EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF: CASE NO.

Employee UD763/2008
P2/2008

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

Employee -v-
Employer

under

MATERNITY PROTECTION ACT, 1994
UNFAIR DISMISSALS ACTS, 1977 TO 2003

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr D. Hegarty
Ms H. Kelleher

heard this appeal at Cork on 10th March 2009

Representation:

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Appellant :
Mr Edmond Smith, Independent Workers Union, 55 North Main Street, Cork

Respondent :
Anne Tait & Co., Solicitors, 7 St. Patrick's Terrace, Douglas West, Co. Cork

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by the employee against the decision of the Rights Commissioner dated 25th June 2008 ref: r-059432-ud-07/EH under the Unfair Dismissals Acts 1977 to 2001 and r-059434-mp-07/EH under the Maternity Protection Act 1994.

Appellant's case:

The claimant commenced employment with the respondent on 17 October 2007 and was dismissed on 16 November 2007. It was the claimant's case that she was dismissed on grounds of pregnancy and accordingly she was not required to have one year's continuous employment to bring a claim under the Unfair Dismissals Acts.

Following a successful interview the appellant commenced employment with the respondent on 17 th October 2007. The respondent told her that her trial period was to last up until Christmas. She had never represented herself to be a qualified dental nurse to the respondent. She had previously worked for another dentist largely as a receptionist. At her interview the respondent commented onher IT experience and told her that he was planning to put patients' records on electronic formatand was hoping that she would set this up for him. That was the main reason he was prepared toemploy her. She felt 90% certain that she would be taken on and two friends with whom she discussed the interview confirmed her optimism about getting the job. On Monday 12th November2007 she told the respondent that she was pregnant and he told her not to worry, to take care ofherself and that there may be some legislation regarding the use of x-rays which he would attend to.The following Friday 16th November he told her he no longer required her services.

In her former position in a dental practice she made appointments, transferred files to electronic format and went into the surgery to soothe patients having extractions but she usually worked at the front desk as a receptionist. She understood that the respondent wanted her in the surgery and that he would train her in but that once he had the software package she would be largely taken up doing the electronic transfers. She was happy to learn the surgery duties from the respondent and part of the learning process was by observing in the surgery. The appellant agreed that she had asked the respondent to complete a form regarding eligibility for a medical card but could not recall his saying to her he was unable to sign it until he decided if he was going to keep her on; it was her recollection that he had told her that the lady who worked in the mornings would sort it. She believed her dismissal was on pregnancy grounds because she had no reason to believe that the respondent was unhappy with her work. Her baby was born on 30th January but her due date was 12th February 2008. At the interview the appellant did not disclose she was pregnant because she believed that it would prejudice her chances of employment. She was aware that a dental nurse, a long-term employee of the respondent, had a number of pregnancies during her employment with the respondent. The claimant had not told the dental nurse that she was pregnant. She believed that transferring patients' records to electronic format could take years.

The appellant's representative's evidence was that the appellant sought his advice on 12 th November 2007 as to whether she should tell her employer about her pregnancy. He advised her that she should be up front with him. He could not tell that the appellant was pregnant at that time.

Respondent's case:

The respondent dental surgeon was looking for someone to replace an employee returning to Poland. He advertised for a dental secretary/nurse. He interviewed a number of applicants one afternoon and, as he generally does, he made some notes on the application forms. In reply to hisquestion about her knowledge and skills of dental practice he had made a contemporaneous notethat the appellant told him that she was "fully aware of all procedures required". According to theappellant's CV she had nine months experience in another dental practice with a well-known dentist who is a very good teacher. With that amount of experience

she should have considerableknowledge and it was on this basis that he had employed the appellant. He told the appellant that heruns a complex dental practice where the vast majority of the surgical procedures are carried outunder sedation/anaesthetic and that it was essential that she be fully aware of what he does, of whatis happening to the patient and of what she is to do. The appellant was also expected to make appointments. She would not be involved in the transfer to electronic files. The respondent expected the appellant would be able to assist him in the surgery. Another employee, who has beenwith him 24 years, is in charge of the paperwork and she would do any transfer of records to theelectronic format; that employee has nothing to do with the surgery. The practice has old-fashionedcharts.

He offered the appellant a part-time position for three to five hours per day on a four-weeks trial basis after which he would re-assess her position. The respondent is involved in cranial facial pain and every year he spends the last week in November and the first week in December in America in relation to this work and this was one of his reasons for opting for a four week trial period. After the second or third week he realised the appellant had hardly any dental surgery skills and felt quite exposed when depending on her in the surgery. However, he did not let her go at that stage because he had agreed to give her a four-week trial period.

At the end of the fourth week he told the appellant she did not have the necessary skills and offered her a reference. Having been in practice for around twenty-five years and seeing around thirty patients each day he is aware of peoples' health and at the interview he was fully aware that theappellant was pregnant but the law prohibits any discussion on pregnancy at interviews. When taking X-rays he followed the radiological guidelines and ensured that all employees stood behindthe demarcation area. His secretary who has been working in the practice for twenty-four years hadthree pregnancies during that time. Two other employees also had pregnancies and returned to workafter the births both left around two years later for personal reasons. Another employee was sevenmonths pregnant as at the date of this hearing. He did not let the appellant go because of herpregnancy. Once she told him of her pregnancy he ensured she was not in contact with certainchemicals. He had some negative feedback on the appellant from a few patients and he felt shewould do better elsewhere.

He kept the appellant for the agreed period and she worked in the presence of his senior dental nurse. He made a decision not to do any complex work while he was depending on the appellant toassist in the surgery. He did not agree that the appellant's trial period was to run until Christmas. About 75% to 80% of the appellant's work was related to her dental nursing duties and the remainder was to be spent on accounts and appointments.

A dental nurse, who has been employed by the respondent for thirteen and a half years, told the Tribunal that she has a two-year old son and was thirty weeks pregnant at the time of the Tribunal hearing. The respondent never had any problems about her pregnancies or when she needed time off for appointments. He told her that the appellant was commencing in the practice on a four-week trial period, that she would be in the surgery observing and that she would then take over from the witness when she finished work at 4.45pm. She could see the appellant did not have the experience however she did not say this to her or to the respondent. She was not aware that the appellant was pregnant. She assumed the appellant had experience and knew what she was doing but she did not. Witness sometimes makes appointments. Witness was due to go on maternity leave and would be returning to work at the end of that period having taken her full maternity leave.

Determination:

The question the Tribunal has to decide is whether the claimant was dismissed because she was pregnant or because she lacked the requisite dental skills and knowledge required of a dental nurse. To decide this question the Tribunal first considered the disputed issue as to the duration of the claimant's trial period. It found the evidence of the respondent's dental nurse reliable and helpful in this matter. Accordingly, the Tribunal is satisfied that the claimant was on a four-week trial period.

The uncontroverted evidence before the Tribunal is that the advertised position was for a dental secretary/nurse. The dental nurse corroborated the respondent's evidence that the claimant did not have the requisite experience/knowledge or skills. In the circumstances, the Tribunal is satisfied that the respondent terminated the claimant's employment at the end of the said four-week trial period due to her lack of the requisite skills and experience and not because she was pregnant. Accordingly, the appeals under the Unfair Dismissals Acts 1977 to 2003 and the Maternity Protection of Employees Act 1994 are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)