

EQUALITY OFFICER'S DECISION NO: DEC-E/2014/007

PARTIES

**MULLEN
(REPRESENTED BY HAYES SOLICITORS)**

-v-

BCon COMMUNICATIONS LTD. (IN LIQUIDATION)

File No: EE/2011/544

Date of issue: 12 February, 2014

Headnotes: Employment Equality Acts 1998- 2008 - sections 6 and 14A – harassment – discriminatory treatment – gender- pregnancy – family status – maternityleave

1. DISPUTE

This dispute involves a claim by Ms. Lisa Mullen (“the complainant”) that she was (i) discriminated against by BCon Communications Ltd. (“the respondent”) on grounds of gender and/or family status, in terms of section 6(2) of the Employment Equality Acts, 1998-2008 and contrary to section 8 of those Acts, as regards her conditions of employment when she informed him she was pregnant up to the time she returned from maternity leave, (ii) harassed by the respondent on grounds of gender and/or family status, in terms of section 6(2) of the Employment Equality Acts, 1998-2008 and contrary to section 14A of those Acts and (iii) dismissed by the respondent in circumstances amounting to discrimination on grounds of gender and/or family status in terms of section 6(2) of the Employment Equality Acts, 1998 - 2008 and contrary to section 8 of those Acts when her employment was terminated in February, 2011.

2. BACKGROUND

2.1 The complainant commenced employment with the respondent in January, 2003 and held roles of progressive responsibility until she was appointed Financial Controller in September, 2007. She states that she informed the respondent’s Managing Director she was pregnant on her third child in November, 2009 and that subsequently his attitude changed significantly and became particularly hostile toward her. She submits that this amounts to discriminatory treatment and/or harassment of her on grounds of gender and family status contrary to the Acts. She further states that when she attempted to return to work following the expiry of her maternity leave at end January, 2011 the respondent sought to dramatically alter her terms and conditions of employment and refused to permit her return to work to the role she had held immediately before the commencement of that leave. She submits that this amounts to discriminatory treatment of her on grounds of gender and/or family status contrary to the Acts. She states that the matters connected with her return to work after maternity leave were not pursued under the maternity protection legislation. Finally, the complainant states that when she refused to accept these amended terms and conditions the respondent terminated her employment on 15 February, 2011. She submits that the termination of her employment amounts to a dismissal of her in circumstances amounting to discrimination on grounds of gender and/or family status contrary to the Acts.

- 2.2** The complainant referred a complaint under the Employment Equality Acts, 1998 - 2008 to the Equality Tribunal on 12 July, 2011. In accordance with his powers under the Acts the Director delegated the complaint to the undersigned - Vivian Jackson, Equality Officer, for investigation, decision and for the exercise of other relevant functions of the Director under Part VII of the Acts. My investigation of the complaint commenced on 7 October, 2013 - the date it was delegated to me. On delegation of the complaint I noted that the respondent had not engaged with the Tribunal at any stage from the referral of the complaint. I wrote to the respondent on 9 October, 2013 at the postal details provided by the complainant, advising of the Hearing arrangements and requesting its responding submission in the matter. This correspondence was sent by registered post and was returned to the Tribunal on 11 October, 2013 marked "gone away". I subsequently became aware that the respondent had gone into liquidation and acquired details of the Liquidator appointed. I wrote to the Liquidator on 11 October, 2013 wherein I advised of the existence of the complaint; provided copies of the relevant documentation connected with the complaint; requested a response to the complainant's submission and advised of the Hearing arrangements. On 4 November, 2013 I received a letter from a firm of solicitors acting on behalf of the Liquidator advising that its client would not be filing a submission or attending the Hearing. I was of the view that the Tribunal had made all reasonable efforts to put the respondent on notice of the existence of the complaint and an opportunity to defend same and a Hearing on the complaint took place on 11 December, 2013. The respondent was neither present nor represented at the Hearing.
- 2.3** It was clear from the complainant's submission that she was alleging the unlawful treatment of her also occurred prior to 13 January, 2011 – i.e. more than six months before the date the complaint was referred to the Tribunal. Whist cognisant of the Determination of the Labour Court in *Hurley v Cork VEC*¹ I decided, having sought the comments of the complainant, that the most effective approach for all concerned, bearing in mind that only one of the alleged incidents occurred within the six month period, was that I take evidence in respect of all the alleged incidents at the Hearing. This would enable me reach a conclusion on those incidents, should the need arise, without reconvening the Hearing.

¹ EDA 1124

3. SUMMARY OF COMPLAINANT'S CASE

- 3.1** The complainant commenced employment with the respondent in January, 2003 and held roles of progressive responsibility until she was appointed Financial Controller in September, 2007. She states that as such she had almost total responsibility for the day-to-day financial activities of the company – creditors, debtors, client payment, payroll, Revenue Commissioners etc., although she was not a signatory on the cheques, this role was retained solely by Mr. W (the Managing Director). The complainant states that sometime in mid-November, 2009 she informed her employer (Mr. W) that she was pregnant. She adds that at this time she had two other children and had suffered a miscarriage in July, 2009. She further states that this conversation took place in the respondent's warehouse and Mr. W's younger brother (Mr. E) was present. The complainant states that when she informed him of her pregnancy Mr. W replied "Jesus Lisa, you don't hang around". The complainant states that she was extremely upset by this remark, particularly in the light of her recent miscarriage. She adds that when Mr. W left Mr. E told her that what Mr. W had said to her "was a horrible comment to make". It is submitted on behalf of the complainant that this amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.
- 3.2** The complainant states that around two weeks after this incident she was talking to two of the respondent's clients who were standing at the door of her Office. She adds that Mr. W's office is in close proximity – approximately six feet away – and he could therefore hear the conversation between her and the clients. She states that she was quite friendly with these clients – they were aware of her miscarriage earlier in the year – and she told them she was pregnant. The complainant adds that Mr. W said loudly "Yes and to be honest lads I am not too happy about this. She was meant to stop after her first two and now I have been informed that she is having a third". The complainant states that she and the clients were shocked by this statement and one of them said to him "[Mr. W] you can't say that, Lisa could take you to court for discrimination". The complainant adds that when she tried to raise the matter with Mr. W later he was dismissive of her and would not talk about it. It is submitted on behalf of the complainant that this amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.
- 3.3** The complainant states that on 15 January, 2010 she was involved in a road traffic accident whilst driving the company car to work, due to the icy conditions. She states that she immediately telephoned Mr. W to report the accident to him and she subsequently attended hospital as she had

injured her back and needed to ensure that there had been no injury to her unborn baby. The complainant states that a doctor at Mullingar General Hospital (where she also attended for her pre-natal care) certified her as unfit for work for a week and advised that she take complete rest. She further states that she telephoned Mr. W to advise him of this and he seemed annoyed and told her that he would “get back to her”. The complainant states that the following day Mr. W telephoned her and instructed to report for duty the following Monday. She adds that when she informed him she had no transport and in any event she was advised to rest, Mr. W told get a Bus Éireann bus to Dublin city centre and he would have a colleague collect her there and drive her to the workplace. The complainant states that she complied with this instruction because she felt intimidated by Mr. W and was fearful of losing her job. In this regard she stated at the Hearing that Mr. W had a tendency to dismiss people in such circumstances – she added she knew this because she would have to complete the employment cessation documentation. It is submitted on behalf of the complainant that this incident also amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.

- 3.4** The complainant states that in early February, 2010 she sought a meeting with Mr. W to discuss arrangements for covering her work when she was on maternity leave, which was due to commence on 29 April, 2010. She adds that she was anxious to have the person covering her role selected and working for about two months before her maternity leave was due to commence so that person would be trained and “up to speed”. The complainant states that Mr. W agreed to engage someone to cover her maternity leave – this had not happened on the previous occasion she had taken maternity leave in 2008 and she ended up working for significant periods of her leave – and she was anxious to get then process going. She states that she was involved in the recruitment process and attended at the interviews. The complainant adds that in the course of the interview with the successful candidate (Ms. S) the issue of the duration of the contract was raised in discussion (the complainant was off the view that it was to be a fixed-term contract from April, 2010-January, 2011) and Mr. W said “well I’m not sure if Lisa will be coming back to work especially now she will have three children to look after”. The complainant states that she was shocked by this comment as she had never done or said anything which might lead Mr. W to this conclusion and she took issue with him when the interview finished. She adds that Mr. W said he had assumed if he had three children she would not want to return to work. The complainant states that she made it perfectly clear to Mr. W it was both undesirable from a personal and professional point of view and impossible from a financial perspective, that she not continue work and informed him that she would be returning. It is

submitted on behalf of the complainant that this incident amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.

3.5 The complainant states that she had noticed a change in attitude towards her by Mr. W from the time she had returned to work following her miscarriage in July, 2009. She adds that at that time she was treated at the A&E Department of Mullingar General Hospital and ultimately had to undergo a D&C procedure. The complainant states that she was certified as unfit for work for two weeks following this procedure and Mr. W contacted her and instructed her to report for duty on 21 July, 2009. The complainant confirms that she did so for fear of losing her job and subsequently collapsed on her return home. She states that Mr. W's attitude towards her deteriorated further after she informed him of her pregnancy in November, 2009 and got worse following the recruitment of Ms. S. The complainant states that Mr. W effectively "froze her out" by obstructing her doing her job; undermining her with clients and customers by overruling arrangements she had made with them; agreeing work related issues with her and then changing his mind and finally by removing tasks from her, in particular her dealing with the bank. She adds that she believed this attitude developed because Mr. W had formed the opinion that she would be less committed to the company when she had three children. The complainant rejects this proposition and states that her loyalty and commitment could not be questioned. She states that in 2008 she had reported for duty and brought her sick child into the office with her and in 2009 she had complied with Mr. W's instruction that she attend work when her young child was quite ill. The complainant states that she considered Mr. W's attitude towards her had deteriorated to an unacceptable level in March, 2010 so she sought a meeting with him to discuss matters. She adds that at this meeting she informed him he was making her working conditions increasingly more difficult and stressful, to which he replied that he had a lot on his mind. The complainant states that things did not particularly improve between then and her maternity leave.

3.6 The complainant states that on 26 April, 2010, three days before her maternity leave was due to commence, she sought a meeting with Mr. W to finalise matters before her departure (she had been trying to arrange this meeting for the previous 2/3 weeks). She adds that one of the issues she wanted to discuss was the prospect of the respondent supplementing her social security payment so as she would receive her normal monthly net salary – this had been the arrangement on the previous occasion she was on maternity leave. The complainant states Mr. W advised her that this practice would not apply on this occasion and offered the complainant a top-up payment of €150 per month –

which the complainant ultimately accepted. She adds that much to her surprise Mr. W asked her to return her mobile phone or transfer the number to her name for the period (which she subsequently did) and to surrender the company car. She adds that she was relying on using the car for her daughter's First Communion the following weekend and Mr. W reluctantly agreed to this - the car was collected a couple of days later. The complainant states that she had been permitted full use of her mobile and the company car on the previous occasion she was on maternity leave in 2008. It is submitted on behalf of the complainant that this amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.

3.7 The complainant states that her period of maternity leave was due to finish on 31 January, 2011 and in compliance with the relevant provisions of the maternity protection legislation she e-mailed Mr. W on 20 December, 2010 informing him of her intention to return to work on 31 January, 2011. She adds that she received no response to this e-mail and she e-mailed Ms. S on 22 December, 2010 advising she had previously e-mailed Mr. W and seeking confirmation that her e-mails had been received. Ms. S replied later that day advising Mr. W had received her original e-mail. The complainant states that Ms. S e-mailed her on 6 January, 2011 asking her to attend a meeting with Mr. W on 14 January, 2011 to discuss her return to work. She adds that she attended this meeting - Mr. W and Mr. O (the respondent's new Technical Director) were also present. The complainant states that at this meeting Mr. W advised her that the role of Financial Controller no longer existed in its previous format within the new company structure and was redundant and offered the complainant an alternative position which involved (i) an additional eight hours work per week, (ii) a 40% cut in her salary and (iii) a more junior and less responsible position in Accounts Receivable. She adds that when she told Mr. W these terms were not acceptable he became quite aggressive and intimidating and she was frightened and left the meeting as soon as possible

3.8 The complainant states that she did some research over the weekend and obtained some professional advice and e-mailed Mr. W on Monday 17 January, 2010 setting out (i) her understanding of the proposed new role (and its terms and conditions); (ii) her rights and entitlements to return to work under the maternity protection legislation and (iii) stating that the role and terms offered were unacceptable to her. She adds that the respondent (Mr. O) replied by e-mail dated 21 January, 2011 wherein he stated the complainant's pre-maternity leave hours and terms and conditions (including her rate of pay) would be restored but re-iterated that the role of Financial Controller no longer existed in the company and suggested her new role would be entitled "Debtor's Ledger Analyst".

The complainant states that she was not satisfied with this revised proposal as she did not consider it an equivalent role in terms of responsibility and status within the company. She adds that the role was restricted to debt collection – which had only been about 10% of her previous role – and that all the other functions were to be removed from her. The complainant rejects the assertion that her role was redundant and states that all the other tasks previously performed by her were being done by Ms. S, who was retained in employment and was housed in the complainant's office. The complainant states that she e-mailed the respondent on 27 January, 2011 advising she viewed the revised post as a “serious reduction in responsibility and role” and requesting that she be permitted to return to her original role of Financial Controller as soon as possible.

- 3.9** The complainant states that Mr. O replied by e-mail dated 28 January, 2010 wherein he again reiterated the role of Financial Controller in the company no longer existed; indicated the respondent was acting in compliance with the maternity protection legislation and suggested that her concerns about seniority could be assuaged by the title “Credit Control Manager”. The complainant states that she replied by e-mail of 30 January, 2010 restating her opinion that the role offered was a “demotion that you [the respondent] is endeavouring to impose on me”; was “so limited in scope and responsibility that had [she] seen it advertised in the newspapers [she] would not give it a second thought” and advising that it was totally unacceptable. She states that Mr. O wrote to her on 1 February, 2011 rejecting her views and advising that the role (as most recently offered) remained open for a period of fourteen days. The complainant states that she replied to this letter on 11 February, 2011 restating her position and asking to be permitted to return to her original role. She adds that the respondent Mr. W wrote to her on 15 February, 2011 rejecting all of her arguments and advising that as she had not reported for duty the respondent considered her to have resigned. The complainant states that the role of Financial Controller continued to exist in the respondent company at all times and in this regard furnished the Tribunal with a “screenshot” of the respondent's website dated 11 May, 2011 – three months after her employment was terminated – which names Ms. S as the company Financial Controller. It is submitted on behalf of the complainant that the actions of the respondent amount to a discriminatory dismissal of her (constructive or otherwise) on grounds of gender and family status contrary to the Acts. In this regard the complainant seeks to rely on the

Decisions of this Tribunal in *O'Brien v Persian Properties t/a O'Callaghan Hotels*² and *Gardiner v Mercer Human Resource Consulting*³.

4. SUMMARY OF RESPONDENT'S CASE

The respondent neither attended, nor was it represented at the Hearing. In addition, it did not at any stage file a submission with the Tribunal despite a number of requests.

5. CONCLUSIONS OF EQUALITY OFFICER

5.1 The issues for decision by me are whether or not the complainant was (i) discriminated against by the respondent on grounds of family status and/or gender, in terms of section 6(2) and 6(2A) of the Employment Equality Acts, 1998-2008 and contrary to section 8 of those Acts, as regards her conditions of employment, (ii) harassed by the respondent on grounds of family status and/or gender, in terms of section 6(2) and 6(2A) of the Employment Equality Acts, 1998-2008 and contrary to section 14A of those Acts and (iii) dismissed by the respondent in circumstances amounting to discrimination on grounds of family status and/or gender in terms of section 6(2) and 6(2A) of the Employment Equality Acts, 1998 - 2008 and contrary to section 8 of those Acts when her employment was terminated in February, 2011. In reaching my Decision I have taken into account all of the submissions, oral and written, made to me in the course of my investigation as well as the evidence presented at the Hearing.

5.2 Section 85A of the Employment Equality Acts 1998-2008 sets out the burden of proof which applies to claims of discrimination. It requires the complainant to establish, in the first instance, facts upon which he can rely in asserting that he suffered discriminatory treatment on the grounds specified. It is well settled in a line of decisions from both this Tribunal and the Labour Court that the type or range of facts which may be relied upon by a complainant can vary from case to case. The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that discrimination has occurred. The language used indicates that where the primary facts alleged are proved it remains for this Tribunal to decide if the inference or presumption contended can be properly drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn from a fact, or range of facts, which have been proved in evidence. At the initial stage the complainant is merely seeking to establish a *prima*

² DEC-E2012-010

³ DEC-E2006-007

facie case. Therefore it is not necessary for her to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts⁴. Where such a *prima facie* case is established it falls to the respondent to prove the absence of discrimination. This requires the respondent to demonstrate a complete dissonance between the protected characteristic (in this case gender and family status) and the impugned acts alleged to constitute discrimination. In this regard the Tribunal should expect cogent evidence showing that the complainant's family status and/or gender was nothing more than a trivial influence on the impugned treatment of her, since the facts necessary to prove a non-discriminatory explanation would normally be in the possession of the respondent.

5.3 I propose to deal with the allegation of dismissal in the first instance - the only alleged incident to have occurred within the six month period prescribed at section 77(2) of the Acts. There is no question that the complainant's employment ceased on 15 February, 2011. However, there is a question as to whether or not the respondent dismissed her or she resigned. It is clear from the evidence submitted by the complainant (both oral and written) that there was significant dispute between her and the respondent after she confirmed (by e-mail dated 20 December, 2010) she would be returning to work at the end of her maternity leave on 31 January, 2011. The complainant sought to exercise her statutory right to return to the post she had held immediately before maternity leave commenced. The respondent said that the post no longer existed under the new structure within the company and offered her what it considered to be a suitable alternative post. The complainant believed this revised role to be a serious reduction in responsibility and role and therefore viewed it as a demotion which the respondent was endeavouring to impose on her. She also states that the position was "so limited in scope and responsibility that had she seen it advertised in the newspapers she would not give it a second thought". In essence the complainant considered the position offered totally unacceptable, regardless of the title ascribed to it and she did not resume duty after her maternity leave ended. The complainant gave evidence at the Hearing as to the tasks she carried out when Financial Controller (before the maternity leave) and the tasks associated with the new post and I accept her evidence on this matter. In the circumstances I am satisfied that the revised role was indeed a demotion. I am further satisfied that the respondent unilaterally attempted to change her basic terms and conditions of employment, albeit that its approach softened from the original

⁴ See EDA 082

proposal it made (during discussions between them), which included a reduction in pay and an decrease in working hours.

5.4 From perusal of the array of e-mails that passed between the parties in the weeks preceding 15 February, 2011 I am satisfied the respondent was clearly aware that nothing short of a return to her position of Financial Controller would satisfy the complainant. Its refusal to permit this was premised on its statement that the role no longer existed within the new structure. I do not accept the respondent's assertion on this matter. I am satisfied that the post of Financial Controller remained in existence at the time and that Ms. S was performing it. In its letter of 1 February, 2011 the respondent sticks to its position and offers the complainant the revised post stating that the offer is open for a further fourteen days. The complainant (by letter dated 11 February, 2011) restates her refusal of the offer and indicates that she remains available to discuss the matter. The respondent's response is that in light of her refusal to return to duty on the revised post on the terms and conditions offered it considered her to have resigned her employment with immediate effect. Nowhere in the documentation opened to the Tribunal, or in the evidence adduced by the complainant on the matter, does the respondent state that the complainant is dismissed. Similarly, there is no evidence whatsoever that the complainant resigned her employment, as asserted by the respondent in its 15 February, 2011. In these circumstances the complainant's claim of dismissal will be addressed as one of constructive discriminatory dismissal on the grounds advanced.

5.5 Section 2(1) of the Acts defines dismissal as including:

"the termination of a contract of employment by an employee (whether prior notice termination was or was not given to the employer) in circumstances which, because of the conduct of the employer, the employee was or would have been entitled to terminate the contract, without giving such notice, or it was or would have been reasonable for the employee to do so"

In *An Employer v A Worker (Mr. O No.2)*⁵ the Labour Court comprehensively addressed the issue of constructive dismissal under employment equality legislation. It noted that the above definition was practically the same as the definition of "dismissal" contained in the unfair dismissals legislation and held that the tests for constructive dismissal developed under that legislation - the

⁵ EED0410

"contract" test and the "reasonableness" test - were applicable tests under the Employment Equality Acts.

5.6 I consider the "contract" test to be the more apt test to apply in the instant case. This test generally refers to circumstances where the employee argues "entitlement" to view the contract as terminated. It was described by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp*⁶ as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself discharged from any further performance"

This passage describes a situation in which an employer commits a repudiatory breach of contract. In such circumstances, the employee is entitled to accept the repudiation and consider himself or herself dismissed. In the instant case the respondent clearly misrepresented the position to the complainant in stating that her role was, in effect, redundant whilst at the time the full range of tasks she had previously discharged as part of that role (Financial Controller) were being performed by Ms. S, a situation which I am satisfied existed at that time and which continued for some months after the complainant's employment ceased. Moreover, the respondent decided to unilaterally change her conditions of employment and, as I have found above, effectively demoted the complainant. From the outset the complainant emphatically rejected the respondent's offer of the alternative position within the company and the respondent was well aware of her position in this regard. In all of the circumstances I am satisfied that the respondent acted in a manner which is consistent with the intention not to be bound by the essential terms of the original contract between it and the complainant and in those circumstances, the contract of employment was brought to an end. Consequently the complainant is entitled to consider herself dismissed in terms of the definition of dismissal at section 2 of the Employment Equality Acts, 1998-2008. I am further satisfied that the termination of the complainant's employment is inextricably linked to her pregnancy and maternity leave, given the nexus of her dismissal to her attempts to return to work following the expiry of a "protected period" in terms of those matters. In addition, I am satisfied that the fact the complainant had three young children at that time acted as more than a trivial influence on the actions of the respondent. In light of the foregoing I find that the complainant has raised a *prima facie* case that she was dismissed in circumstances amounting to discrimination on grounds of gender and family status

⁶ 1978] IRLR 332

contrary to section 8 of the Employment Equality Acts, 1998-2008 and the burden of proof shifts to the respondent to rebut that inference. The respondent has failed to discharge that burden and the complainant is therefore entitled to succeed with this element of her complaint.

- 5.7** In light of my finding in the previous paragraph and having regard to the Determination of the Labour Court in *Hurley v Cork VEC*⁷ and *Mustafa Gulgen v Marks and Spencers (Ireland) Ltd.*⁸ I shall now examine the alleged incidents which pre-date 13 January, 2011 to determine if any of them are sufficiently connected to the incident within the six month period (the complainant's dismissal) so as to make them part of a chain of interlinked acts of discrimination on the grounds advanced. In addition, as the complainant relies on essentially the same set of facts to ground separate claims of (i) discriminatory treatment and (ii) harassment on both grounds advanced I will address those overlapping claims as if they were pleaded in the alternative in accordance with the Determination of the Labour Court in *A School v A Worker*⁹ where the Court held "***that as a matter of principle the complainant cannot rely on the same facts to obtain redress under more than one head of liability under the Acts. The Court will, however, deal with these overlapping claims as if they were pleaded in the alternative.***"
- 5.8** I shall now look at the remaining elements of the complaint – the alleged discriminatory treatment and/or harassment of the complainant on either or both of the grounds advanced. Section 6(1) of the Acts provides that discrimination shall be taken to have occurred where "***a person is treated less favourably than another person is, has or would be treated in a comparable situation on any of the grounds specified in subsection (2)....***". Section 6(2A) of the Acts provides "***without prejudice to the generality of subsections (1) and (2), discrimination on the gender ground shall be taken to have occurred where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has or would be treated.***". Section 14A of the Acts defines harassment as follows – "***any form of unwanted conduct related to any of the discriminatory grounds being conduct which... has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.***".

⁷ EDA 1124

⁸ EDA 1316

⁹ EDA 122

- 5.9** The first incident I propose to examine is the one alleged to have occurred in mid-November, 2009 when the complainant states she informed Mr. W she was pregnant in the course of a conversation in the respondent's warehouse. She adds that at this time she had two other children and had suffered a miscarriage in July, 2009. The complainant adds that when she informed him of her pregnancy Mr. W replied "Jesus Lisa, you don't hang around". The complainant states that she was extremely upset by this remark, particularly in the light of her miscarriage the previous July. She adds that when Mr. W left Mr. E (who is Mr. W's younger brother) told her that what Mr. W had said to her "was a horrible comment to make". It is submitted on behalf of the complainant that this amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts. I found the complainant to be a credible and truthful witness who gave her evidence in a forthright manner, sometimes to her own possible detriment, and I fully accept her evidence on this matter. I have considered her evidence carefully and I am not satisfied that she has established facts from which it could be inferred she was treated less favourably on either of the discriminatory grounds advanced. As regards the argument that the incident amounts to harassment, I concur with Mr. E's opinion that Mr. W's comment "was a horrible thing to say". In my opinion Mr. W's comment demonstrates a profound insensitivity to the complainant's experience of miscarrying some months before but I am not satisfied that it amounts, on its own, to unlawful harassment of her on either gender or family status contrary to the Acts. It may however, have probative value in terms of displaying a certain disposition as regards other incidents encompassed by this complaint.
- 5.10** The complainant states that next alleged incident occurred around two weeks after the incident detailed in the previous paragraph. She states that she was talking to two of the respondent's clients and she informed them she was pregnant. She adds that she knew these clients well and they were aware of her miscarriage earlier that year. The complainant states that Mr. W overheard this conversation and said to the clients "Yes and to be honest lads I am not too happy about this. She was meant to stop after her first two and now I have been informed that she is having a third". The complainant adds that when she tried to raise the matter with Mr. W later he was dismissive of her and would not talk about it. It is submitted on behalf of the complainant that this amounts to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts. Again, I fully accept the complainant's evidence on this matter and having given careful consideration to same, and having regard to the previous comment made by Mr. W, as detailed in the previous paragraph, I am satisfied that this comment amounts, *prima facie*, to harassment of the complainant on grounds of gender and family status as it had the effect of creating and offensive,

humiliating and degrading environment for her in terms of her pregnancy and the fact she had children at the time. I am further satisfied that when the complainant sought to raise her objection to the comment with Mr. W (who was the most senior employee in the company as Managing Director) he was dismissive of her. Consequently, I find that the respondent is unable to avail of the defence at section 14A(2) of the Acts and the complainant is entitled to succeed with this element of her complaint as regards an allegation of harassment. In light of my conclusion in this regard I will not address the incident in terms of less favourable treatment in accordance with the Determination of the Labour Court in *A School v A Worker*¹⁰

5.11. The next alleged incident relates to events following the complainant's involvement in a road traffic accident on 15 January, 2010 whilst driving the company car. She states that she immediately telephoned Mr. W to report the accident to him and she subsequently attended hospital as she had injured her back and needed to ensure that there had been no injury to her unborn baby. The complainant states that a doctor at Mullingar General Hospital certified her as unfit for work for a week and advised that she take complete rest. She further states that she telephoned Mr. W to advise him of this and he seemed annoyed and that he telephoned her the following instructing her to report for duty the following Monday, if necessary using public transport. Although she recorded her displeasure with this instruction she subsequently complied with it because she felt intimidated by Mr. W and was fearful of losing her job. She clarified at the Hearing she formed this opinion because she was aware that Mr. W had a tendency to dismiss people in such circumstances. Consequently, it appears to me that Mr. W would, on balance, have behaved in a similar fashion in respect of any other employee who found himself/herself in the same situation as the complainant. I fully understand how upset the complainant felt at the time, given she had previously suffered a miscarriage and had the traumatic experience of being involved in a road traffic accident whilst pregnant. However insensitive and uncaring Mr. W was in the circumstances, in light of my conclusion that he would not have treated another employee involved in an accident any differently, I find that the complainant has failed to establish a *prima facie* case that his actions amount to less favourable treatment of her on either of the discriminatory grounds. I further find that she has also failed to establish a *prima facie* case of harassment of the same grounds and consequently, this element of her complaint fails.

¹⁰ EDA 122

- 5.12** The complainant states that she attended interviews with Mr. W in February, 2010 to select the person who would provide cover for her post when she was on maternity leave. She adds that in the course of the interview with the successful candidate (Ms. S) Mr. W said “well I’m not sure if Lisa will be coming back to work especially now she will have three children to look after”. Having carefully considered this matter I find that the comment amounts to harassment of the complainant on grounds of both gender and family status contrary to the Acts. The complainant states she was shocked by this comment as she had never done or said anything which might lead Mr. W to this conclusion and she took issue with him when the interview concluded, adding that he replied he had assumed, if he had three children she would not want to return to work. The comment, regardless of Mr. W’s misguided opinion, created concern and fear for the complainant in terms of her job and had the effect of producing an intimidating working environment for the remainder of her period of employment before she commenced maternity leave, especially as it was made in front of the candidate who would replace her during that absence. The respondent did nothing to allay her fears in this regard when she raised the matter with him and it cannot therefore avail of the defence available to it at section 14A(2) of the Acts and this element of the complainant claim is well founded.
- 5.13** The complainant states she attended a meeting with Mr. W on 26 April, 2010, three days before her maternity leave was due to commence, in order to finalise matters before her departure and to seek clarification as to whether or not the respondent was prepared to supplement her social security maternity payment so as she would receive her normal monthly net salary, as had been the arrangement on the previous occasion she was on maternity leave. The complainant states Mr. W advised her that this practice would not apply on this occasion and offered the complainant a top-up payment of €150 per month – which the complainant ultimately accepted. She adds that much to her surprise Mr. W asked her to return her mobile phone or transfer the number to her name for the period (which she subsequently did) and to surrender the company car, although she was permitted to retain the company car for a short while for use in respect of her daughter’s First Communion. The complainant states that she had been permitted full use of her mobile and the company car on the previous occasion she was on maternity leave in 2008 and it is submitted on her behalf that the respondent’s actions in April, 2010 by refusing to “top-up” her maternity benefit to the level of her normal weekly wage and the removal of her mobile telephone and company car, amount to less favourable treatment and/or harassment of her on grounds of gender and/or family status contrary to the Acts.

5.14 An employee on maternity leave does not have any statutory entitlement to payment of her full salary and other benefits during that leave. The same outcome applies in terms of entitlements pursuant to the Pregnant Worker's Directive¹¹ and the Court of Justice of the European Union has found on many occasions¹² that the protection required by Article 11 of that Directive does not extend that far. It follows therefore that an employer has discretion as to whether or not it continues to provide full pay and benefits to an employee during maternity leave. I accept the complainant's evidence that she had received her full salary and retained the other benefits during her previous absence on maternity leave. However, I cannot hold that the respondent's actions on this occasion, however one might describe them, to amount to either less favourable treatment or harassment of the complainant on either of the grounds advanced. The complainant seeks to rely on the Decision of this Tribunal in *O'Brien v Persian Properties t/a O'Callaghan Hotels*¹³ on this matter. However, the facts of that case can be distinguished from those at issue in the instant case as the Equality Officer in the former found that the non-payment of the complainant's salary and the removal of other benefits which formed her pay amounted to victimisation of the complainant. Consequently, this element of the complainant's case cannot succeed.

6. DECISION OF THE EQUALITY OFFICER

6.1 I have completed my investigation of this complaint and in accordance with section 79(6) of the Employment Equality Acts, 1998-2011 I issue the following decision. I find that –

- (i) the complainant has failed to establish a *prima facie* case that the respondent discriminated against her on grounds of family status and gender in terms of sections 6(2) and 6(2A) of the Employment Equality Acts, 1998- 2008 and contrary to section 8 of those Acts in terms of her conditions of employment,
- (ii) the respondent harassed the complainant on grounds of family status and gender in terms of sections 6(2) and 6(2A) of the Employment Equality Acts, 1998- 2008 and contrary to section 14A of those Acts,

¹¹ EU Directive 92/85/EC

¹² See *Gillespie v NHSSB* Case C-342/93 and *Gassamayr v Bundesminister für Wissenschaft und Forschung* Case C-194/08

¹³ DEC-E2012-010

- (iii) the respondent dismissed the complainant in circumstances amounting to discrimination on grounds of family status and gender in terms of sections 6(2) and 6(2A) of the Employment Equality Acts, 1998- 2008 and contrary to section 8 of those Acts.

6.2 In assessing the appropriate remedy, this Tribunal is required to follow the judgement of the European Court of Justice (as it then was) in *Von Colson v Land Nordrhein-Westfalen*¹⁴ by ensuring that the sanction for breaches of Community rights must be effective, proportionate and dissuasive. The complainant was subjected to a range of unlawful treatment and comments which intensified after she informed the respondent of her pregnancy in November, 2009. When she attempted to exercise her statutory rights and return to work at the end of her maternity leave her employer made it particularly difficult for her, misrepresented the true position to her by informing her that her role no longer existed when it clearly did and using that scenario as a background, offered her alternative employment which I am satisfied amounted to a demotion. Ultimately, having made it impossible for the complainant to proceed any further it dismissed her. I am satisfied that the redress awarded should reflect all of these factors and I therefore order, in accordance with my powers under section 82(1) of the Acts, that the respondent pay the complainant the sum of €80,000 by way of compensation for the distress suffered by her as a consequence of the discrimination. This compensation does not contain any element of remuneration and is therefore not subject to PAYE/PRSI.

Vivian Jackson
Equality Officer
12 February, 2014

¹⁴ Case C-14/83