

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE *-appellant*

CASE NO.
P7/2010

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. O'Leary B. L.

Members: Mr D. Peakin
Mr M. O'Reilly

heard this appeal at Dublin on 23rd January 2012
and 18th May 2012

Representation:

Appellant: In Person

Respondent: Mr Dermot Murphy B.L. instructed by,
Maguire McClafferty, Solicitors, 8 Ontario Terrace, Portobello Bridge, Dublin 6

This case came before the Tribunal by way of an employer appeal of the Rights Commissioner Decision r-081101-mp-09/JW. As this is an employer appeal the appellant will hereinafter be referred to as the employer and the respondent the employee.

Respondent's (employee's) Case

The employee made sandwiches for the company. The employee's pregnancy was confirmed by her G.P. on the 14th of April 2009. She informed the employer on the 15th of April 2009 and gave him the medical certificate. She asked how her work would now be scheduled as she was concerned about lifting weights and working in a cold environment. In order to prepare the sandwiches the employee had to lift buckets of ingredients up to 15kg and get boxes up to 20kg from the cold storage room. When she raised her concerns and asked for lighter work the employer said that she wasn't the first pregnant woman to work in the company so he didn't see why she was concerned. There was lighter work in the packing area. She expected to be facilitated as there was other work available.

On the 22nd of April the employee asked for alternative work and if there was none available

asked for a certificate in order to go on Health & Safety leave. The employer refused to provide a cert as he said he had contacted her doctor and was reassured that there was no danger. The employee's doctor denied such a conversation took place. She gave her employer permission to contact her doctor when she requested Health & Safety leave on the second occasion. On the 28th of April the employee was asked to attend a meeting on the 29th of April; this was as a result of the employee's solicitor writing to the employer. During that meeting the employee was asked for a cert saying she was fit for work which she provided on the 5th of May and returned to work on the 9th of May.

The recommendations contained in her return to work certificate had not been implemented by the employer. The employee was in receipt of the 'pregnancy assessment form' but only received a copy of the risk assessment on the 12th of May. The risk assessment was carried out without any consultation with the employee. The employee did not resign her employment; she received her P45 before the 28th of April.

On the 18th of May the employee put all her concerns in writing and again asked for a certificate to go on health & safety leave. At a meeting on the 26th of May the employer agreed to provide a cert for health & safety leave and asked that the employee collect it on the 30th of May. On the 30th she was contacted by the employer to say no cert would be provided as on further medical advice there was no danger. The employee was on sick leave from the 3rd to 27th of June 2009 and from the 17th to the 26th of November 2009 and then on maternity leave. The employee only worked from the 9th to 17th of May during the whole period.

Appellant's (employer's) Case

The employer identified the risks to the employee and as there was no extreme temperatures (work area are a consistent 12 degrees) and assistance could be given for any lifting required he could not justify completing the Health & Safety Leave form. On the 14th of April the employee attended the office telling the employer she was pregnant and queried how much she would get from Social Welfare if she left her employment; he said he would check it out. On the 15th of April the employee and her boyfriend arrived with forms to sign for Social Welfare. Her boyfriend left and the conversation continued with the employee insisting she no longer wanted to work. The employer took this to be her resignation.

At a further meeting the employer asked the employee if she wanted to resign and she said that she did not but she wanted her working conditions changed. She wanted to work in the packing area. The employer informed her that there was no full-time position available in the packing area but that she could do it part-time and the rest of the time she could continue with her normal duties. She said she would have to check with her doctor and get back to him. In the mean time the employer got a risk assessment done and organised a further meeting with a translator and suggested that the employee bring someone with her to the meeting.

At this meeting the employer gave the employee the risk assessment; she said she would revert after getting her doctor to check it out and see if she could return to work. The employer agreed the new duties with the employee and removed any of the lifting. The temperature of 12 degrees could not be changed so he needed the employee's doctor to confirm she could not work in that temperature as according to the Health & Safety form it is not an 'extreme' temperature. He asked on numerous occasions for this confirmation, including a request to the employee's solicitor.

Determination

The Tribunal having heard the evidence in this matter and note that there is no onus on the employer when he is carrying out a risk assessment of the work station of the employee, that such a risk assessment should be carried out with her full participation. The Tribunal finds that no such requirement is placed on an employer when carrying out a risk assessment under Section 18 of the Health & Safety Act. It follows that in carrying out the risk assessment that was done in this case the employer complied with the legal requirements placed on an employer in the circumstances.

The Tribunal determines that the complaint was not well founded and overturns the Rights Commissioner Decision **r-081101-mp-09/JW**.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)