

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYEE –**Claimant**

UD81/2013

and

EMPLOYER- **Respondent**

UD1753/2012
P7/2012

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MATERNITY PROTECTION ACTS 1994 TO 2004**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Lucey

Members: Mr G. Andrews
Ms H. Henry

heard these appeals at Castleconnell on 18 June 2013

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:

These cases came before the Tribunal with both parties appealing against a recommendation of a Rights Commissioner **R-121207-UD-12/GC** under the Unfair Dismissals Acts and the respondent appealing against the decision of a Rights Commissioner **R-101227-MP-10/POB** under the Maternity Protection Acts.

Preliminary Issue

The decision of the Rights Commissioner under the Maternity Protection Acts was dated 7 December 2011. The appeal form from the respondent's representative was date stamped by the Tribunal office as being received on 23 May 2012. The Maternity Protection Acts provide at Section 33 (2) that

“An appeal under this section shall be initiated by a party by giving, within four weeks of the date on which the decision to which it relates was given to the parties concerned, a notice”

The claimant's representative submitted that the respondent had failed to comply with this provision.

The respondent's representative drew the Tribunal's attention to a Fax header sheet from the representative's administrator and dated 20 December 2011 at 15:44 in the following terms

"Please find attached T1-B form, appealing the Rights Commissioner decision R-101227-MP-10/POB"

The Tribunal was satisfied that this fax header, which was sent to the number of the fax machine in the Tribunal office with the result indicating ok, confirmed that notice had been given within four weeks and, accordingly, there was jurisdiction to hear the appeal.

Maternity Protection Acts Appeal:

The claimant was employed as a customer service administrator (CSA) from May 2006 in the respondent's filter and masking making operation. The contract of employment sets out the duties of the role:-

- Inputting and processing of all sales orders and invoices
- Liaising with production manager on order acknowledgement dates
- Organising shipping of goods with stores manager
- Maintaining customer database
- Daily update of mask and filter production plan/orders
- Processing letters of credit for certain customers
- Ensuring relevant paperwork accompanies the goods in transit and that the different countries import regulations are complied with
- Dealing with customer queries swiftly and in a courteous manner
- Compiling weekly sales reports and other ad hoc reports required for finance and production
- Reception duties to include answering the phone, post and general administration duties

You shall also undertake such other duties and exercise such powers as the company shall assign to or vest in you. Such duties to include duties of such subsidiary companies as the company may require.

The employment was uneventful and the claimant went on maternity leave from August 2009 and returned to work on 4 May 2010. During the period of maternity leave the respondent, due to business needs, made changes to their operations and this caused changes to the role of CSA. The claimant's position was that her role changed to that of production scheduler as well as keeping her previous duties.

The respondent's plant manager (PM) issued a memorandum setting out the duties of the revised customer services role on 29 April 2010. This document sets out the duties of the revised role:-

- Morning meetings start at 8-00am customer services need to attend
- Each Tuesday morning update at morning meeting position to date, week ahead
- Weekly and daily schedule for filter area, discuss with PM and charge hands which machines to run product

- Update output from filter each day
- Activate PDN's in filter when on system
- Scheduling mask production
- Activate PDN's in mask when on system
- Enter all incoming orders onto system
- Acknowledge orders
- Schedule production for Thailand
- Issue PDN's for Thailand
- Organise shipping of products with stores
- Maintain customer database
- Provide all data relating to deliveries
- Deal with customer queries swiftly and in a courteous manner
- Compiling sales reports for accounts
- Reception duties

On her return to work on 4 May 2010 the claimant met PM and the finance director (FD) to discuss the revised role and it is common case that the claimant agreed to "give it a shot and try it". The claimant's position was that she was not fully aware of what scheduling involved and found that she did not have enough time to complete her duties such that she had to work through lunch in order to keep up.

The claimant brought her concerns to the attention of PM on 20 May and 27 May 2010, she then brought her concerns to the attention of both PM and FM on 9 June 2010. It is the claimant's position that FM berated her on 9 June asking the claimant "what can you be doing with your time?" The claimant was out sick suffering from stress from 17 June 2010. On her return to work on 23 June 2010 the claimant handed in a grievance about the changes to her job on return from maternity leave, contemporaneously she was called to a meeting by PM and FM at which she was suspended with pay pending an investigation into a complaint from the managing director of a nearby customer which also plays a role in the manufacture of some of the respondent's products. At this same meeting the claimant presented PM with a memorandum to the managing director (MD) with PM and FM handwritten as recipients setting out the outline of her grievance complaining of excessive duties necessitating extra hours of work to complete them and further complaining about the lack of improvement in reports so as to avoid repetition.

PM then wrote to the claimant confirming her suspension and inviting her to a disciplinary meeting on 29 June 2010 to give the claimant an opportunity to provide an explanation regarding:

- The complaint from the customer
- Poor customer communication and correspondence
- Orders not entered on system or delivery dates acknowledged to customers

The claimant was warned that these matters could be potentially regarded as gross misconduct which could lead to her dismissal.

On 24 June 2010 PM wrote to the claimant acknowledging receipt of her grievance and to inform her that it was proposed to hear her grievance on 29 June instead of the disciplinary meeting. The grievance meeting was conducted by PM and FM, the claimant declined the offer of being accompanied at the meeting. On 30 June 2010 PM wrote to the claimant to tell her that her grievance had not been substantiated. She was informed of her right of appeal of this decision to MD and submitted her appeal on 5 July 2010 with the detail behind the appeal submitted on 9 July

2010.

The appeal was heard by MD on 21 July 2010, in attendance was a note-taker, the claimant was again unaccompanied. This appeal took the form of a re-hearing of the grievance and dealt with additional items regarding the alleged failure of the materials controller to answer her phone when the claimant called her, it further dealt with the issue of PM raising the issue of civil action against the claimant in light of her allegations against him.

MD wrote to the claimant on 23 July 2010 notifying her that he had found her accusations to be unsubstantiated and, accordingly, her appeal had been rejected. MD regarded the threat of civil action from PM as being in his personal capacity and not issued on behalf of the respondent.

On 16 August 2010 the claimant wrote to MD pointing out that under the Maternity Protection Act she should have been returned to the job she held immediately prior to the commencement of her maternity leave, whereas she had been given additional duties of scheduling mask and filter production. MD replied on 17 August 2010 stating that the respondent felt that the changes to her role were a natural development of changes within the business and did not constitute a change so great as to be unacceptable and that the respondent had acted in accordance with the Maternity Protection Act.

On 19 August 2010 PM wrote to the claimant inviting her to attend a disciplinary meeting on 25 August 2010 it set out the allegations against her:

- Alleged failure to carry out current duties, i.e. orders received from six named customers but not entered into respondent's system or delivery dates confirmed
- Allegedly taking part in activities resulting in adverse publicity by sending emails to high value clients that caused them to complain, civility and clarity required when communicating
- Alleged deliberate behaviour leading to threat of high value client (referred to as first item for proposed 29 June 2010 disciplinary meeting)
- Poor customer service and communication to four other customers.

The claimant was advised of her right to be accompanied by a fellow employee or a trade union representative; the matters were potentially regarded as gross misconduct which could lead to her dismissal.

The meeting on 25 August was conducted by PM who was accompanied by a note taker. The claimant was accompanied by a union official. On 30 August 2010 PM wrote to the claimant informing her that she was being issued with a final written warning of twelve-month duration. The claimant's suspension was to end on 1 September 2010 when she was to return to work and be subject to a performance management plan. On 31 August 2010 the claimant wrote to MD to advise of her intention to appeal the final written warning. She enclosed a medical certificate stating that the claimant was unfit for work due to "stress secondary to work".

The appeal hearing was conducted by MD on 9 November 2010 with a note taker. The claimant was again accompanied by her union official. On 11 November 2010 MD wrote to the claimant advising her that the original findings had been upheld to a certain degree and the penalty was changed to a first written warning.

The claimant remained on sick leave from 1 September 2010. On 8 February 2011 she attended for

an occupational health assessment with a doctor nominated (OH) by the respondent. In his report OH found that while the claimant was medically fit for work she did not believe it was possible for her to complete her current workload. He recommended a meeting to discuss and resolve her declared work issue. On foot of this report MD wrote to the claimant on 24 February 2011 proposing a meeting on 3 March 2011. Eventually this meeting was held on 30 May 2011. The claimant returned to work on 18 July 2011; this was on a four-day week basis in keeping with other staff employed by the respondent.

Determination:

Whilst it is clear that changes were made to the claimant's duties during her maternity leave the Tribunal does not accept that those changes were as significant as contended by the claimant. Nevertheless the claimant raised the issue of these changes, and her dissatisfaction with them, on several occasions after her return to work. By 23 June 2010 the respondent was well aware, even before receipt of the formal grievance, that the claimant was unhappy about her revised role. If the complaint relating to the email sent by the claimant on 9 June 2010 was so serious as to warrant her suspension it is hard to see how it took until 23 June for the allegation to crystallise and for the claimant to be suspended. It is hard for the Tribunal to escape the conclusion that the suspension was related to the respondent's attitude to her complaint about her role. The matters complained of in the letter from PM inviting the claimant to the proposed disciplinary meeting of 29 June 2010 were much expanded by the time of the 19 August 2010 letter from PM inviting the claimant to the disciplinary meeting of 25 August 2010 which resulted in the final written warning being issued. Lest the respondent was in any doubt the claimant had written to MD on 16 August 2010 asserting her rights under the Maternity Protection Acts. It is hard to believe that MD believed his reply of 17 August 2010 was going to solve the problem which undoubtedly existed. For all these reasons the Tribunal is satisfied that the respondent was in breach of Section 26 (b) & (c) of the Maternity Protection Acts. The Tribunal varies the determination of the Rights Commissioner and awards €10,300-00, being the equivalent of twenty weeks' remuneration under the Maternity Protection Acts 1994 to 2004.

Unfair Dismissals Acts Appeal

From September 2010 the respondent had financial difficulties in that order levels dropped and production staff were put onto a three-day week with administration staff on a four-day week. The respondent did not bring in any extra personnel to cover the claimant's position when she was out on sick leave. On 3 October 2011, following a decision that there was going to have to be a reduction in head count amongst the administration staff, MD and FD held a consultation meeting with MC and the claimant as it had been identified that their roles would be combined going forward. The plan was to work four six-hour days. Accordingly they were warned of their positions being at risk.

After taking them through the savings that had been introduced MD invited MC and the claimant to offer alternative cost savings to the elimination of one of their positions. MD offered the possibility of a voluntary redundancy in lieu of this there was to be a selection made between the claimant and MC based on a matrix.

MD wrote to the claimant on 3 October 2011 to confirm the content of that day's meeting and to invite the claimant to a further consultation meeting on 6 October 2011. In the event MD met the claimant for the second consultation meeting on 10 October 2011. At this meeting the claimant was very sceptical of the financial situation being presented by the respondent. The claimant

proposed a job-sharing arrangement between herself and MC; she also proposed a campaign of direct marketing to dentists.

MD went through the matrix and the claimant's score as against that of MC. This resulted in a score of 68 for MC versus 46 for the claimant. The biggest difference in the scores came in the attendance category where MC scored 5 and the claimant -5, this was due to the claimant's absence on sick leave due to stress. Even if the effect of this were to be discounted MC outscored the claimant by twelve points.

The third consultation meeting took place on 17 October 2011, on this occasion MD had a note taker and a human resource adviser. At this meeting the matrix scoring was gone through in more detail.

The fourth consultation meeting was held on 19 October 2011, there was no HR adviser but the claimant's union representative was in attendance. Later that day MD and a note taker met the claimant to inform her that she had been selected for redundancy and was to be put on four weeks garden leave in lieu of notice. This was confirmed in a letter to the claimant from MD on 24 October 2011. The claimant availed of the opportunity of an appeal to the company auditor. This appeal was heard on 25 January 2012. The auditor was accompanied by the HR advisor and the claimant by her union representative. The claimant was notified of the rejection of her appeal one week later.

Determination

The Tribunal is satisfied that a redundancy situation pertained within the administrative staff functions of the respondent in October 2011. The respondent was clearly in financial difficulty, the working week had been cut, enforced holidays imposed, pay frozen, a six-month pension contribution holiday along with the release of fixed-term staff and PM. The matrix applied to select the claimant for redundancy was objective. As was pointed out to the Tribunal if LIFO had been applied the claimant would have been chosen, in fact the matrix scored MC and the claimant equal in terms of length of service. Accordingly, the Tribunal is satisfied that the dismissal, by reason of redundancy, was not unfair and the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007 is upset.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)