

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE - *appellant*

CASE NO.
UD677/2008

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. K. T. O'Mahony B.L.

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

heard this appeal at Kilkenny on 8th January 2009

Representation:

Appellant(s): Mr. Kris Wilk, 25 Butler Place, Lakeside, Kilkenny

Respondent(s): Ms. Yvonne Blanchfield, Owen O'Mahony & Co., Solicitors, 5 John's
Bridge, Kilkenny

This case came before the Employment Appeals Tribunal by way of an appeal by the employee (hereinafter referred to as the appellant) against the recommendation of the rights commissioners; r-054766-ud-07/JOC dated 30 May 2008.

The determination of the Tribunal was as follows

Appellant's case:

The appellant commenced employment with the respondent on 18 May 2007, working in its hotel bar in a provincial city in Leinster. On 28 June 2007, she developed some symptoms and did not feel well. She attended a doctor in the Polish medical clinic in Dublin, who advised her that she was pregnant and that she should stay in bed for three months because of her two previous miscarriages. The doctor gave her a medical certificate covering her absence from work from 28 June to 5 July. The appellant gave this medical certificate to the respondent's bar manager. The following week, because she was still symptomatic, she again attended at the same clinic in Dublin and was advised to remain in bed. She was given another medical certificate covering the period 6 July to 9 July. Because the doctor at the clinic could only issue a weekly medical certificate, the appellant was advised to attend her own local doctor to get a medical certificate for a longer period. When the appellant went to the hotel with the second medical certificate on 5

July, the deputy general manager (DGM) told her that he had been trying to contact her all of that day to tell her that she was being laid off because of the downturn in business due to the bad weather. The appellant told him that she was pregnant and could not be laid off. An issue arose between the parties as to the correct legal position on this point. The appellant's employment was terminated on 5 July 2007, with notice that her employment ended on 13 July 2007.

The appellant had been employed, with one or two others, in the bar area of the hotel to serve drinks and clear the tables. Some days were very busy. The respondent recognised that she was a good worker. There had been complaints about other employees yet she had been dismissed. The weather during the summer of 2007 was "like it always is in Ireland". She was not employed outside on the terrace.

During her first employment with the respondent in 2006, the appellant had also become pregnant and because of her condition, she was unable to do some duties. Sometimes she had to leave work early due to being sick. A member of management suggested to her at that time that she should quit. During that employment, she suffered a miscarriage with twins. The respondent had treated her well after her miscarriage. It was the appellant's opinion that she was let go in July 2007 because of her pregnancy.

In cross-examination, the appellant agreed that another worker's employment had also been terminated at the same time as hers in July 2007. She terminated her first employment with the respondent in 2006 because she had been offered a job as a supervisor in another hotel at a better rate of pay. She did not work during this pregnancy but remained at home as it was a high-risk pregnancy.

Respondent's case:

The appellant had worked for the respondent from June 2005 to August 2006 in its restaurant. The respondent's general manager (GM) commenced employment with the respondent in April 2006. He had not been aware of the difficulties with the appellant's earlier pregnancy. The appellant had resigned from the respondent in August 2006 to work in another hotel.

In 2006, the respondent had opened a carvery in the bar so customers could order their food directly. The weather was very good in summer 2006 and it had been the respondent's busiest summer on record. In April 2007, a management decision was taken to employ extra staff for summer 2007. DGM recruited the appellant and another employee. GM was happy to have the appellant on the staff as she was honest, pleasant and a hard worker. However, the weather in summer 2007 was bad and business was substantially down. Food and drink were down 60% in June 2007 as compared to the same period in 2006.

In early July 2007, GM attended an early morning meeting in Co. Kerry with the senior members of management, including the financial director of the respondent's parent company. These senior management members make the financial decisions for the respondent. Due to the significant downturn in the respondent's sales, a decision was taken to cut costs by reducing staff numbers. GM was not aware that the claimant was pregnant when this decision was taken, nor did he make the decision as to who would be let go. After the meeting, GM telephoned DGM and instructed him that two members of staff were to be laid off on a "last in first out" (LIFO) basis. GM instructed DGM to explain this to the two staff members, that they were being let go due to the weather conditions and that if business improved, they would both be re-employed. The appellant and another employee were the two members of the staff with the

shortest service. DGM attempted to contact the appellant to inform her of the position.

When the appellant came to the hotel on 5 July 2007, DGM assumed that she was attending in response to his efforts to contact her. He informed her that she was being let go due to the downturn in business and assured her that she would be given first option on a position if business picked up again. The appellant told GM that she was pregnant and submitted a medical certificate covering her absence for the week commencing 6 July 2007, stating that she was off work due to pregnancy. GM had not been aware of the claimant's pregnancy at the time the decision to dismiss her was taken. At a subsequent meeting on 6 July, GM tried to explain to the appellant the reason for her lay off. In his letter dated 6 July 2007, GM confirmed the respondent's position to the appellant. At the time of writing this letter, GM was aware that the appellant was pregnant.

In the respondent's business, the summer season starts at the beginning of June and ends in September. About two months of the summer season were left when the appellant and the other employee were laid off. The respondent employs students throughout the hotel on contracts varying from the summer months to a year. The appellant was an excellent worker.

The policy of "last in first out" (LIFO) is always used by the respondent. The appellant's earlier service with the respondent had not been taken into account in the decision to lay her off because she had resigned from the employment on that occasion. DGM had not been aware that the claimant was pregnant when the decision to lay her off was made.

GM and DGM only had knowledge of the medical certificate submitted by the appellant to DGM on 5 July 2007. At the rights commissioner's hearing, the appellant only mentioned that medical certificate. It was only at the hearing before the Tribunal that she suggested that she had submitted a medical certificate to the bar manager on 28 June 2007.

Employees do not receive sick pay. While the person in pay roll would have noticed the appellant's absence from work, it is not something that would cause concern because the respondent was trying to keep costs down. Business did not improve and no one else had been taken on after the termination of the appellant's employment.

Determination:

This appeal came before the Tribunal under the Unfair Dismissals Acts. Section 6(2) of the Unfair Dismissals Acts sets out the grounds on which a dismissal is deemed to be unfair. The new paragraphs (f) and (g) of that section as substituted by Section 23 of the Maternity Protection (Amendment) Act 2004 set out the reasons relating to pregnancy on which a dismissal is deemed unfair. These paragraphs are as follows:

- (f) the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected herewith, the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected herewith,*
- (f) the exercise or proposed exercise by the employee of the right under the Maternity Protection Act 1994 to any form of protection leave or natal care absence, within the meaning of Part IV of that Act, or to time off from work to attend ante-natal classes in accordance with section 15A (inserted by section 8 of the Maternity Protection (Amendment) Act 2004), or to time off from work or a reduction of working hours for breastfeeding in accordance with Section 15B (inserted by section 9 of the Maternity*

Protection (Amendment) Act 2004)

The Tribunal does not accept that the claimant was dismissed for any of the grounds set out in the aforementioned paragraphs. It accepts the respondent's evidence that the reason for the claimant's dismissal was the significant downturn in its early summer business as compared to its business for the same period in the previous year, which necessitated a reduction in its labour force on the basis of the principle of "last in first out" and that the appellant was the employee with the least service. Furthermore, the Tribunal accepts the respondent's evidence that it was not aware of the claimant's pregnancy at the time the decision to dismiss her was taken. Accordingly, the Tribunal is satisfied that the appellant's dismissal was for economic reasons and was not on grounds of any "exercise or proposed exercise" by her under the aforementioned paragraphs of subsection (2) of Section 6 of the Unfair Dismissals Acts. Accordingly, the dismissal was not unfair, the appeal under the Unfair Dismissals Acts, 1977 to 2007 fails and the Tribunal upholds the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)