

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

– *claimant*

CASE NO.

UD651/2008

against

Employer - *respondent*

and

Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. J. Hennessy
Mr. G. Whyte

heard this claim at Kilkenny on 8th January 2009

Representation:

Claimant(s): Mr. Gerald Meaney, Solicitor, 17A William Street, Kilkenny

Respondent(s): In person

The determination of the Tribunal was as follows:-

Dismissal was in dispute in this case.

Claimant's case:

The respondent repairs and makes horse rugs for the equestrian sector. The claimant commenced employment with the respondent around September 2004. Initially, she was repairing horse rugs and later moved on to making the rugs. She worked two and a half days per week at the start but around March 2005, at her request, she became a full-time employee of the respondent. She worked from 9.30am until 6.00pm, five days per week. Around five people, including the owner (OB) and his wife (WO) worked in the business but this number varied over the years. WO did not do full-time hours. The claimant took her instructions from another employee (AE), on whom she looked as her boss although never so appointed. In the early years in the employment, the claimant was responsible for her own affairs and had her own accountant but in October 2007, she was put on the respondent's books.

In February 2008, the claimant discovered that she was pregnant. She immediately informed the owner OB because some time prior to this, she had slipped outside and wanted to avoid any further falls. From then on, the claimant felt that the owner had a problem with her. She felt he got angry with her over things. On returning to work following three weeks' sick leave, OB asked who was going to pay her maternity benefit and she replied that social welfare would. He also enquired as to the length of her maternity leave and when she told him that it would be for three months, he replied, "That long!" She told him her due date and that she would be going on maternity leave two weeks prior to that. Her baby was born in October.

While on holiday in France on the first week of March 2008, the claimant had a threatened miscarriage. On her return to Ireland, she attended her doctor and the hospital and was absent on sick leave for a few weeks. On the Friday of the last week, she sent a text to OB telling him she would return to work the following week. She had a doctor's appointment on the Monday and so returned to work on the Tuesday, 1 April. On her return she found someone, whom she had never before met, (STG) sitting at her desk. He was from Poland and had commenced employment while she had been on holidays. When STG saw her, he got up and told her that she could sit at the desk. OB appeared surprised to see her back and told her to pack rugs.

When she had finished packing the rugs, the claimant went back to making rugs, which meant that she had to cut and prepare same. When she told OB that she needed more fabric to continue the job, he became angry and went looking for more fabric. He had never gone on like that before. He told the claimant that from the information he had received from social welfare, she was not entitled to maternity benefit because she did not have enough stamps paid. She was already aware of this.

STG remained at the claimant's desk on Wednesday and Thursday. The claimant stood all day Wednesday while working. WO had not spoken to her. She felt that both OB and WO were reacting differently to her. AE told the claimant to watch her step. The claimant was upset that WO was angry with her. She felt that OB and WO did not want her there so that day she left work a bit early.

On the Thursday, there was an incident about a record book. The claimant maintained the record book upstairs and the girls kept another downstairs. The claimant sometimes needed to use the downstairs record book. On Tuesday, the claimant had given WO the downstairs record book and it went missing, as sometimes happens. On Thursday, she sent her sister to ask WO if she had found the book and WO was giving out about looking for the book, which was strange. When OB later asked about the book, the claimant told him that she did not have it and was recording the work on pieces of paper. OB seemed really annoyed with her and he stormed off. Then WO stormed upstairs giving out and kept going on about the book and asking why couldn't she (the claimant) do this and that. The claimant told her that everything was done. WO would not accept what she was telling her and was becoming angrier and angrier. Then WO asked her in abusive terms what was her problem. The claimant replied that it was she who had a problem and that she was trying to get rid of them (AE, her sister and herself). The claimant then got her coat and left. WO told her to come back. Her sister left with her. AE had walked out on an earlier occasion and had been asked to come back.

There was an informal atmosphere in the workplace. The claimant loved working there and would have been happy to continue in her employment if things had been sorted. OB was not a bad employer and he had sent her a lovely text on her return from holidays in France. The claimant was due to be paid on the Friday but could not approach the respondent. Her husband told her to calm

down and he would go in to find out what was going on and to collect her pay. She received her P45 form some weeks later when her solicitor asked for it. No one contacted her or told her that her job was still available for her. She knew that the respondent did not want her there. STG had replaced her. Subsequently, she returned to the status of self-employed in order to have sufficient social welfare stamps to entitle her to maternity benefit. She had been at work for the full day on the Tuesday but admitted to leaving early on Wednesday and Thursday. She never had a problem with WO before and she had given her a pay increase before she married. However, she knew that WO was angry with her and did not want her because on the Tuesday morning when she went to the kitchen to make tea, WO was chatting to AE and ignored her and did not ask how she was or about her pregnancy. OB had never said to her that she was not to do work because of her pregnancy.

On being asked by the Tribunal's for specific examples of the respondent's change in attitude towards her, the claimant stated that she felt that they got annoyed with her for no reason. It was the way OB asked her who was going to pay for her maternity leave. He did not normally go on like that. While OB had indicated in his letter of reply to the solicitor's of 11 April 2008 that her job was still available to her, she did not consider returning to work because she thought that they did not want her there. She felt that that there was no point in asking the respondent if he had a problem with her being pregnant. When she returned to work, she felt that OB treated her differently when giving her wages. OB could not be approached about anything because he always got angry and walked away. When WO became angry with her, the claimant felt that she could no longer approach either of them. The claimant confirmed that there had been no problems with OB prior to her becoming pregnant.

The claimant's husband (CH) told the Tribunal that the claimant had come home from work upset on Tuesday and Wednesday and was very upset on the Thursday after a row with WO. She told him that STG had replaced her at work and that the owner and his wife were doing everything to make her life miserable. He advised her not to go to work on Friday and that he would go in and talk to OB. He met OB on the Friday at 10.30am. The meeting was calm but there was a certain amount of tension. Their conversation lasted five minutes and was within earshot of AE. He told OB that he was there to collect the claimant's and her sister's wages because they would not be coming in to work. When he asked OB if she still had a job, he told him that he was sorting their money and that the claimant's P45 form would be sent out to her. When he asked OB why he was sacking the claimant, he replied in words to the effect that he could not run a business with staff taking time off work to be pregnant and have babies. CH denied that he had been aggressive during the meeting.

AE told the Tribunal that she had initially worked part-time on a self-employed basis with the respondent and had other sources of income. She was satisfied with this because she liked the job. She had been self-employed because the respondent did not want to pay PRSI. She walked out of the job but WO had come to see her and said if she would like the job back, it was there for her. AE had gone back because she had liked working there but on condition that she would be put on the books. The atmosphere was "iffy" and it was as if "people were walking on eggshells". Things got worse after the claimant announced that she was pregnant. If OB or WO were not around, she (AE) suggested to the claimant (rather than instructed her) what to do. Both got on well and worked well together 98% of the time. If they felt that someone was on the warpath, they would warn each other. On the Thursday morning when she was about to leave the kitchen, WO asked her to stay and later over a cup of coffee WO said, "That's got rid of them". At the time, she did not know what had been going on or what the statement meant. She confirmed hearing OB say to the CH at the end of their conversation on the Friday morning that he could not be

expected to run a business when people are away for four weeks. When OB had said to her that he would not be paying maternity benefit, she told him that the State would be paying it. He had not seemed to be aware that the State would pay maternity benefit.

The claimant's sister had been employed by the respondent for a few weeks doing odd bits of work. When the claimant was absent, she told OB that the claimant was returning to work. When she asked WO about the rug book on the Thursday morning, WO told her that it was ridiculous to keep looking for it. Later WO came upstairs and asked what the problem was. The claimant replied that there was no problem and that she was trying to get back to doing her work. WO continued to ask what the problem was and kept saying that it was stupid to be looking for the book and for them to get on with their work. The claimant was trying to calm the situation. The witness was not really listening but thought that WO had gone on for around ten minutes. The claimant walked out and the witness left with her. She left her employment with the respondent of her own volition.

Respondent's case:

The respondent's business is small. He had known the claimant's family for several years. He had employed the claimant's brother on a part-time basis making rugs and there had been no problems with him, he was a great lad. He had also employed the claimant's father for some time at the same job but he found that this did not suit him as he preferred working outdoors. The claimant's father told him that the claimant was returning from Dublin and asked if there was a job for her. She commenced employment with the respondent on a part-time basis in September 2004. She had no set duties with the respondent and they worked around her personal interests and commitments.

In February, the claimant told OB that she was pregnant and he had no problem with it. He found out his obligations to a pregnant employee. She asked to have her hours reduced to two days per week and this was not a problem. The claimant became unwell while away on a week's holidays in early March and on her return home, she sent him a text saying she would be out. After a few weeks, the claimant sent him a text on a Friday, informing him that she would be back to work the following week. At lunchtime on the Tuesday, she had told him that she was unwell and went home. He did not have a problem with her leaving but he did not know what was happening or if she would be returning. On her second day back, the claimant and her sister were late for work by a half to three quarters of an hour and this annoyed him because there was lots of work to be done. Then she and her sister left twenty-five minutes later. After that, they had no contact from her and she never returned. It did not suit him at all that she left because there was lots of work to be done.

While the claimant was an unreliable timekeeper, her work was good and she was good to have around the place. OB denied that the claimant had spent one of her days standing; work is a fluid situation involving different tasks. Because of her pregnancy, he was not going to let her do any heavy lifting and the rugs that she was working on were sterile and would not be a threat to her health. He did not think that he got annoyed with the claimant. The only discussion he had with the claimant was when she told him that she was pregnant and this had been in February.

On the Thursday or Friday of that week, the claimant's husband came to collect their wages. OB calculated what was owed and gave them to him. OB did not mention the claimant's P45 form to him. The first mention of the P45 form was in the claimant's solicitor's letter of 11 April. He said to her husband that it was hard to employ staff who do not come to work. OB was upset because once again he was very short of staff. CH had harangued him during their meeting.

OB had not set out to employ STG. He had come from Poland to take up a job in Ireland but it fell

through when he arrived. He had no money and was staying with a man who worked for OB's wife. OB and his wife looked after him for a while. While he had previously worked with horses, he had not worked with a sewing machine but was willing to learn. He gave him some work. He was not a replacement for the claimant. In cross-examination, OB agreed that it suited him to employ STG as there was plenty work to be done; he had work for both the claimant and STG. If the claimant had waited, STG's presence would have been explained to her but neither she nor her sister were there long enough on that last day to give them an explanation; they had worked only about five hours together. Had the claimant returned to work, she would have worked alongside STG as her sister had. AE had left in August 2007 but WO asked her to return. She was put on the respondent's books in October 2007. Prior to that time she had been self-employed; she had wanted it that way. OB did not have an attitude about paying tax.

In his reply to the solicitor's letter of 11 April 2008, OB indicated that the claimant's job was still available for her.

According to WO, she had known that the rug book was missing and believed that she had been the one who had mislaid it. When the claimant's sister had come looking for it, she told her that no more time was to be spent looking for it and to get on with the work. She did not want any more time wasted looking for the book because there was lots of work to be done. WO then went upstairs and while she could not remember what she had said, it was to the effect that she wanted everyone to get on with the work because so many rugs had to be repaired. She could not remember exactly how the claimant had responded but as far as she could recall, the claimant tore into her and within seconds both the claimant and her sister had left. She had expected the claimant would return to discuss the problem with her. WO felt that she is approachable if someone had a problem. She had considered whether to make contact with the claimant but had not done so.

WO had been instrumental in securing the prospective job for STG. When his job offer fell through, he accompanied his friend (an employee of WO) to work every day. STG was desperate to work and had previously worked with horses. WO was aware that they were under pressure in the saddlery and she asked him if he could sew rugs and do machine work. While he had no experience with a sewing machine, he was willing to give it a try. It was a case of his landing on their doorstep. They had so much work to be done and no one to do it. However, STG had not come in and taken over the claimant's job.

WO had no recollection of saying to AE that she was delighted to be rid of the claimant. She doubted if she said such a thing. She had never had a problem with the claimant and she had hoped that she would return.

As regards the claimant's evidence that she had ignored her and never asked her about her pregnancy on her first day back, WO replied that she could be unpleasant if employees were not in for work. If she had something to say to someone, she would say it. However, she and the claimant had always got on well and she could not understand why the claimant failed to approach her if she had a problem.

Determination:

Dismissal was in dispute in this case. It was the claimant's case that on 4 April, the respondent had indicated to her husband that her P45 form would be sent to her. It was the respondent's case that the claimant had walked out of her job and had not returned.

The evidence on behalf of the claimant is that her husband's conversation with the respondent on or around 4 April lasted about five minutes and was within earshot of AE. AE could not offer any evidence on the P45 issue. In the event the claimant received her P45 at her solicitor's request some weeks subsequent to the termination of her contract of employment. Three different versions of the respondent's reply to the alleged question as to why he was sacking the claimant were given in evidence. Having considered these the Tribunal is not satisfied that the respondent indicated to the claimant's husband that her employment was being terminated. Accordingly, the Tribunal finds that the claimant terminated her contract of employment on or around 3 April by leaving her place of employment and not returning.

The Tribunal next considered whether the claimant's resignation constituted a constructive dismissal. Having informed the respondent of her pregnancy the claimant contended that the respondent's attitude towards her changed, that he and his wife wanted her to leave and that the respondent had taken on STG to replace her. Dealing with the latter issue first, the Tribunal accepts the respondent's evidence on how STG came to be employed by the respondent and is satisfied that he was not taken on to replace the claimant. While the respondent did not explain his presence in the workplace to the claimant on her return to work she had never articulated any concern on this matter to the respondent. The claimant did not adduce evidence of any incidents or incident, which could justify her decision to terminate her employment. Accordingly the claimant failed to discharge the onus on her under the Unfair Dismissals Acts 1977 to 2007 to show that it was reasonable for her in the circumstances to terminate the contract of employment. The claim under the Acts fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)