

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE – *appellant*

P5/2010

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

EMPLOYER – *respondent*

under

### MATERNITY PROTECTION ACT 1994 AND 2004

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. W. O'Carroll  
Ms. H. Henry

heard this appeal in Tullamore on 21<sup>st</sup> March 2012

Representation:

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Appellant: Ms Collette Egan B.L. instructed by Mr. Richard Stapleton, Smyth  
Stapleton & Co, Solicitors, O'Moore Street, Tullamore, Co Offaly

Respondent(s): Company Director

**This case came before the Tribunal by way of an employee appeal of the Rights Commissioner  
Decision ref: r-083763-mp-09/TB**

#### **Appellants Case**

EM told the Tribunal she received a phone call on a bank holiday weekend in 2008 from a former employer. The respondent, a community swimming pool was looking for someone urgently as a person had walked out. She phoned F, met him on Sunday and told him she had a HND and the pool was badly managed. They wanted to open the pool for the full year and not just for the summer. EM was five months pregnant and was asked how, if there was an accident, she would save somebody. She told the respondent this was not an issue. She also told the respondent that her travel from Abbeyleix would not be an issue. They offered her € 31k the same salary as the previous employee. They agreed on €35k.

Up to December 08, she had made substantial progress with the Board of Management. She got a loan of lifeguards, bought safety equipment, signs and arranged for two lifeguard courses. This meant the respondent had its own staff. Mail mergers were sent to schools.

They had bookings in September and October. Because the pool was not opened previously, November and December were quiet. From January 09 to June 09, the pool was booked out for the mornings.

JT and CF told her they had promised a girl who was in Australia the manager's job. They asked the Claimant if she was agreeable to a joint role. After two months it was discovered the other employee was not up to the role and she took a pay cut.

Most days working she was working from 9am to 5pm nonstop, and was engaged in giving swimming lessons and other activities. Around the 17<sup>th</sup> December 08, she took her maternity leave. JR and CF asked her if she would be taking the full leave. EM said she could not say but that JR and CF could take it as given that she would.

On the 22<sup>nd</sup> Dec 08, she was involved in a fundraiser, swimming the length of Dublin to Holyhead. She sat at the edge of the pool giving encouragement and was in the town collecting funds.

On the 7<sup>th</sup> January 09, her child was born and she texted staff to inform them. Around the 3<sup>rd</sup> March 09, she received a phone call from CF. She was told the Board of Management had a meeting and had decided they no longer needed a manager. EM took it that she was dismissed over the phone. EM mentioned they might need a senior lifeguard.

She had agreed to meet CF on the 6<sup>th</sup> March 09. She drove to Naas to drop her son off at her mother's and rang CIC for thirty minutes. They said under no circumstances should she attend any meetings and the employer should not be contacting her on maternity leave. Seven weeks after giving birth she was very anxious and was waiting for a letter in the post.

When she had not heard from the respondent she e-mailed CF. She received an e-mail from CF to say her position remained the same. After the email she thought everything would be ok, but she had backtracked.

She contacted the respondent giving her intention to return to work. Her maternity leave expired on the 29<sup>th</sup> June 09.

On the 30<sup>th</sup> June 09 she received a registered letter from the respondent to inform her that she was dismissed. She was devastated. They stated that they were confirming the contents of phone conversation earlier in March. Nothing came of the lifeguard role. This was the first letter she got from the company.

She had taken the role as a full time pool manager. She was unaware of the exact financial situation but was aware there was on-going fundraising. She was aware of the loan from the credit union that was carried over.

On her first day at work the Board of Management was collecting money at the door. She had staff, so she got them to do this. The Board of Management were giving their time. Changes were made to the pool, changing rooms, plant rooms. She was told she had money to spend.

In 2009 six staff were hired. On the 23<sup>rd</sup> April 09 after the phone call, she saw an advertisement in the Leinster Leader for pool staff. Jobs for aqua instructors, lifeguards, swim

teachers were advertised. All of these roles formed part of her former duties.

Under cross-examination EM confirmed she was aware that C was starting and was aware of the financial problems

She remembered the phone call clearly and agreed to come to the meeting. Her phone records show a 29 second phone call to CF on 06 March 09 at 15.55pm. On the 6<sup>th</sup> March she also phoned the CIC for 20 minutes at 15.35pm.

### **Respondents Case**

CF is a company Director. The pool is a community pool where all Directors are volunteers. The pool was opened for six months. It closed October to March and normally reopened on St Patricks Day. In May/June, she and JT got involved with the board in order to get the pool up and running.

The building is 40 years old. JT was involved before and knew the layout. Money was always a problem. We were told there was a figure for a development fund which was not the case. The company had a €20k overdraft.

There was a frantic move to open the pool in August 08. On the day the pool opened the girl who was in charge left. JT met with the appellant the following day. The pool is opened eighty hours per week. She knew C was offered the role. Nobody is saying the appellant did not do a good role. The appellant left on the 15<sup>th</sup> December 08, and did not discuss a handover with us. In January she had her baby, we wished her well.

At board level, money was always an issue. They had regular meetings. The schools were always involved prior to the appellant joining. Their funding was cut and the respondent could not afford to pay people, as it was fundraising.

She called the appellant, spoke about money; the €35k was not tenable. She put herself in the appellant's shoes and thought she would want to hear from me about the money situation. She offered the appellant a senior life guard role.

Around June, after the emails, the Board of Management instructed her to issue the letter after her maternity leave had finished. The Board is a voluntary organisation. Nobody gets paid. It is for the town and the people.

During cross-examination CF said there was a frantic rush to get a new pool manager. They needed a life guard on the deck. They took on a joint manager; they had had a discussion with C. They discussed C with the appellant. The appellant was unhappy the C was on the same pay. There was always an issue with funding, now and again

Her relationship was not strained with the appellant at that time. She felt it would be better to be told in advance.

At the Board meeting on the 26<sup>th</sup> February 09, everything was discussed. The plan was to reduce costs. She accepted the appellant was costing nothing while on maternity leave. They were concerned about costs all the time. She did not recall giving the appellant any rosters.

It did not annoy the Board the appellant took holidays after her maternity leave. She had sought advice, the day after the appellant's Maternity Leave finished.

She sent the letter of dismissal on the 30<sup>th</sup> June 09. They gave the appellant a month's notice. The letter was sent by registered post on the 30<sup>th</sup> June 09.

The witness contended that three Directors can agree a decision, by phone or email. The witness stated that directors have discussions on the phone all the time concerning the management of the pool. He states that there was no meeting called to discuss the appellants dismissal.

CF was sure the decision was taken on the 30<sup>th</sup> June 09: that they discuss such matters every day. She did not accept they were planning to dismiss her

They were faced with a problem of meeting out payments. They offered the appellant a Senior Life guard role earning €22k a year.

### **Determination**

Section 23 of the Maternity Protection Act 1994 provides that any purported termination of an employee's employment while the employee is absent from work on protective leave shall be void

In the instant proceedings the Tribunal in the resolution of inconsistencies prefers the evidence of the respondent.

The Tribunal is influenced by the submission of the Claimant's representative that decided cases on the application of Article 10 of Council Directive 92/85 from the European Court of Justice namely the case of *Nadine Paquay v Société d'architectes Hoet + Minne SPRL*, (Case C 460/06) and the relevant provisions of European law (Council Directive 92/85 and Council Directive 97/80) establish that procedures and preparatory steps such as in the instant case committee meetings, and phone calls put in place prior to the end of the period of protection, are to be considered as coming within in the scope of the prohibition of dismissal in Article 10 of . Council Directive 92/85

Article 10 of Council Directive 92/85 provides: -

#### *Prohibition of dismissal*

*In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:*

*1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the*

*competent authority has given its consent;*

*2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;*

*3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.*

The Decision in the Paquay case ruled that

*Article 10 of Council Directive 92/85 must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and / or the of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.*

In the circumstances the Tribunal would set aside the Decision of the Rights Commissioner and award the appellant the amount of twenty weeks pay by way of compensation

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Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)