

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER

-Appellant

CASE NO.
UD291/2010

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

-Respondent

EMPLOYEE
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne
Mr F. Dorgan

heard this appeal at Waterford on 2nd June 2011

Representation:

Appellant: Peninsula Business Services (Ireland) Limited, Unit 3, Ground Floor,
Block S, East Point Business Park, Dublin 3

Respondent: E.A. Ryan & Company, Solicitors,
Dungarvan, Co. Waterford

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employer (the Appellant) appealing against a recommendation of a Rights Commissioner under the Unfair Dismissals Acts (reference: r-076689-ud-09/MMG).

The appellant company was formed some ten years ago. Initially the company comprised of a restaurant and a delicatessen. In 2008 the company sold the restaurant part of the business. The delicatessen was retained and it was hoped to open additional premises. A director of the company gave evidence that at the company's peak in 2007 it employed some thirty people. Now there are just ten employees due to the necessity to implement redundancies.

It was common case between the parties that the respondent employee commenced her employment in the delicatessen in May 2008. Her role was that of counter assistant and she worked Monday through to Friday from 11am until approximately 6pm. Her role was that of counter assistant number 2. In addition to this the respondent employee worked for a number of hours on a Saturday but for these hours she performed a different role in the kitchen.

During the course of his evidence the director outlined to the Tribunal that the company suffered a 25% downturn in revenue between September and October 2008. A staff meeting was held in September regarding the decrease in business, which then worsened during October 2008. The

supervisor's impending maternity leave was also discussed at the September meeting. In the course of her evidence the respondent employee confirmed that she did not put herself forward at this meeting to cover the supervisor's maternity leave, as she was unsure if her level of English was sufficient for the role. She also stated that during September she had asked the director to complete an employment status form as she was applying for a car loan and she asked him if her role was secure before applying for the loan.

The director stated in evidence that he did not recall this discussion with the respondent employee. He stated that the directors held weekly revenue meetings. They tried to address the problems facing the company by assessing costs. Labour costs were usually between 23% and 25% but they had increased to over 30% while the level of business had decreased. A decision was reached that redundancies had to be implemented. Other alternatives were considered such as an earlier closing time and a stringent waste policy was implemented. When it was decided that redundancies had to be implemented the directors sought advice from their representatives and a redundancy plan was put in place. A notification to staff regarding redundancies was displayed on the 18th October 2008. The respondent employee refuted this in her evidence stating that she first became aware of redundancy on the 21st October 2008.

The directors had identified that one of the roles that had been created in the past 12 months would have to be made redundant. The director outlined that the cook's position was known as counterassistant number 1 and her shift ran from 6.30am to 2pm. The employee with the position of counter assistant number 3 started work at 6.30am, and the supervisor's shift was from 8.30am to 4.30pm. The respondent employee's position of counter assistant number 2 was from 11.30am to 6.30pm. However, due to the downturn there was not the same volume of work and the company was on the verge of changing its opening hours. In addition to this both directors were making themselves more available to the business throughout opening hours. The decision to make the respondent's position redundant, that of counter assistant number 2, was taken in or around the 17th October.

The respondent employee gave evidence that on the morning of the 21st October 2008 she was informed at a medical centre of her pregnancy. When she attended for work she told her supervisor who said that for health and safety reasons she must inform the director. When she informed the director, he congratulated her and she continued with her duties for the rest of the day until 4.30pm. At that time she was approached by the director and asked to attend a meeting at 5pm. At the meeting he told her that he no longer had a position for her, as business was poor. The respondent employee asked if she could work on a part-time basis or if could she re-locate to Cork when the premises opened there. The director said he could not give her any hours. She also asked about future work and he said that he did not know if work would become available. The respondent employee also asked if she could cover the supervisor's shift while she was on maternity leave. In the course of his evidence the director stated that the respondent employee had agreed at the meeting that she did not have the necessary skills to carry out the supervisor's role.

The director stated in his evidence that he did consider the fact that the respondent employee was pregnant before meeting with her in the afternoon. However, the decision had been taken prior to being informed of her pregnancy to make her position redundant. The directors discussed the matter but felt that it would be discriminating to other staff members if the respondent employee were retained due to her pregnancy. The director stated that he would have held a further meeting with her but a member of his family became ill on the 22nd October 2008.

Other items on the company's redundancy plan were implemented on an ongoing

basis.

The director stated that Employee N was employed in mid- November 2008 on a part-time basis to assist the other director with covering the supervisor's maternity leave. Initially it was hoped that the company would open another deli in Cork in January 2009. Employee N was therefore employed as a supervisor for Cork but she was to be based in Dungarvan at first to cover the supervisor's maternity leave. The respondent employee in her evidence stated that she had offered to relocate to Cork in an alternative to her role being made redundant. The director did not recall this offer being made. In any event the opening of the premises in Cork was delayed by three months. By the time it was due to open another supervisor was employed for that premises. In the following months the supervisor returned from her maternity leave however Employee N is now employed on a full-time basis as the company secured a contract to supply lunches to a local school. Another employee was employed as part of the Saturday workforce, which catered to a different clientele than the mid-week staff.

Determination:

The Tribunal is asked in this instance to decide if the respondent employee was dismissed as a result of her pregnancy or if her pregnancy was a factor in the decision to dismiss her.

The Tribunal has considered the evidence heard and documents presented to it. There is a conflict of evidence on a number of important points and it has been left to the Tribunal to decide the matter on the balance of probabilities.

On balance the Tribunal has concluded that the respondent employee's pregnancy was a significant factor in the decision to dismiss her and the Tribunal believes that the lack of prior discussion and consultation and the apparent inflexibility on the part of the appellant employer in exploring alternative work options for the respondent employee supports the view.

The appellant employer first posted notice of potential redundancies on Saturday the 18th of October 2008. On Tuesday the 21st October the respondent employee advised her employer that she was pregnant. In or about 4.30pm on the same evening she was asked to attend a meeting with her employer at 5pm where she was effectively dismissed. The Tribunal believes that an objective interpretation of these events would lead to the reasonable conclusion that the employee's pregnancy was the reason she was selected for dismissal.

Accordingly, the Recommendation of the Rights Commissioners under reference number: r-076689-ud-09/MMG is hereby upheld and the respondent employee is awarded the sum of €7,500 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)