Tribunal is

one whereby the claimant, who was an accounts technician, did not have one year's service and she contends that she was dismissed by reason of her pregnancy. The employer's attitude to her changed after she became pregnant and she was dismissed unfairly while on pregnancy related sick leave.

The representative for the respondent opening: The respondent contends that the claimant was not dismissed by reason of her pregnancy but that issues arose as to her performances at work. The claimant was issued with a letter (on 01st October 2007 Monday) for tasks to be performed by the end of the week and the tasks were not performed. The owner spoke to her on the following Monday and said that they were to be performed by the end of the day and they were not performed. The owner issued her with a letter to the effect that disciplinary action would be taken if she failed in performing her tasks. There was an argument and the claimant stormed out saying she was not putting up with this s*** and saying that she felt f***** terrible. The employer was under the impression that she resigned. The claimant had not informed the employer that she was ill. The employer contacted the claimant on 22nd and informed her that he could no longer work with her. The respondent did not dismiss her because of her pregnancy.

The Tribunal asked when the employer knew of the claimant's pregnancy and the representative for the claimant replied that it was circa six weeks before the events. The representative for the respondent concurred. The Tribunal asked if the claimant had received a contract and the respondent representative initially stated that she did. The representative for the claimant stated that she did not and that she did not receive a letter of termination. The representative for the respondent stated that the letter of termination was definitely sent. The claimant's representative reiterated that they did not get the letter nor did they get their conditions of employment. The representative for the respondent later accepted that the claimant may not have given her a contract of employment.

Claimant's case:

The claimant told the Tribunal that she was not given a contract of employment. She was not given a work review. She had told her employer in August 2007 (circa six weeks before the end of her employment) that she was pregnant. Another employee, (L), had previously been doing her job and that other employee changed to working in sales. The employer's wife was pregnant at this time and L was out on sick leave, therefore they were short staffed at the time.

The claimant submitted a document in evidence, which was headed as a "To-Do-List". She told the Tribunal that the owner came to her desk to her one Monday morning (1st October, 2007) and asked her to sign this document, and he "stood over" her. The employer wanted her to do the work within two days and she thought that this was completely unreasonable. Her predecessor L, who could advise her, was out sick and she could not possibly do the work in two days.

The claimant explained that the day that her employer gave her the "To-Do-List" dated 01st October 2007; she told him that it was not possible to do the tasks by the following day. He extended the time by a week

The claimant also indicated that, from the time that she told her employer that she was pregnant he started to put pressure on her and her workload doubled. She referred in particular to being required to do sales returns, to answer the phone, to order diesel and stationary in addition to her own work and it was impossible for her to get her own work done.

On 09th October the claimant had been in work and went to the bank and had just arrived back from the bank. Her employer “banged” a letter on the table and told her to sign the letter. She asked him if it was a warning letter but he just asked her to sign it. She was very upset at his conduct. She told him that she did not feel well and left the premises and visited her doctor with whom she had a previously arranged pregnancy related appointment. She did not know what was in the letter and she had not seen it again until the hearing. She submitted a medical certificate (for 10 day’s pregnancy related illness). While she was out she phoned her employer twice to advise him of her intended date of return to work. She left a message on his mobile for him to ring her and she also phoned L to say why she was not at work and asked her to tell her employer. She made every effort to contact her employer but got no response. Her employer finally returned her call on 22nd October; he told her that he could not work with her anymore. He told her that he did not see the point in bringing her from her home in Tinahealy to Bunclody. She was upset and explained to him that she was upset when he ordered her to sign the letter and stood over her. She denied that her claim of unfair dismissal was in any way related to maternity benefit.

The Tribunal heard evidence from the claimant’s husband. He told the Tribunal that he was on his way home from work and he got a phone call from his wife’s doctor who asked him to let her employer know that she was not well due to pregnancy. He rang her employer and the owner returned his call. Her employer asked if she was ok and he said that she was. The employer asked about the baby and he told him that the baby was ok. He had not been speaking to his wife prior to ringing the respondent.

Respondent’s case:

The Tribunal heard evidence from the employer. He told the Tribunal that he felt that the claimant was unhappy in her job from a conversation he had with her sometime after she arrived, although she had indicated the next morning that she was happy. He felt her unhappiness was due to being asked by sales staff to do extra work.

The employer was asked if the claimant had an increase in duties and said that she had not. He explained that she was asked from time to time to answer the phones but this was not frequent and was only when they were busy. The task of contacting the creditors was not really a new task and the stationary and other matters mentioned were not substantive.

The respondent said that he gave the claimant the “To-Do-List” because he needed to have his accounts system done in a manner, which would ensure that he knew how much he owed at the end of each month. He indicated that elements of the accounts problem predated the arrival of the claimant on the job. The claimant knew

that “this was an ongoing project on which progress had to be made” and she had made some progress. He agreed to extend the time to do the tasks but he did not agree that they should have taken so much extra time.

The employer gave the employee a letter on 09th October. She arrived back from the bank and was taking off her coat and he gave her the letter and asked her to read it. He put the letter on her desk and asked her to read it and then sign the letter. He did not slam the letter. He may have been curt but was in no way aggressive. She asked him if it was a written warning and he told her “no, but”; however he did not get a chance to finish his sentence as she told him that she did not need “to put up with this” and that she felt “f***** terrible”; she was crying and then she left. He called her but she would not return. He was shocked, as he had never seen the claimant behave like this before. He felt that she did not have respect for him in front of other staff. He took it that she had left her job.

The employer told the Tribunal that the first he heard that she had a prior appointment with her doctor was today (day of hearing). The claimant’s husband did phone him to say she had gone to the doctor and he asked if she was ok.

From the time that the claimant told him she was pregnant, he could not think of anything that changed. The sales returns task was not new. Obtaining credit from suppliers was not a new task it was part of her role. The claimant knew that they were working on improving their accounts. He had asked her to answer the telephone on occasion when other staff were out.

The employer was asked about medical certificates. He explained that a medical cert was left into the shop on the afternoon of the 09th October, the day that the claimant stormed out. He explained that she told him when she walked out that she “felt f***** terrible” she had not told him that she had an appointment. Any other time that claimant felt unwell due to pregnancy she would ask to go home and he would tell her that she could and it was not a problem. It would not have been a problem on that day either.

Regarding the claimant’s contract the employer accepted in cross-examination that it was most likely that she did not receive a contract. All of the other employees had contracts but he was “not the quickest in getting them (the contracts) out”.

The employer answered questions of clarification from the Tribunal:

The employer said that he had no explanation why he had not spoken to the claimant until some considerable time after the 09th October. He wrote to her on 22nd October to confirm that she was not employed. When he spoke to her she told him that she was going to return to work on a certain date he told her that she was not and that he could not work with her. The letter had been written before the conversation. He felt that he should have written the letter on 09th October but he did not do so; he signed the letter on 17th October and had it posted following the phone call on the 22nd October. Notwithstanding the terms of the letter, which refers to her employment being “terminated from 9th October and two week’s holiday pay being paid” he regarded the substance of the situation as being that she had walked

out rather than terminating her employment. He also indicated, in response to a question from the Tribunal about the claimant's right of access to grievance or disciplinary procedures that this did not arise as the claimant had resigned.

Determination:

An employee alleging dismissal due to pregnancy can take a case either to the Employment Appeals Tribunal under the Unfair Dismissals Acts, 1977 as amended or to the Labour Court (now on appeal from the Equality Tribunal) under the Employment Equality Act, 1998 as amended. The claimant in this case has chosen to proceed under the Unfair Dismissals legislation. Section 6(f) of the Unfair Dismissals Act, 1977 as amended deems a dismissal to be unfair if it is on the grounds of "pregnancy, attendance at ante-natal classes, giving birth or breast-feeding or matters connected therewith". The claimant has less than 52 week's continuous service and is seeking to rely on the special eligibility rules set out in section 6 (2A) of the 1977 Act inserted by section 38(5) of the Maternity Protection Act, 1994.

The claimant is also seeking relief under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

The representative for the claimant has brought the attention of the Tribunal to the approach adopted in particular by the Labour Court in *Donna Millet (claimant) v. Charles Shinkwin (respondent)*; EDD044/03 /33 [2004] 15 E.L.R. 319 and in *Harco Investments Ltd and Loraine O Sullivan*; ED/03/27 Determination No 0316 in respect of cases the Employment Equality Act, 1988.

Protection from unfair dismissal during pregnancy is accorded under both European (in particular EC Council Directive 92/85/EEC) and domestic law. The approach of the domestic and of the European Court of Justice in interpreting the relevant legislation confirms the extent to which a very high degree of protection is given to pregnant employees in situations where the employer is aware that the employee is pregnant. Tribunal cases establish that the employee must discharge the onus of proof, on the balance of probabilities, that she was dismissed by reason of pregnancy and it is for the employer to establish that there were substantial grounds for dismissal not related to the pregnancy. If, on the facts, a *prima facie* case is established by the employee the burden of proof shifts to the employer to prove that the grounds were not pregnancy related.

Recourse to the Labour Court under the Employment Equality Act, 1988 (now on appeal from the Equality Tribunal) is the more usual avenue followed in pregnancy related dismissal cases (the remedies under the Employment Equality legislation are more extensive than under the Unfair Dismissals code) and, as referenced by Anthony Kerr in *Irish Employment Law*, the Labour Court, in exercising its' jurisdiction, has summarised the position as being that "no employee can be dismissed while they are pregnant unless there are exceptional circumstances unconnected to the pregnancy

and these exceptional circumstances are notified to the employee in writing". The Labour Court approach is influenced in particular by the EC Council Directive 9/85/EEC (The Pregnancy Directive); by EC Council Directive 97/90 and the related EU (Burden of Proof in Gender Discrimination Cases) Regulations, 2001 and by the relevant decisions of the European Court. See, for example, Assico Assembly Ltd –and- Brenda Corcoran ED/02/43; Determination No EED033.

The Tribunal has very carefully considered the evidence. While the respondent did accommodate the claimant in relation to her initial attendance at her doctor there are other aspects which give rise to serious questions about the respondent's actions in a situation in which he knew that the claimant was pregnant.

The Tribunal accepts the evidence of the claimant that the approach adopted by the respondent in relation to the "To Do" list on 1st October was overbearing and represented a substantial change in the manner in which the respondent had dealt with her on work related issues prior to her becoming pregnant and his becoming aware of this. There were problems with the accounts reconciliation predating the engagement of the claimant but there was no evidence of these having been addressed in a similar manner. There was, prior to this event, no evidence of any problems with the claimant's work.

The Tribunal accepts the evidence of the claimant that there was some element of official increase in her work since she became pregnant.

The Tribunal accepts the evidence of the claimant that the manner in which the respondent approached her in relation to the letter of 9th October was also overbearing and caused her stress and upset. In the ordinary course of industrial relations, not to mention when an employee is pregnant, it would have been reasonable to expect that an employer who wished to raise performance related issues would not, in effect, stand over the employee and abruptly present a letter to the employee with a request to sign it.

The claimant left the premises on 9th October because she felt terrible - in substance, she felt ill. The respondent indicated that a prime concern of his was that she had undermined his authority in front of other staff. On cross examination it became clear, however, that the brief oral exchange between the parties took place in private and that the public element only happened when the respondent followed her and asked her to return after she had started to leave.

The Tribunal does not accept the contention of the respondent that the claimant resigned from her employment by her walking out on the morning of 9th October. The Tribunal's conclusion in this regard is supported by the evidence, not contested by the respondent, that the claimant had a pre arranged pregnancy related doctor's appointment; that she went from work to that appointment and that her absence from work on that and subsequent days was medically certified pregnancy related. The respondent in cross examination accepted that he knew, from a phone call from the claimant's husband on the afternoon of the 9th

October, that her absence was pregnancy related. The Tribunal is satisfied that her walking out was because she felt ill and, on the medical opinion, that this, in the terms of the Unfair Dismissals Act, 1977 as amended, was in relation to a matter

connected with her pregnancy. It is also clear to the Tribunal that, at that stage, the respondent must have known that there was no intention of abandonment of her job by the claimant. At no stage did the claimant give any indication that she was resigning and her repeated efforts to contact the respondent by telephone (including leaving a message on his mobile) were directed towards arrangements for her return following her 10 day pregnancy related certified sick leave.

It is clear to the Tribunal that the first intimation that the claimant got of her employment terminating was in the telephone call from the respondent on 22nd October. The respondent's indication that he could no longer work with her because of the events of 9th October in effect constituted a termination of employment with immediate effect. The termination of her employment by the respondent rather than her having in any way resigned is substantiated by the letter of 17th October which the respondent says was signed on 23rd October which he says he gave to a staff member to post.

The Tribunal is satisfied on the evidence that the grounds for the claimant's dismissal were in no sense substantial or exceptional not related to the claimant's pregnancy. A brief private altercation, precipitated by the respondent's behaviour, followed by a situation in which the pregnant claimant, feeling ill, left to go to a doctor's appointment are not grounds that remotely justify summary dismissal. To make matters worse, it is clear from the evidence that the respondent was unwilling to listen on 22nd October to any explanation of events from the claimant and normal disciplinary procedure were not followed. The Tribunal further accepts that the claimant did not receive any formal letter of dismissal from the respondent outlining any duly substantiated grounds for her dismissal.

The Tribunal considers that the facts as established in evidence by the claimant raised a prima facie case, on the balance of probabilities, of pregnancy related dismissal and that the respondent in the manner of dismissing the claimant clearly did not establish that the dismissal was on a substantial grounds not related to pregnancy. The Tribunal as outlined in this determination considers that the opposite applies. The Tribunal is also satisfied that the claimant is entitled to rely on the special eligibility rules set out in section 6 (2A) of the 1977 Act inserted by section 38(5) of the Maternity Protection Act, 1994.

The Tribunal, therefore, determines that the dismissal of the claimant is an unfair dismissal under the terms of Unfair Dismissals Acts, 1977 to 2001. The Tribunal considers that compensation is the appropriate remedy and determines that this should be in the amount of € 8, 500.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 also succeeds and the Tribunal determines that an amount of €480.7 is due to the claimant in this regard.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)