

FULL RECOMMENDATION

MP/20/2
ADJ-00025236 CA-00032105-001

DETERMINATIONNO.MPD201

SECTION 33 (1), MATERNITY PROTECTION ACTS, 1994 AND 2004

PARTIES :

TESCO IRELAND LIMITED

(REPRESENTED BY IRISH BUSINESS AND EMPLOYERS' CONFEDERATION)

- AND -

(REPRESENTED BY MANDATE TRADE UNION)

DIVISION :

Chairman:	Ms Jenkinson
Employer Member:	Mr Murphy
Worker Member:	Ms Treacy

SUBJECT:

1.Appeal of Adjudication Officer DecisionADJ-00025236, CA-00032105

BACKGROUND:

2.The Worker appealed the Adjudication Officer's Decision to the Labour Court under Section 33(1) of the Maternity Protection Act 1994. A Labour Court hearing took place on 13 November 2020. The following is the Court's Determination:

DETERMINATION:

This is an appeal under section 33(1) of the Maternity Protection Act 1994 – 2004 (the Acts) by [REDACTED] (hereinafter referred to as the Complainant) against a decision of the Adjudication Officer reference number ADJ-00025236, CA-00032105-001 issued on 23rd March 2020. The Complainant claimed that the Respondent failed to allow her to return to the job she held immediately before she commenced her maternity leave. The Adjudication Officer decided that her employer Tesco Ireland Limited (herein after referred to as the Respondent) was in breach of the Acts, he directed the Respondent to re-install the Complainant into a position in the Payroll Department or alternatively into a position that is similar and acceptable to the Complainant. He ordered the Respondent to pay compensation to the Complainant in the sum of €3,631.60. The Respondent appealed against that decision to this Court. The case came on for hearing on 13th November 2020.

Background

The Complainant commenced employment with the Respondent in its [REDACTED] in October 2007 as a General Sales Assistant (Customer Assistant). In November 2011 she was appointed as a Team Leader, however in February 2015, she decided to step down from that position and began working in the Payroll Department working as a payroll clerk. She commenced maternity leave on 6th August 2018 and returned to work on 15th May 2019. When she returned to work, she had no assigned department and was informed that she would be conducting staff health and safety training for eight weeks at which point she would be assigned a department. The Complainant lodged a grievance with the Respondent alleging that she was prevented from returning to the role she held before going on maternity leave. This grievance was not upheld.

The Complainant went out on sick leave on 12th December 2019 and remains on sick leave.

Position of the Parties

The Complainant, represented by Mandate Trade Union, submitted that she had been working in payroll when she went on maternity leave but did not return to work to payroll, in breach of Section 26 (1) (b) of the Acts. The Union also submitted that the Respondent was in breach of its own policy which states:-

"when a colleague returns from maternity leave, she is entitled to return to her previous position with no less favourable terms and conditions".

and

"if the colleague's previous position has been made redundant, the colleague will be offered a suitable and equivalent alternative position where a vacancy exists".

The Complainant returned to work on 15th May 2019 with no assigned department and was informed that she would be conducting staff health and safety training for eight weeks at which point she would be assigned a department. She was then put back into the Payroll department for a period of four weeks, covering absence. The Complainant was of the opinion that maybe she would be retained in the aforesaid department and the matter would be resolved, however this was not to be the case as at the end of the four-week period she was placed on the Systems Roster.

In support of the Complainant's contention, the Union relied on *Tighe v Travenol Laboratories (Ireland) Ltd* [1989] 8 JISLL whereby the EAT held that a woman who had previously been employed as an office worker and returned following maternity leave to be given production work, was constructively dismissed. The EAT held that the nature of work involved in production was so different to office work that it did not consider it appropriate from the employee's standpoint. It stated: *"The words should be interpreted subjectively from the employee's standpoint, including the general nature of the work which suited her and her domestic considerations"*.

The Respondent, represented by Ibec, stated that the Complainant returned to work after maternity leave on the same terms and conditions of employment as she was on before she went on maternity leave, i.e. as a General Sales Assistant/Customer Assistant. She was assigned into the Training Department on her return and was advised that it was not possible to assign her to payroll as colleagues had been moved around over the past year and would be moved again, therefore another colleague was now in the payroll role.

The Respondent stated that it is an accepted and established practice within the Company that Customer Assistants move positions from time to time as provided for in their contracts of employment. This provision was specifically provided for in collective agreements reached with Mandate Trade Union in 1999 and 2006, which provide that all employees will be fully skilled to and work in all areas of the store. The 2006 Agreement provides that *"As a Customer assistant you will be required to work in all areas and departments of the store as determined by business requirements"*.

The Law

The Respondent confirmed for the Court that it was in compliance with Section 26 of the Acts with regard to the Complainant's return to work following maternity leave. Section 26 of the Acts states:-

26.—(1) Subject to this Part, on the expiry of a period during which an employee was absent from work while on protective leave, the employee shall be entitled to return to work—

(a) with the employer with whom she or he was working immediately before the start of that period or, where during the employee's absence from work there was a change of ownership of the undertaking in which she or he was employed immediately before her or his absence, with the owner (in this Act referred to as "the successor") of the undertaking at the expiry of the period of absence,

(b) in the job which the employee held immediately before the start of that period, and

(c) under the contract of employment under which the employee was employed immediately before the start of that period, or, where a change of ownership such as is referred to in paragraph (a) has occurred, under a contract of employment with the successor which is identical to the contract under which the employee was employed immediately before the start of that period, and (in either case) under terms or conditions —

(i) not less favourable than those that would have been applicable to the employee, and

(ii) that incorporate any improvement to the terms or conditions of employment to which the employee would have been entitled, if she or he had not been so absent from work.

(2) For the purposes of subsection (1) (b), where the job held by an employee immediately before the start of the period of her or his absence on protective leave was not the employee's normal or usual job, the employee shall be entitled to return to work, either in her or his normal or usual job or in that job as soon as is practicable without contravention by the employee or the employer of any provision of a statute or instrument made under statute.

(3) In this section "job", in relation to an employee, means the nature of the work which she or he is employed to do in accordance with her or his contract of employment and the capacity and place in which she or he is so employed.

Findings of the Court

The Complainant's 2007 contract states that her job title is "General Sales Assistant" and the job description for that role also referred to as a "Customer Assistant" which was agreed during the national Agreement reached between the Respondent and Mandate in 2006 states as follows:-

“As a Customer Assistant you will be required to work in all areas and departments of the store as determined by business requirements”.

The 1999 Building our Future agreement states:-

“This agreement will ensure that going forward all staff employed after December 12th 1996 will be fully skilled to and work in all areas of the store. Staff will be scheduled to suit the needs of the business, taking into account their individual needs”.

Having carefully considered the submission made by the parties, the Court notes that section 26 of the Acts provided a general right to return to work on expiry of maternity leave to the job which the employee held immediately before the start of her leave. Section 26 (3) of the Acts defines “job” in relation to an employee and refers to the nature of the work which she is employed to do in accordance with her contract of employment and the capacity and place in which she is so employed. Therefore, the Court must examine the facts of this case in the context of that provision.

The Court is satisfied that the reference to “*nature of the work*” means the job as described in her contract of employment, in this case it has been referred to as “General Sales Assistant” or “Customer Assistant”. The only other grades in the store are Retail Security Officers and Grocer/ Home Delivery Drivers. It is not disputed that within the General Sales Assistant/Customer Assistant grade, there is an expectation of total flexibility, where staff can be assigned to work in any area of the store.

There is no dispute that the “*place*” of the Complainant’s employment is the Clarehall store, that is the store she had been employed in prior to her maternity leave and the place to which she returned to.

Therefore, the remaining element provided for with the definition of a “*job*” under section 26 (3) of the acts is the “*capacity*” in which she was employed prior to the taking of her maternity leave.

The Cambridge Dictionary of English defines the term “capacity” as meaning:-

“aparticularpositionorjob; arole”

The Oxford Dictionary of English defines the term “capacity” as meaning:-

“a specified role or position”

Therefore, the Court is satisfied that the “capacity” in which the Complainant was employed in her grade as a General Sales Assistant/Customer Assistant prior to her taking maternity leave was in the Payroll Department, a position she held for three and a half years. Hence based on the Court’s conclusion in this case on the interpretation of section 26(3), the Court finds that the Complainant should have been returned to the role/position which she held immediately before the start of her maternity leave, she should therefore have been returned to the payroll position on return from the leave. Taking cognisance of the fact that her contract of employment requires flexibility, whereby she can be transferred to different areas of the store “*as determined by business requirements*” viz, the 1999 Collective Agreement then in accordance with section 26 (1)(b) & (c), the Court accepts that such a flexibility requirement remains part of her conditions.

This general proposition is supported by the decision of the High Court in *Holland v Athlone Institute of Technology* [2012] 23 E.L.R. 1., in a claim under the Protection of Employees (Fixed -Term Work) Act, 2003. Here, the Court had to consider if an employee who acquired a contract of indefinite duration pursuant to section 9 (3) of that Act could be dismissed on grounds of redundancy. Hogan J pointed out that an employee who acquired a contract of indefinite duration by operation of law is not placed in a superior position to that of an employee whose status as the holder of a contract of indefinite duration was never in doubt.

It follows, on the same basis, that an employee who returns to her job on the completion of maternity leave is not placed in a superior position to that of an employee who has not had occasion to avail of maternity leave.

Therefore, the finding by the Court that the Complainant should have been returned to the Payroll Department on return from maternity leave does not undermine the Respondent’s right to transfer the Complainant to alternative duties as determined by the business needs of the store.

Conclusion

The Court finds that the Respondent was in breach of section 26 (1) in not returning the Complainant to her previous job which she held prior to taking maternity leave, when she returned on 15th May 2019. Therefore, the Complainant’s claim is well founded.

Right to Redress

Section 32(2) of the Acts provide as follows in relation to redress by the Labour Court:-

(2) A decision of the Labour Court under section 44 of the Workplace Relations Act 2015 on appeal from a decision referred to in subsection (1) may include such directions to the parties to the appeal as the Labour Court considers necessary or expedient for the resolution of the matter, and if the decision is in favour of the employee then, without prejudice to the power to give such directions, the Labour Court may order —

(a) the grant of leave for such period as may be so specified,

(b) an award of compensation (in favour of the employee to be paid by the relevant employer) of such amount, not exceeding 20 weeks’ remuneration in respect of the employee’s employment calculated in such manner as may be prescribed, as the Labour

Court considers just and equitable having regard to all of the circumstances, or

(c) both such grant and such award.

The redress sought by the Complainant is reinstatement to the role in the Payroll Department she occupied prior to her maternity leave and an award of compensation. Having regard to all the circumstances of this case the Court notes that the Complainant is currently on sick leave, therefore the Court in exercising its discretion as provided for under section 32(2) makes no direction to the Respondent regarding the Complainant's return to work. The Court believes that the appropriate redress in this case is an award of compensation. The Court measures the amount of compensation that is just and equitable as €7263.20 (€12.97 x 28 hours x 20 weeks).

Determination

The Court determines that the complaint under the Acts is well founded, however, the Decision of the Adjudication Officer is varied.

The Court so Determines.

	Signed on behalf of the Labour Court
	Caroline Jenkinson
H.M.	_____
04 December 2020	Deputy Chairman

NOTE

Enquiries concerning this Determination should be addressed to Heather Murray, Court Secretary.