THE HIGH COURT

CIRCUIT APPEAL

In the matter of sections 77(3) and 82(3) of the Employment Equality Act, 1998

2023 No. 200 CA

[2024] IEHC 432

BETWEEN

RENATA KARPICZ

PLAINTIFF/RESPONDENT

AND

GRAHAM O'SULLIVAN RESTAURANTS LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 17th day of July, 2024

1. Introduction

1.1 This is an appeal against an award made by the Circuit Court under the Employment Equality Act of 1998, as amended ("the EEA") on the grounds that the Plaintiff was dismissed while pregnant. The single issue is the fact of dismissal. This appeal was a full re-hearing on 6th June, with written submissions made on 19th June. For clarity, the parties will continue to be referred to as the Plaintiff and the Defendant.

1.2 The Plaintiff alleges that the delivery of her P45 was sufficient indication that she had been dismissed and the Defendant submits that the P45 was issued in error, the Plaintiff was a valued employee and was not dismissed. The Defendant argues that

the Plaintiff should have raised the receipt of a P45 with her manager or should have contacted the owner of the business if she had a complaint about her branch manager.

1.3 It is unrealistic to expect a pregnant woman, who is aware that five members of an overwhelmingly female staff are pregnant or on maternity leave, and who is herself physically ill due to her pregnancy, to negotiate with the owner of the business when she unceremoniously receives a P45. The receipt of her P45 was a dismissal, in all the circumstances, and she was not obliged to seek explanations or to go to mediation.

1.4 The Plaintiff is entitled to damages and to the costs of these proceedings.

2. <u>The Employment Equality Provisions</u>

2.1 There is little dispute about the law that applies in this case. Under section 77(1) of the EEA, a person who claims to have been dismissed in circumstances amounting to discrimination in contravention of the EEA may refer the case to the Director General of the Workplace Relations Commission ("WRC"). Under section 77(3), if the grounds for the claim arise under Part III, or in any other circumstances to which the Equal Pay Directive or Equal Treatment Directive is relevant, the claim may be referred to the Circuit Court. This case arises out of an allegation of dismissal on the grounds of pregnancy and began in the Circuit Court.

2.2 The Plaintiff's claims under the Organisation of Working Time Act of 1997 and Minimum Notice and Terms of Employment Act of 1973, for notice and holiday pay, were dealt with in the WRC, this case involves only the allegation of dismissal.

2.3 The parties referred to various cases decided by the Labour Court and the WRC which involved situations of resignation or dismissal, some of which are set out in more detail below. Notably, in her seminal text on Employment Law, Redmond's *Dismissal Law in*

Ireland, the author refers to "*unambiguous words of resignation*" as a safe basis for the conclusion that an employee has resigned, adding that "*context is everything*".

2.4 This case involves an employer's words and acts in the context of an alleged dismissal, not a resignation and, here also, context is everything. The Defendant submitted that this P45 was received in circumstances that arose due to error and there was no dismissal. If the P45 issued in error, which is unlikely in the circumstances, it is difficult to understand how this error was not immediately corrected. Seen in context, the effect of delivering this P45 to this Plaintiff, was to dismiss her. The dismissal took effect after the Plaintiff had taken over a month of sick leave due to the effects of her pregnancy and was noted in the payroll as taking effect 8 days after a meeting in which she was advised to seek social welfare assistance. These facts show a probable causative link between the pregnancy and the dismissal. However, there is strong protection for the pregnant employee in law which means that a causative link need not be established, and which requires specific measures where a woman is dismissed while pregnant or on maternity leave, which were not undertaken in this case.

2.5 Article 10(1) of Council Directive 92/85/EEC ("the Pregnancy Directive") provides that pregnant employees cannot be dismissed from the beginning of their pregnancy to the end of their maternity leave, save in exceptional circumstances not connected with their condition. Article 10(2) requires that if a worker is dismissed during that period, the employer must cite substantiated grounds for her dismissal, in writing.

2.6 The European Court of Justice confirmed in *Jiménez Melgar v Ayuntamiento De Los Barrio* (Case C-438/99, ECLI:EU:C:2001:509) that Article 10 enjoys direct effect in Member States. These obligations do not apply to dismissals in other circumstances. No grounds for dismissal, as provided for in the Pregnancy Directive, were cited here.

3. History of the Pregnancy and the Employer's Response

3.1 The Plaintiff was hired by the Defendant restaurant on the 18th November, 2017. Her role was that of general assistant and she began work as a barista. Her supervisor was Ms. Lavinia Lungu and her manager was Ms. Nicol Haragus. The general manager of the branch was a director of the defendant company, Mr. Geoff Barnes. Mr. Barnes attended at the branch once or twice a month to bring wages and other correspondence for staff. The Plaintiff would usually receive her wages and correspondence from her manager or supervisor, not directly from Mr. Barnes. Letters and wages were kept in a safe and only supervisors and managers had access to this safe.

3.2 The Plaintiff notified the Defendant that she was pregnant on the 29th July, 2018. At the time, she was six weeks pregnant. In giving her evidence, the Plaintiff described her reaction when she learned she was pregnant. She was open in her answers, both about her personal life and about various medical details. The witness had clearly discussed many of these issues with her direct manager, Ms. Haragus, and answered directly and with considerable detail in her replies in this regard.

3.3 Mr. Barnes became aware of the Plaintiff's pregnancy when Ms. Haragus told him. Mr. Barnes had worked at the Defendant company for decades and confirmed that he had never before been the subject of any complaint by an employee. In 2017, the Defendant operated four restaurants in Ireland, with a total of 45 employees. Of these employees, between 38 and 40, insofar as Mr. Barnes could recall, were women.

3.4 Mr. Barnes explained that issues with maternity leave and pregnancy were common given the number of women working in the company. Over time there had been dozens of maternity leave applications. The company got to know how to work

around these issues, as he put it. His evidence was that historically, there were three categories of pregnant women: one group with no problems; another group with some problems, for example, they couldn't work with hot food, so he would "*re-jig the working roster"* changing their duties; the last category included those "*like Renata*", this Plaintiff, who had issues like back pain and were not able to continue to work. These women were, as he put it, "*deeply unhappy*." This witness also gave detailed and careful evidence.

3.5 The Plaintiff told the Court that Ms. Haragus had told her that Mr. Barnes was not happy to hear that she was pregnant because five employees were either pregnant or on maternity leave at the same time. Mr. Barnes gave evidence that he had never said this to Nicol Haragus. Ms. Haragus did not give evidence. I was invited to prefer the evidence of Mr. Barnes and to find that he did make any such comment. As Ms Haragus was not called, it is impossible to make such a finding.

3.6 Either side could have called Ms. Haragus, in theory, and there was no evidence as to whether she still worked for the Defendant company. The Plaintiff did, however, comment that Ms. Haragus did not want to be involved at the WRC stage of the proceedings and that she was a manager in the Defendant company at that time. When put to the Plaintiff that Mr. Barnes did not say anything to Ms. Haragus, the Plaintiff replied he did, word for word. Here, the Plaintiff was only repeating what she says another person told her and could not comment on what Mr Barnes himself may or may not have said to Ms. Haragus.

3.7 It is not possible for this court to decide what, exactly, was said to Ms. Haragus. The statement attributed to her is classic hearsay and has been vigorously contested. The out of court declarant was not available and what she said was offered in order to

prove that it was true, namely, that Mr. Barnes was unhappy that the Plaintiff was pregnant. An out of court statement is not admissible as evidence of the truth of its contents, and I must disregard it for that purpose. The remaining evidence is sufficient to allow me to decide the case without reference to hearsay evidence which is evidence of a reported statement that cannot be tested.

3.8 It is accepted that five women of 45 staff were either pregnant or on maternity leave at that time. It was not contested that all staff at the branch were women. At the time of these events, therefore, over 10% of the Defendant's staff were either unavailable or would be imminently on leave due to pregnancy-related illness or maternity leave and could only be lawfully replaced by temporary staff, appointed pending their return.

3.9 Shortly after he was told about the pregnancy Mr Barnes congratulated the Plaintiff in person and made the comment: "*there must be something in the water*", referring to the fact that five others were pregnant or on maternity leave. All present at that time understood that this was a reference to five other staff. There is conflicting evidence about the mood of this conversation, but the words, in italics above, were spoken.

3.10 Mr. Barnes told me that he considered the comment to be innocuous. He said that he had smiled and was delighted for her and he considered that this was joyful news. The Plaintiff did not react to his comment and his evidence was that while she may have thought the comment was unpleasant, at the time, nothing was said.

3.11 The Plaintiff did not consider this conversation in the same light. She formed the impression that Mr. Barnes was not happy about the pregnancy and noted that he did not smile at her. While he may have said congratulations, she said it appeared to her to be fake by his tone of voice and the look on his face. She recalled he was beside her, not face to face, and she understood that her pregnancy was not welcome news.

3.12 When asked about the company's view, if any, of her pregnancy, the Plaintiff replied that the company was not happy and pointed out that in her branch they were an all-female team. Her evidence was that there was no member on site at that time who could teach new staff who might be filling in for those who were already unavailable due to pregnancy-related illness or maternity leave.

3.13 The Plaintiff was cross-examined in this regard and asked why she did not complain about this comment. She answered, reasonably enough: *"and do what? What can I do?"*. The evidence was that the grievance procedure did not set out any mechanism whereby a complaint could be made about this witness, who was the branch manager. The only person more senior was the owner of the company who is not mentioned in the grievance procedure.

3.14 I do not accept the suggestion that the Plaintiff ought to have complained to the owner of the company about this comment. It is not reasonable to expect a pregnant woman to go outside the grievance procedures, which do not even contemplate a complaint about the overall manager, and to complain to the owner of the company about such a comment. The comment appeared to have no immediate effect on her work and it was entirely reasonable to let it go and not to make any fuss about it. This failure to complain does not suggest that the comment was a joke or, perhaps more pertinently, does not prove that it was understood as such.

3.15 Asked about the Plaintiff as a worker, Mr. Barnes confirmed that she had been promoted from making coffee to general assistant and it was hoped that she would become a supervisor. In his words: "*Nicol spoke very highly of her… Her colleagues liked her, she was good with customers, she was outgoing, friendly and impressive. Nicol was hoping she would be a supervisor. She was an asset to the company*."

3.16 I have considered the evidence of both witnesses and the totality of the evidence very carefully in this regard. On the balance of probabilities, even if it was done unintentionally, Mr. Barnes conveyed to the Plaintiff that the pregnancy was not welcome news generally. The comment that was made could only be a pleasant one in friendly and informal circumstances. My impression of the witness was that he was a serious man. He did not strike me as one who was a garrulous or chatty boss, albeit that he appeared courteous and respectful. The words *"there must be something in the water"* do not sound like a joke unless uttered in the most relaxed of situations.

3.17 Consider the events described: this was a branch manager who had limited interaction with this member of staff and who was already managing a situation where other members of staff were unavailable to work, albeit temporarily. His response in court about the value of this employee, while describing her as an excellent employee, is based in very large part on the reports of Nicol Haragus, which bears out my impression that the witness probably did not know the Plaintiff well. I accept that the impression he made on the Plaintiff during this conversation was that, while he might have been congratulating her, he was not happy to hear that they would lose another member of staff for several months in the near future, when several other members of staff were already on leave for similar reasons. While Mr. Barnes repeatedly emphasised that he was happy about this pregnancy, this ignores the simple facts: it was logistically difficult for the company to replace so many of the workforce at one time and the precise timing of the P45 that later issued confirms my conclusion.

3.18 At the time Mr. Barnes made his comment to her, the evidence suggests that various unpleasant symptoms had already arisen and the Plaintiff took leave for an extended period. The Plaintiff suffered from nausea and back pain and was on sick

leave from the end of July, 2018 until 27th August, 2018. While the Plaintiff returned to work on 28th August, her symptoms continued, which led to a meeting in early September, with Mr. Barnes, about what the Plaintiff should do next.

4. Social Welfare Suggestions

4.1 On 4th September, 2018, Mr Barnes met with the Plaintiff and with Ms. Lavinia Lungu, the Plaintiff's supervisor, to discuss how they might address the Plaintiff's situation. There was broad agreement in the evidence as to what occurred in this meeting. Nobody could remember exactly what words were used, but Mr Barnes was confident that he had reassured the Plaintiff that her job would be waiting for her when she returned to work. His evidence was that his concern was for the Plaintiff and her baby. He intended to convey that her job would be available for her and that she should avail of sick leave for the remainder of her pregnancy and should return after maternity leave. Mr. Barnes said that he advised the Plaintiff to think about it and to tell Ms. Lungu the following day, 5th September, what she wanted to do after discussing it with her husband.

4.2 The Plaintiff's summary was that "*he offered me the Irish social system and come back to work when ready*". The Plaintiff told me that she did not understand exactly what her entitlements were at that time but discussed it with another woman who had taken maternity leave. Having had that discussion, she decided that she would take sick leave until the end of her pregnancy.

4.3 The Plaintiff told the Defendant on 5th September, 2018 that she would continue in her job but with certified sick leave. To that end, she provided medical certificates from 6th September, 2018 until mid-November. The last certificate expired on 29th November.

In November, the arrangement came to an end as the Plaintiff received her P45 on the 18th of November, the event to which I now turn.

5. The Mystery of the P45

5.1 On 18th November, 2018, the Plaintiff met Ms. Haragus by chance and was told that there was an envelope at the office of the restaurant for her. She initially thought that this might be her holiday pay, which she was expecting. The Plaintiff went to the office, where her supervisor, Ms. Lungu, took an envelope from the safe and handed it to her. It had the Plaintiff's name on it, and it contained her P45. Ms Lungu told the Plaintiff that she didn't know anything about it. She wrote down the e-mail address of Mr. Barnes for the Plaintiff. The Plaintiff did not submit any further medical certificates after that date, nor did she contact Mr. Barnes. She heard nothing further from him, or from anyone connected to the Defendant, until 18th February, 2019.

5.2 Mr. Barnes gave evidence that he first learned of the P45 issue when he heard from the WRC, to which body the Plaintiff brought her complaint. He wrote two letters, both dated 15th February, 2019, in order, as he put it, to "*row back on it as it was completely wrong*". However, he did not "*row back on it*". To do so, one would expect a letter making it clear that no P45 had been issued from him and that, if the employee had received a P45, this was in error.

5.3 His letter to the Plaintiff's solicitors stated that the Defendant "*had no issue engaging directly*" with the Plaintiff "*to resolve what I can only surmise is a misunderstanding*". He stated that he, the writer, was "*anxious to establish exactly what took place*," and he noted that he was willing to go to mediation. If this was the only letter received, his request

in that regard might have been received in a different way. However, he also attached the letter he had written to the WRC.

5.4 In his letter to the WRC, Mr. Barnes wrote this:

"I am at something of a loss in relation to the above complaint. It would appear that Ms. Karpicz notified her Supervisor of her wish to leave in September of last year, and a P45 was issued. The Supervisor who dealt with this matter is currently on maternity leave herself, having just had her baby, and I am somewhat reluctant to contact her at the moment. To this extent, I am working in something of a vacuum."

This letter contains the very clear message that the Plaintiff requested her P45 but that her manager was away. My note of his direct evidence on this reads:

"I had nothing on file, that was the assumption I made. Nicol [Haragus] was on maternity leave, I did not want to trouble her so I was fishing for a reason, normally it would come from the manager. This situation was very odd, as I would not sanction a P45 for someone who was pregnant, it just beggared belief."

5.5 In his response, the witness did not accept that what was in his letter was simply wrong, he characterised it as "*fishing for a reason*". In fact, it was making up a reason. Mr. Barnes was cross-examined on this issue. He accepted it was not correct to suggest that the Plaintiff requested her P45, but added: *"I was surmising, I had no evidence to support it, that is why I asked if I could engage with the solicitors…"*

5.6 This was not persuasive evidence and it explains why the Plaintiff never contacted him to engage in mediation: she knew that she had never requested a P45. The language of the letter is plain and suggests that the witness himself had spoken to Nicol Haragus or Lavinia Lungu. It now appears that Mr. Barnes did neither but put into a letter, nonetheless, his theory that the Plaintiff herself sought the P45. Even if he

did not know it then, he now knows that this is not true and still said in evidence that he was surprised that she did not want to engage with him about a potential settlement.

5.7 The witness swore that he would not have sanctioned a P45 for a pregnant woman and that it was "*wrong, morally and legally... How this came about, I cannot explain it – unfortunately*." It is certainly wrong and it is clear that Mr. Barnes knew this at all times. Again, this makes it all the more strange that the first response of the company was to suggest that the Plaintiff sought the P45 herself, rather than issuing an immediate apology and retraction of the P45.

5.8 Mr. Felim Meade, current Director of the Defendant company, swore an affidavit confirming that there was no copy P45 on the company file. Mr. Barnes confirmed that, as far as he knew, there was no office copy, casting some doubt over the provenance of the P45 and saying that the system automatically produced copies for the office and for Revenue. He noted that the office copy would bear a hole in the top left-hand corner if there was such a copy. Mr. Barnes was then shown a copy of the P45 which had been included in discovery documentation from the company at the WRC proceedings. There is a hole in the top left-hand corner, shown clearly on the photocopy. The witness accepted that this suggested it was an office copy of the P45 and that his, and Mr. Meade's evidence to the effect that there was no such copy, was probably incorrect.

5.9 It was submitted that little turns on whether a copy was filed in the Defendant's offices. It was also submitted that the presence of the hole punch was not determinative as such feature exists in many filing systems including, for example, the Revenue Commissioners and solicitors' firms. This submission ignores the fact that the witness, Mr. Barnes, was the one who raised this issue in the case and who accepted that the

copy he saw was probably an office copy. He had initially noted that there was no office copy, suggesting that there was some mystery as to how the Plaintiff had received a P45 at all. So, while it had not been expressly stated, my understanding of his initial evidence on this topic was that he intended to create an impression that the P45 had not originated at the Defendant's office and was somehow inexplicable.

5.10 When the office copy was identified by this characteristic hole punch, this clarified that the P45 had probably been created at the Defendant's office, and probably by the witness himself, as he conceded. It is not reasonable, after that evidence was given, to submit that the copy found in the WRC documents might have been created by the Revenue or by a solicitor. I accept that Mr. Meade may not have had access to the WRC papers and may not have deliberately misled the Court.

5.11 Mr. Barnes then confirmed that payroll system would not record a finish date if an employee was not paid in a given week, as had been the case with this Plaintiff throughout the first months of her pregnancy, as they may be on sick leave (as initially occurred in this case) or on maternity leave. On page 8 of the payroll records in respect of the Plaintiff, however, Mr. Barnes accepted that there is a finish date recorded and it was set out in this way: 13/09/2018. 13th September is the date set out on the P45 also.

5.12 When asked how this arose if the Plaintiff had stopped working but was still employed, the witness replied: *"this is confirming that a P45 would have been issued for that date."* Mr. Barnes agreed that he had put that date into the system. The date is one week and one day after the Plaintiff accepted Mr. Barnes suggestion that she take sick leave and apply for social welfare benefits, having been assured that she could come back. Her statutory entitlement to notice was a period of one week.

5.13 On 20th January, 2019 the P45 in question was sent to Revenue and put on file there. Nobody from the Defendant company has suggested how this occurred other than to explain that it was an error or, as suggested in submissions, simply an administrative act following on from an initial error. Of necessity, this required researching which office of the Revenue Commissioners dealt with that employee's tax affairs, so it follows logically that whoever sent the form to Revenue knew which employee had received the P45. This was not an automated process.

5.14 To summarise: the finishing date for her employment, a week after she was urged to go on social welfare benefits, was inserted into a P45 and on the payroll, the Plaintiff's name, her address and other details were set out in a P45, the P45 was put in an envelope, addressed to her and given to her manager who put it in a safe at the office shortly before she collected it. There was no explanatory document with this P45. A copy was filed in the office, as suggested by the distinctive hole which appeared in the copy shown in discovery. Another copy was sent, about two months later, to Revenue. Whoever sent the document to Revenue had to check the employee's address and send it to the right local office.

5.15 This is my note of Mr. Barnes' evidence in respect of processing the P45:

"Q: Do you accept you most likely did that? [The witness sighs]

A: I accept it but am completely baffled by it, I just simply don't know how this came about.

Q: When it was sent to Tallaght and Revenue, did you know she was pregnant?

A: Yes, clearly.

Q: It didn't occur to you to stop the process?

A: I tried to explain this, it shouldn't have and I cannot believe it did happen. I do not understand it."

6. <u>Advertisement of the Plaintiff's Position</u>

6.1 Evidence emerged during cross-examination that this Plaintiff had noticed her own job being advertised the day after she received her P45. On 19th November, 2018, the Plaintiff saw an advertisement online for a permanent, full time position as a general assistant, which was her job title, at the same branch of the Defendant's restaurant.

6.2 Mr. Barnes addressed this in evidence and said they were always looking for employees and suggested that the ad would refresh automatically, saying: "*The website would refresh – they could have been there for some time. I was not responsible for putting them up*." There was no evidence as to who put up this ad, nor was there any evidence that such an ad had been on the website either before or after the one day in question.

6.3 The ad was for a permanent, fulltime post. In this regard, Mr. Barnes explained that a number of employees were on maternity leave and if someone is going on maternity leave, they trained people in before she left. He added that employees could be gone for periods of time in excess of a year. My note reads: "*They were temporary jobs and only became permanent if someone did not come back from maternity or if somebody else left*."

6.4 This reply does not address the main issue raised by the evidence: the advertisement was for a permanent, fulltime post, not a temporary position, and it was online the day after the Plaintiff received her P45. There was no further evidence to support the suggestion by Mr. Barnes that these ads were always being placed, could have been there for some time or were regularly refreshed. This could have been addressed by the Defendant in a number of ways, for example, by showing similar ads from around that date or indeed calling the relevant witness as Mr. Barnes had made it clear that this was not his department, effectively. Evidence could have addressed the issue, yet

there was none except the fact of the ad itself and the date on which it was seen online. I consider this to be a relevant factor in the case and unlikely to be a coincidence of timing or one of a regularly recurring set of ads for the same position.

7. The Fact of Dismissal

7.1 The issue in this case is whether or not, given the circumstances as described above, the issuing of a P45 to the Plaintiff constituted a dismissal. It is for the Plaintiff to prove that fact, and if that is proven, the burden shifts to the Defendant to justify the dismissal of the Plaintiff at a time when she was pregnant.

7.2 The evidence establishes that the Plaintiff was told that there was an envelope waiting for her at work. There is no dispute about the fact that she went to the branch, asked her supervisor for the letter and opened the envelope to find a P45. She had not requested one, which might sometimes happen in the event that an employee decides to formally leave a position for any number of reasons, if only temporarily.

7.3 In her pleadings the Plaintiff claimed that when she met Ms. Haragus on the 18th of November, Ms. Haragus told her that her P45 was in the envelope. The Plaintiff was cross-examined about this, and it was submitted that it would affect her credibility. The argument is that she claimed to be shocked on opening the envelope when, if her pleadings were accurate, she already knew it was her P45; Ms. Haragus had told her. Whether or not Ms. Haragus knew this, or mentioned it, is of minimal relevance in my view. The fact is not disputed: the Plaintiff went to the office to find her P45 waiting there. Whether forewarned shortly beforehand or not, the receipt of the P45 with no attendant explanation must have been shocking.

7.4 Mr. Barnes gave detailed evidence about how this P45 came to be created. His overall position was that it must have been him who sent it, but he couldn't understand it and was, in his words, "*completely baffled*" by it. Ms. Lavinia Lungu confirmed that the letter would not have been there for long and could only have arrived a day or two, at most, before being collected. Ms. Haragus, who knew the envelope was there, may also have known what was in the letter although it is not necessary for me to decide this.

7.5 What is clear is that a P45 was delivered, without explanation, to a woman who was pregnant and who had already left work with the suggestion that she collect social welfare payments. While she was told she would be welcomed back, the Plaintiff had understood, from a comment her manager made to her directly, that he was not happy about the pregnancy. She already knew that this was bad timing for the company as she knew several employees were either on maternity leave or due to go on leave. The minimum notice the Defendant was required to give to the Plaintiff was one week. One week and one day later, as noted in the payroll, her employment ceased.

7.6 The day after she received her P45, the Plaintiff saw what appeared to be her own job advertised online. This was not explained satisfactorily. It was reasonable for this Plaintiff to seek a solicitor's advice rather than contact anyone in the company. When the Defendant contacted the Plaintiff's lawyer, it was suggested that *she* had asked for the P45. In all of these circumstances, the sending of the P45 constituted a dismissal.

7.7 The Defendant company submits that issuing a P45 cannot, of itself, constitute a dismissal. It also submits that this is comparable to an employee requesting a P45, which does not constitute a resignation. These two situations are not equivalents; one party has considerably more power than the other and legislation is in place to protect an employee who is pregnant. While a P45 is an administrative statement of an

employee's pay and deductions for the year up to the date of termination of employment, it is easily and most readily understood as the document which, in itself, is notice that the employment itself has terminated. It is understood in popular language as such, even by those who know nothing of its legal effect and have never seen a P45, the term is understood: "*getting your P45*" means being fired.

7.8 The Defendant accepts that the provision of a P45 may constitute a dismissal but it insists that this only arises "*where it is accompanied by a statement (or context) that communicates and/or infers dismissal as a fact*." The Defendant submits that the context was that Mr Barnes assured the Plaintiff that she could return to her job after maternity leave and that her job was safe.

7.9 This was not my overall impression of the evidence. While Mr. Barnes certainly discussed her options with her, this was two months before the P45 issued and it seems clear that what he was trying to achieve was a situation in which the Plaintiff received social welfare benefits and knew that she could return to work after her pregnancy. I do not accept that it was impressed upon her that her actual job would remain open for her and would only be filled by a part-time employee. That would have been a different conversation and neither the Plaintiff nor her supervisor, Ms. Lungu, both of whom were in the room, remembered any specific reassurance such as that being given. Both considered that the Plaintiff was encouraged to take up Irish social welfare benefits, as they recalled it, and could return to work for the Defendant company.

7.10 Mr. Barnes suggested in evidence that the Plaintiff should have gone to Nicol when she got her P45. This ignores several obvious obstacles: Ms. Nicol Haragus herself was pregnant at that stage and, whether Nicol knew about the P45 or not, the P45 came from above her level, it came from Mr. Barnes. He also suggested that she

go to the owners. As he put it, *"you exhaust the chain, go up the tree"*. This is not reasonable. Again, it ignores the power dynamics in the relationship and the background to these events, in particular the Plaintiff's impression, arising from Mr. Barnes' comment and from her knowledge that five others were either on leave or about to take leave, that her pregnancy was not welcome.

7.11 It was further submitted that, even if a P45 were to act as a dismissal in the circumstances of this case, "*the Plaintiff is not entitled to treat it as such without making proper and substantive inquiry of her employer*". Counsel referred me to the cases of *Finnegan v. Boylan Group* UD2/2001 and *A General Operative v. A Packaging Company* ADJ-00008541, adjudications of the Employment Appeals Tribunal ("EAT") and the WRC respectively, both involving very similar facts. The decisions are not binding on me but are instructive and were delivered by subject matter experts in this field. Both cases are clear and succinct summaries of the relevant facts and well-reasoned, cogent decisions in the light of the relevant law.

7.12 In the case of *A General Operative*, decided in 2019, the claimant became pregnant and received her P45. Her employer insisted that she had asked for the P45 to issue but the adjudication officer of the WRC, Mr. Pat Brady, did not accept this evidence and pointed to consistent and persuasive evidence of the claimant and her husband on this issue of fact. In the circumstances, he held that receipt of the P45 amounted to a dismissal. This is similar to the facts of this case and I also adopt his sensible comment, set out in the Defendant's submissions, to this effect:

"*It would not have been difficult to discharge the burden in relation to the facts of this case. At a minimum, the Respondent [employer] could have sought confirmation of the Complainant's actual intentions, and ideally in writing for the purposes of good record keeping and, as things*

turned out, for the equally important purposes of discharging the burden of proof in respect of this complaint. This would have been no more than prudent management."

7.13 In *Finnegan*, decided in 2001, the claimant had been ill for a lengthy period and asked for a P60 as proof to the social welfare department that she had not been receiving her earnings for the relevant year. Her employer gave her a P45 instead but explained at the time that the P60 could not be generated as she had not been at work that year. Ms. Finnegan was unhappy with this and wrote to the company who responded the following month confirming that there was no intention to dismiss her. Her claim was dismissed by the EAT adjudicator, Ms. Penelope McGrath. The facts in *Finnegan* can be contrasted with those in this case: here, there was no request made and no explanation given. Ms. Finnegan knew the context and understood why a P45 had issued, her employer had also confirmed that her job was safe. There was no such context in which this P45 could be understood. Only the natural inference was open to this Plaintiff: she had been fired and identifying the cause as her pregnancy was a natural inference, indeed it was the only reasonable inference open to her.

7.14 I was also referred to *Farrell v. Farcourt Foods Limited* UD610/1989, where the EAT determined that "*The issuing of a P45 Form does not necessarily in itself constitute the ending of the contract of employment and the Tribunal is satisfied that the contract was not ended in this instance on 30th June*." However, in *Farrell*, similar to the events in *Finnegan*, the applicant had requested his P45, and the circumstances were entirely different.

8. <u>Assessment of Evidence</u>

8.1 The Defendant submitted that various pieces of evidence should be interpreted in ways that are set out in its submissions. It was argued that it was significant that the

Plaintiff found her employer to be positive and supportive and that she liked her work and wanted to stay at work and continue her job. Her evidence was that her immediate managers and supervisors were supportive. This does not require a finding that the Defendant body, or its manager, Mr. Barnes, was supportive of her, particularly when she became pregnant and was ill as a result.

8.2 I was invited to place emphasis on the evidence that in a business of over 40 years standing, and with the workforce comprised predominantly of women, that Mr. Barnes as director and as the person overseeing the staff, had never been the subject of any allegation of discrimination of any nature. I was reminded that Mr. Barnes's evidence on this was not tested. This is undoubtedly the case. My function is to test the evidence in this case, however. A good track record is not an irrelevant consideration, generally speaking, but the fact that there is no evidence of this Defendant having dismissed a pregnant woman before does not outweigh the clear documentary evidence before me that this is exactly what happened to this Plaintiff.

8.3 It was submitted that Mr. Barnes gave evidence that there was no financial or other advantage to the Defendant by terminating the Plaintiff's employment, and that this evidence on his part was not tested. It was submitted that therefore, there was no reason for him to be unhappy about the Plaintiff's pregnancy. The witness offered his opinion that there is no advantage to the employer in terminating this pregnant woman's contract, but the rationale behind the Directive and the relevant Irish legislation suggests otherwise.

8.4 This argument ignores the Europe-wide, if not worldwide, concerns for women who are vulnerable to dismissal while pregnant. If the Defendant company is unusual in this respect, in that it has no issue with the logistical arrangements that must be made

to find temporary replacements for pregnant employees or those on maternity leave, then it could have accompanied the P45 with an explanation as to why it had issued. If, as it asserts, it issued in error, it could have immediately corrected that error with a clear explanation to an employee whose first language is not English, explaining the mistake and reassuring her that her job had not been terminated. Instead, a letter was sent, months later, asserting that she had requested a P45 when she knew she had not.

8.5 It was argued that it is incumbent on an employee to take reasonable steps to establish a dismissal, especially where the dismissal is contrary to what were described as "*express assurances from her employer*". To find otherwise, it was submitted, would be "*a charter to bring unnecessary and unmeritorious claims rather than making a simple inquiry*" to confirm the employment relationship. Such an inquiry, it was argued, would "*prevent opportunistic lawyers from taking advantage of what was (in the instance of this case) a mistake*" and would "*prevent the misuse of precious court time at considerable public expense from being wasted*". The problem with this submission is that it ignores the strong evidence in this case that the P45 was issued, deliberately, to an employee while she was pregnant and after she had already taken over a month of sick leave. This was not a situation in which the employee should be seeking clarification, it is a situation in which an employer should act fast to rectify the error, if that is what it was.

8.6 The Defendant relies on the decision of *Tumusabeyezu v. Murean & MIBI* [2021] IECA 191, in which the Court of Appeal upheld a decision preferring one witness's evidence over the conflicting evidence of three witnesses. That was a personal injuries claim, arising out of a one-vehicle crash. Collins J. expanded on a theme in the judgments of Hardiman J. to the effect that demeanour is not a reliable indicator when seeking the truth and that islands of fact should be sought and relied upon, if that is possible.

8.7 There is no doubt that this advice is not only binding but constitutes a very reliable guide in the assessment of evidence. The Defendant cites the case in the context of what it characterises as "assertions" by the Plaintiff. These are the claims that the Plaintiff was told that Mr. Barnes was not happy about her pregnancy, that he made the comment about *"something in the water"* and that Ms Haragus informed the Plaintiff on 18th November, 2018 that the envelope in the safe contained her P45. I have already confirmed that the first is clearly hearsay and cannot be considered, and that it does not shed any light on the credibility of either witness. The evidence I heard in this regard does not undermine the Plaintiff's general evidence. I do not know what Ms. Haragus would have said, had she been called.

8.8 I have considered the conflicting evidence about the comment that the witness admits making in some detail, above, and this does not affect the Plaintiff's credibility insofar as I accepted her account of this conversation. I have also noted that whether Ms. Haragus knew that there was a P45 in the envelope was not a significant fact in this case, as this was an event that must have been shocking to the Plaintiff either way.

8.9 Unlike *Tumusabeyezu*, there is substantial documentary evidence in this case and the central fact, that a P45 was delivered to the Plaintiff, is not contested. What is in issue is the context in which this was done and the evidence in that regard is also, in my view, very clear. The two letters sent in February 2019, months later, set out the Defendant's first response to the complaint made by the Plaintiff very plainly.

8.10 I do not accept that this P45 was sent in error, given its timing and the multiple deliberate and administrative actions that were required to prepare, deliver and copy it to the Plaintiff and to Revenue. The evidence that her job was advertised online the following day and the letters written by Mr. Barnes, one clearly asserting what he now

accepts was not true, combine to support this finding. This having been proven, the burden passes to the Defendant to justify the dismissal. No evidence was offered to discharge this burden, the Defendant maintaining throughout that the dismissal was an error and submitting that the Plaintiff should have challenged it.

8.11 As noted, context is everything. While it was submitted that the Plaintiff should have sought clarification from Mr. Barnes, Ms. Haragus or Ms. Lungu, this is not a reasonable suggestion. Ms. Haragus was not at work, Ms. Lungu had already told the Plaintiff she did not know anything about it, and the document had come from Mr. Barnes. As that witness conceded. In those circumstances, recalling his reaction to her pregnancy, the conversation about her getting social welfare, and the arrival of a P45 with no explanation, the Plaintiff took the natural inference: she had been fired.

8.12 If, as the Defendant asserts, the P45 had issued in error, it was for the company to contact her and correct the record, not for her to make sure that the P45 was intended for her. It clearly was. The attempt to "*row back*" was too little, too late. The letters did not dispel the impression that the Plaintiff had been fired but attempted to lay the blame at her door. The date of cessation on the payroll, the ad for her job and the steps taken to create and circulate the P45 satisfy me that this was a deliberate decision.

9. Conclusions, Compensation and Cost

9.1 The fact of issuing a P45 may not constitute a dismissal in and of itself; context is everything. Where the employee is pregnant, delivering a P45 to her without explanation is strong evidence that the woman has been dismissed. Here, it is likely that this P45 did not issue in error. However, the Defendant sought to characterise the event firstly, as a request for a P45 which emanated from the Plaintiff, and secondly,

as an administrative error which required a response from the Plaintiff, not from the Defendant company. This second position was maintained throughout the case.

9.2 The effect of the EEA is that there is a presumption that the dismissal of a pregnant woman is discrimination on the grounds of gender. The facts of this case disclose a dismissal. There was no explanation for the issuing of a P45 and an incorrect assertion that she requested it. It was reasonable for the Plaintiff to infer that she had been fired because she was pregnant and no onus on her to follow up the issuing of the P45 with anyone from the Defendant company, nor was there any onus on her to respond to an initial call for mediation given the misstatement of her position in that same letter.

9.3 The Plaintiff is entitled to an order for compensation for the effects of this discrimination pursuant to section 77 of the EEA of 1998. Section 82(3) thereof provides that the types of redress for which the Circuit Court may provide under s. 77(3) are:

"(c) an order for compensation for the effects of acts of discrimination … which occurred not earlier than 6 years before the date of the referral of the case …;

(d) an order for equal treatment in whatever respect is relevant to the case;

(e) an order that a person … specified in the order take a course of action which is so specified;

(f) an order for re-instatement or re-engagement, with or without an order for compensation."

This subsection also provides that no enactment relating to the jurisdiction of the Circuit Court shall be taken to limit the amount of compensation or remuneration which may be ordered by the Circuit Court by virtue of this subsection.

9.4 In the circumstances, the most appropriate order is one for compensation for the act of discrimination and its effects. I have been referred to several cases in this regard. In *Fox v. Lee & Anor* EED036 (18th February 2003) the Labour Court held that an employee had been discriminatorily dismissed on the grounds of her pregnancy, and noted that

in measuring compensation, regard must be had to "*all the effects which flowed from the discrimination which occurred*", including "*not only the financial loss suffered by the complainant arising from the discrimination but also the distress and indignity which she suffered in consequence thereof, including the effects of bringing these proceedings*".

9.5 In *Vereker v. Holden Plant Rentals Ltd* Labour Court EDA221 (21st February 2022) the Labour Court awarded one year's salary for pregnancy-related discrimination. In *Vereker*, there was no discriminatory dismissal and no details of lost income, whereas this Plaintiff was dismissed and has provided evidence of special damages and loss. In *Vereker*, the Labour Court noted that "*Discrimination against a worker due to pregnancy is a particularly egregious breach of the Acts"* and went on to award €70,000 which was intended to reflect the seriousness of the breach. That Court was confined to awarding a maximum of 104 weeks' pay, which limitation does not apply to this Court.

9.6 The Court in *Vereker* also quoted from *Paquay v. Societe d'architectes Hoet + Minne SPRL* (Case-406/06 ECLI:EU:C:2007:601, ECR 1-8511 (2007)) to the effect that redress should *"guarantee real and effective judicial protection and have a real deterrent effect on the employer'*."

9.7 The Plaintiff prepared a Schedule of Special Damages and provided vouching documentation setting out her quantifiable losses, namely, loss of earnings and loss of Maternity Benefit. The total figure is one of €41,502.28. I am satisfied that these losses were caused directly by the discriminatory dismissal of the Plaintiff by the Defendant.

9.8 The Plaintiff's evidence at trial supported this finding as she was refused Maternity Benefit and the letter from the Maternity Benefit Section of Social Welfare Services Office, dated 28th January 2019, confirms this. The Plaintiff was in receipt of Illness Benefit until she emailed the relevant Social Welfare Office on 14th January 2020

notifying them that she was no longer claiming that payment and she claims only the loss of the Maternity Benefit for the period she was on Illness Benefit. The Plaintiff also provided payslips from her subsequent employer, from which one can calculate her loss of earnings as set out in the Schedule of Special Damages.

9.9 It was submitted that Mr. Barnes sought to rectify the error of issuing a P45 as soon as he was made aware of the error by seeking the mediation services of the WRC and the Plaintiff through their Solicitor. I was referred to the case of *Catlan Trading Limited v. McGuinness* [2017] 28 E.L.R. 137, where an employee who complained that they were subjected to sexual harassment and harassment on grounds of gender was awarded compensation in the sum of €5,000. There was evidence in that case that once the complaint had been made to the employer, it had attempted to take action.

9.10 However, this is not my view of the letters from Mr. Barnes. He did not confirm that the Plaintiff had not been dismissed in his letter dated 15th February, 2019, he claimed that she had asked for her P45 and suggested mediation. On 7th May, 2019, the Defendant wrote again stating that she had not been dismissed. This was one week before the Civil Bill issued and it was too late for the Defendant to change its position, particularly as there was no acknowledgement that this was a change of position.

9.11 In addition to the losses set out in her schedule, it is appropriate to make an additional award in order to compensate the Plaintiff for the discriminatory act. This must be sufficient to act as a deterrent but must also be proportionate and fair. I am awarding €25,000 to this Plaintiff in this regard, making a total award of €66,502.28.

9.12 It was submitted that this Court could not award damages for any inability to work post-pregnancy as the Plaintiff had agreed in evidence that her back pain did not resolve and that it continued even after she gave birth to a healthy baby girl. This

award does not reflect compensation for back pain but for actual losses due to the Plaintiff's dismissal and loss of maternity benefits, her subsequent employment in a job with lower pay and, finally, a sum to compensate her for the stress caused to her and for the discriminatory act against her at a time when she was already vulnerable.

9.13 As the Plaintiff has been entirely successful in defending this appeal, the usual rule that costs follow the event should apply. I propose making an award of costs in favour of the Plaintiff.

9.14 If either party wishes to contend for a different costs order in this regard, or if there are any other consequential orders required, please contact the registrar on or before 22nd July, 2024 and the matter can be listed for mention the following week, on Monday 29th July.