

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1061/2008
MN981/2008
WT444/2008

against

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr W. Power
Mr P. McAleer

heard this claim at Cavan on 25th February 2009 and 7th May 2009

Representation:

Claimant: Mr. Ronan O'Brien, Burke Hunt & Co. Solicitors, Elm House, Athbara, Cavan

Respondent: Mr. Vincent Turley, Personnel Advisor, Black Lane, Latlurcan, Monaghan

The determination of the Tribunal was as follows:

Claimant's case:

The claimant was pregnant and was advised to stay away from work by her GP. Her partner gave a cert to the employer on 3 July 2008. The following day her partner gave her a letter that he was given by the employer, with a P45 dismissing her. She got no social welfare payments.

The claimant gave evidence that she started work on 4 February 2007. When she came back from holiday she didn't feel well and was advised to go to a doctor by E (a SIPTU representative). Her colleague G went with her to the GP. She was given a cert for one week and asked to come back to see how she was. She never told G that she was resigning. She never received a letter of cessation

of employment and thought that she was still working there.

She said she didn't understand what a P45 was until a colleague explained that she was dismissed. She received the P45 in early July. She didn't think she was entitled to any more holiday pay as she thought she got this in May, and in her final payment. She got no social welfare payments after this. She has sought no further work since because her child is too young.

She said that she knew she was pregnant in April 2007. She vehemently denied that she told G that she intended to claim social welfare and wouldn't come back to work. She said that her SIPTU representative told her she could get a medical cert and come back to work when she was better.

She said that Social Welfare told her she would get child benefit payments on 3 March 2009 which would be backdated. She has also been getting illness benefit payments since 16 January 2009. The claimant said that she didn't receive payments all the time, but did get a lump sum.

The respondent said that the claimant gave the medical cert to her supervisor and told her that work was not good for her, and that she would claim social welfare instead. The P45 was requested by her partner. She got her final payments including holiday pay on 11 July 2008.

On the second hearing day an independent Lithuanian interpreter translated for the claimant's cross-examination. The claimant did not dispute that she had said that she would prefer not to go back to work because it might affect her pregnancy. A doctor had given a pregnancy-related medical certificate which was then given to G (the claimant's supervisor) who had acted as the claimant's interpreter at the medical examination.

The claimant, through the Tribunal's independent interpreter, told the Tribunal that she had been told that she had to go back to work until the end of her pregnancy. She had in fact stayed at home during her pregnancy.

It was put to the claimant that G would testify that the claimant had said that she would not go back to work. The reply was that it had been the claimant's opinion that it would be dangerous to go back to work. The claimant's representative here submitted that what was meant was that the doctor had said this rather than the claimant putting ideas in anyone's head.

It was now put to the claimant that G would say that the claimant had made up her mind that she would not go back to work and that she would claim social welfare. The claimant did not dispute this and said that there was a lot of pressure in the job in that she worked very long hours on the days she worked (even if her weekly total was thirty hours).

Asked what she had done about social welfare, the claimant replied that she had asked and had been told that she was not entitled. Asked what social welfare payments she had applied for, the claimant said that she had just called and had been told that her partner was working and that she was not entitled. She had just received child benefit.

It was put to the claimant that the respondent had information that the claimant had got illness benefit. The claimant replied that she had applied for this and that she had got a lump sum cheque in January 2009. The respondent's representative pointed out that the claimant would have received this before the last the Tribunal hearing. When it was put to the claimant that at the last Tribunal hearing she had said that she had not got any payments the claimant replied that at the last Tribunal hearing she had not understood the question, that she had been referring to payments from her

employer and that she had initially only been in receipt of child benefit. She had applied for social welfare but had not expected to get any money (apart from child benefit). She told the Tribunal that she now understood that social welfare covers any benefit she gets from the social welfare service. She confirmed that she had made a social welfare application on 7 July 2008 but added that it had been a big surprise when she had received a lump-sum backdated social welfare payment.

In re-examination the claimant said that she had spoken to a trade union person and had been advised to go to a doctor. G had attended the doctor with her and she had given the medical certificate to G.

Asked how she had got her P45, the claimant said that her partner (who had worked for the respondent) had got the P45 and had given it to her. The claimant showed it to a friend who said that it meant that the claimant had been dismissed.

Asked if she had intended to go back to work after the baby was born, the claimant replied that she had not. Asked if, when she went off sick, she had intended to go back to work after the baby was born, she replied that, if all was okay, she had wanted to go back to work. However, when she got her P45 she decided to stay at home.

The claimant's representative now called the claimant's partner (V) to give evidence but, when it emerged that V wished to testify in Russian, his evidence was not taken because the Tribunal had not been asked to provide a Russian interpreter.

Case for the Respondent:

Giving sworn testimony, G (the claimant's abovementioned supervisor) said that, as she spoke both Russian and English, she had sometimes assisted employees and that the claimant had asked her to help by interpreting at the doctor's surgery. G had done so.

At the surgery the claimant had said to the doctor that she thought that her work with the respondent was not good for her pregnancy and that she thought she should not work there. Although the certificate was not issued to G the doctor handed it to G who could not recall everything but did recall handing it to the respondent's accountant. The claimant was happy that she was pregnant and said that she would not go back to work.

Asked if it was possible that she had not understood the claimant, G rejected this saying that her Russian was quite good. She told M (the lady who did the respondent's accounts) that the claimant had intended not to go back to work.

G had no further contact with the claimant. She spoke with V (the claimant's partner) who was "all the time" pressing her for documentation for social welfare. It took about a week to issue a P45. When V had said that they (he and the claimant) needed documents for social welfare G had understood that they wanted a P45.

Asked if they could have meant social welfare documentation relating to pregnancy or illness benefit, G replied that they had been asking for all documentation and that they had wanted to calculate all monies including holidays and calculation of wages. G could not recall if V had said that he wanted a P45.

Asked if she had had any other contact with the claimant after July 2008, G replied that she herself had finished with the respondent on 21 July 2008 and that she had started to work at a social welfare office where the claimant arrived and asked G why she was not receiving social welfare. As G had only been working there a short time herself she asked about the claimant and was told that the claimant had to wait because the claimant did not have enough contributions. The claimant had to apply for contributions from Lithuania.

Asked at the Tribunal hearing if the claimant had said that she had been dismissed, G replied that the claimant had only asked about social welfare and why she was not getting social welfare payments.

G told the Tribunal that the next contact was in September 2008 when the claimant had rung her cellphone, had said that she was going to court and had asked if G would be a witness for her whereupon G had said that she did not want to participate in any court.

When G was asked why she had said this to the claimant, G replied that it was because the claimant had told her that she was going to court because she had found out that her P45 was wrong to say 2 July 2008 when her employment had ended on 3 July 2008. G told the Tribunal that "this was the main part of the phone discussion" and that the claimant had not been saying that she had got a P45 by mistake but rather that the claimant had found a mistake on it.

Giving sworn testimony, the abovementioned M said that she did accounts (including payroll) for the respondent and liaised with supervisors. M said that she issued P45s and forms that needed to be filled out.

A medical certificate was brought to M by G who said that it was a certificate for the claimant who did not want to return to work. Carrying out the usual procedure, M calculated the claimant's pay for her P45.

When it was put to M that the certificate had just referred to pregnancy problems, M replied that G had been one hundred per cent certain that the claimant wanted to leave. M took from this that M was to do up the claimant's final pay. It was normal procedure for a supervisor to tell M when an employee was leaving. The respondent employed forty-five to fifty mushroom pickers. There was a high turnover. About two P45s would be done every four to five weeks. G had said that the claimant was very happy to be pregnant and would not come back.

M told the Tribunal that the claimant left on 3 July and that she was asked once or twice during the following week for the P45. The P45 was issued. M thought that the claimant was pregnant and was going to claim social welfare.

As to whether the claimant had in fact been dismissed, M said to the Tribunal that none of the respondent's employees would be just dismissed and that there would be consultation with an employee if there had been any problem with that employee's work. There would be a verbal warning and two written statements warning that the work of a particular employee had to improve. A dismissal would require a senior manager.

When the subject of a holiday pay claim was raised at the Tribunal hearing, the claimant's representative interjected to say that the claim lodged under the Organisation of Working Time Act,

1997, was not being pursued.

M told the Tribunal that it had been G's job to tell M if an employee was leaving but that the respondent now has a procedure whereby an employee requiring a P45 would state in writing that he or she resigns. M said: "We've changed our procedure for employees leaving. I get them to sign a little note saying they're leaving." All was now being done more formally as to the issue of a P45 in respect of an employee's P.P.S. number. Speaking of when the claimant's employment had ended, M said: "It was just word of mouth at that time."

Determination:

Given that the claimant's representative stated on the second day of hearing that the claim lodged under the Organisation of Working Time Act, 1997, was not being pursued, the Tribunal deems the claim under the said legislation to have been withdrawn.

Regarding the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal considered whether, the respondent, on receiving a medical certificate should take an extra step to clarify whether or not an employee really intends to leave rather than going on the word of a supervisor. The Tribunal's basis for finding that the claimant was unfairly dismissed within the meaning of the legislation was that, on receiving the claimant's medical certificate, the respondent issued a P45 without seeking further clarification that the claimant was resigning her post.

However, the claimant failed to show through her representative that she had mitigated her loss by seeking alternative work post-dismissal. Moreover, she was incapable of working for a period of time. In all of the circumstances of this case, the Tribunal deems it just and equitable to award the claimant compensation under the Unfair Dismissals Acts, 1977 to 2007, in the amount of €2,275.00 (this award being equivalent to seven weeks' gross pay at €325.00 per week).

Regarding the claim under the Minimum Notice and Terms of Employment Act, 1973 to 2005, the Tribunal does not make any award in addition to the award made under the unfair dismissals legislation. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is dismissed because the claimant has no loss beyond that for which she has been awarded compensation for unfair dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)