

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
Employee - appellant

CASE NO.
UD1423/2008

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

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly BL

Members: Mr. T.P. Flood
Mr. F. Barry

heard this appeal in Dublin on 16 March 2009

Representation:

Appellant(s) :

Mr. Blazej Nowak, Polish Consultancy Enterprise, 19 Talbot
Street, Dublin 1

Respondent(s) :

No legal representation

This case come to the Tribunal as an appeal against Rights Commissioner Recommendation
r-060664-ud-08/JT.

The determination of the Tribunal was as follows:-

Giving sworn testimony through an interpreter, the appellant said that she commenced employment with the respondent in late November 2007 but that on a day off in late December of that year she fainted on a street and an ambulance was called. The next day, she was due to go to work but felt weak whereupon her husband rang the respondent to say that she could not go to work due to illness. The respondent's manager (hereafter referred to as D) had no difficulty with this.

The appellant went to a doctor who said that she was pregnant. She got a medical certificate for two days and delivered it to the respondent on that same day (21 December 2007). The note said that the appellant was pregnant. (The appellant did not have a copy for the Tribunal.) D asked the claimant what she was doing and allegedly said that the appellant was behaving like an "a**hole".

D asked if the appellant wanted to go to work. The appellant said yes but D said that the appellant did not have to go to work any more because she had got herself “fired” and that she would not get a P45 or her wages because this was a punishment for how she had behaved.

The Tribunal was now told that the appellant had brought a claim for unpaid wages and holidays to a rights commissioner, had been successful and had not received the sum awarded. The appellant said that, not having received a P45, she had to go to the tax office. She sought new work but could not obtain it. She had no contract with the respondent. She got “fired” before she could sign a contract.

The appellant told the Tribunal that she had returned her uniform to D. She said that when the ambulance had been called she had been “checked” and told to go to her doctor who had duly done tests before giving her a medical certificate for two days. The appellant said to the Tribunal that she could not understand how she could have been said to have behaved like (as above) and that getting pregnant was not something bad. She had said to D that she had felt really sick and fainted whereupon D had looked at the medical certificate and told the appellant not to come to work any more because she had been “fired”. The appellant told the Tribunal that the respondent had been there but that she did not see him. Rather, when she heard from D that she did not have to go to work any more she just left. Just the two of them had been present at that conversation.

Giving sworn testimony through the interpreter, the appellant’s husband (hereafter referred to as S) told the Tribunal that he had taken the appellant to her workplace and had waited outside when she had gone to give in her medical certificate. However, after the appellant had been there for a few minutes, she said that she had been “fired” but that she would not be given back-wages or a P45 because D had said that the appellant had behaved like (as above) and that she did not want people like the appellant around the place.

S went to D to ask for the appellant’s wages and to ask what was happening. D said that she did not want to talk to him because he did not work for her. S was told that the claimant had behaved like (as above). He said that he would take it to court. D said that she was not afraid because the respondent had “contacts”.

A few days later, S went with the appellant to the respondent’s shop for the return of the appellant’s uniform. S “was in the shop but did not hear the conversation”. He was standing a few metres away when the uniform was given to D. S and the appellant “wanted to buy coffee in the shop”. D said not to serve them and they left the shop.

Regarding the appellant’s fainting in the street, S said that he had been there at the time and that, within a few minutes, the ambulance arrived, did a few tests and said that the appellant was to go to a gynaecologist for a pregnancy test. When the ambulance left they drove home getting a pregnancy test on the way.

S told the Tribunal that he had twice rung the respondent’s shop after the appellant’s uniform had been returned but that he had not known to whom he had spoken. He asked about the appellant’s wages and the lady said that she did not know. He thought that this could have been just after New Year’s Day.

Offered an opportunity to cross-examine S, the respondent only said: "If I was sacked I'd not buy coffee in the shop. That's just an observation."

Giving sworn testimony, D (the abovementioned manager for the respondent and an English-speaking compatriot of the appellant) said that she had not dismissed the appellant and that she had not received any medical certificate from her. D acknowledged that she had met the appellant in a hallway, that the appellant had said that she was not feeling well and that she could not work because her back was hurting her. It was a "standing job". The appellant was out for two days. S rang to say that the appellant was sick and D said to tell her when the appellant was "o.k."

D told the Tribunal that she had asked the appellant to work till the end of the week but that the appellant had declined saying that she had "big pain" in her back and that she was leaving. D told the appellant that, if she was leaving, she was to bring back her uniform and the key to her locker and that D would give the appellant her wages although it would take a week-and-a-half. D could not speak to the appellant after that. S (who was then the appellant's boyfriend rather than husband) came after about ten days for her wages and P45. D told him that he did not work there and that the appellant had to come with her uniform and locker-key.

Questioned by the Tribunal, D acknowledged that the appellant had not received her P45 but said that it had been "ready-to-go" and that the appellant had not come to collect it with "her last wages".

Asked if the respondent had a policy about pregnancy, D replied that there had been "three girls in the shop who were pregnant" and that "we never had a problem". D said that these three had been pregnant before the appellant had worked in the store and added: "I don't have a problem helping pregnant women." D stated that two women had been pregnant before the appellant was pregnant.

Asked if anyone had been dismissed in late December 2007, D replied that this had been a very busy time when "we needed people to work". D added that she had been "very happy" with the appellant, that the appellant had been very "smiley" and that she had been surprised when the appellant had said that she was going to leave. D had had no complaint or conflict regarding the appellant. D told the Tribunal that she was surprised when the appellant (a part-time employee) had said that she was leaving on account of "not feeling well because of her back".

D told the Tribunal: "Nothing can be done if somebody wants to leave." She told the respondent that the appellant was leaving because she had not been feeling well.

The respondent acknowledged to the Tribunal that part-time employees did not get sick pay.

D admitted to the Tribunal that in late December 2007 she had not known that the appellant was pregnant but that she had found out when the respondent had learned of a claim to a Rights Commissioner.

When it was put to D that she had said that the appellant and S were not to be served coffee in the respondent's shop D replied that she had not got the appellant's uniform. The Tribunal was told that this was the first that the respondent had heard of getting the appellant's uniform back and that this could not be checked on cctv footage because the respondent only kept such footage for one month.

D acknowledged to the Tribunal that S had rung her to say that the appellant had not been feeling

well.

Under cross-examination, D admitted that she had said that she would not talk to S because he did not work in the shop. When it was put to her that the appellant and S said that they brought back the uniform D replied: "I say they didn't."

Asked why 28 December 2007 had been given as the appellant's date of leaving, D replied: "We pay a back week."

Determination:

Having considered the evidence adduced, the Tribunal was not satisfied that the appellant had discharged the onus that was on her to establish that a dismissal had taken place and, therefore, upholding Rights Commissioner Recommendation r-060664-ud-08/JT, the Tribunal finds that the appeal under the Unfair Dismissals Acts, 1977 to 2007, against the said recommendation fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)