

**Reserved judgment**



**Claimant:** Ms A Rae  
**First Respondent:** Gladewood Taverns (The Beehive) Limited  
**Second Respondent:** Thomas Smith  
**Third Respondent:** Lorraine Smith

**Heard at London South Employment Tribunal on 24-27 July 2017**

**Before Employment Judge Baron**

**Lay Members:** Ms Y Walsh & Mr S Goodden

**Representation:**

**Claimant:** Patrick McNamee - Solicitor  
**Respondent:** Gillian Crew - Counsel

**JUDGMENT**

It is the judgment of the Tribunal as follows:

- 1 The Tribunal declares in accordance with section 112 of the Employment Rights Act 1996 that her complaint that she was unfairly dismissed by the First Respondent is well-founded;
- 2 The Tribunal declares that the Respondents have contravened the provisions of the Equality Act 2010 to the extent set out in the reasons below but not otherwise;
- 3 The remaining claims made by the Claimant fail and are dismissed.

**REASONS**

*Introduction*

- 1 On 17 August 2016 the Claimant presented a claim to the Tribunal. In the claim form ET1 she claimed that she had been unfairly dismissed from her post as Manager of The Beehive public house in New Eltham, and had been discriminated against because of her pregnancy, and also because of her sex. The Claimant also made certain money claims. A response was duly presented stating that the claims were resisted. Amended Grounds of Resistance were filed with the Tribunal on 11 January 2017.
- 2 The Claimant gave evidence herself. She also called Samuel Norman, Ian Rae (her uncle) and Nicole Sanderson (her cousin). Mr Norman is a friend of the Claimant. Ms Sanderson worked at The Beehive from February to June 2016 as a member of the bar staff.

3 Mr Smith and Mrs Smith are the owners and directors of the First Respondent. They are also individual Respondents in these proceedings. They gave evidence, as did the following:

James Smith – Son of Mr & Mrs Smith;  
Martin Lloyd – Operations Manager of the Respondent;  
Connie Haddon – Barmaid at The Beehive from July 2015 to February 2017;  
Niamh McGarry – Barmaid at The Beehive from October 2014.

4 We were provided with a modest bundle of documents and we refer to them as necessary below. During the second day of the hearing the Claimant mentioned that she had been provided by her GP with a form Med3 on 9 May 2016. That document was not in the bundle, and Mr McNamee sought leave to introduce it at the beginning of the third day. That application was opposed by Miss Crew on the basis that the Claimant had had the benefit of legal advice since at least the commencement of the proceedings, and it should have been disclosed earlier. We decided that leave should be granted. We failed to see what prejudice there was to the Respondents as the Claimant's witness statement had referred to medical advice having been taken by her.

5 We saw extracts from the CCTV recording of the events of the morning of Sunday 8 May 2016 during the hearing. The recording was shown to us before we heard evidence and we have looked again at the recording during our deliberations. What is shown on the recording became more meaningful after having heard the evidence. However, sound was not recorded which is unfortunate considering the extent of the conflict of evidence.

6 We also heard a lengthy voicemail message left for the Claimant by Ms McGarry on 9 May 2016, and we listened to it again during our deliberations. We consider that this recording is very material to our findings.

7 There was a preliminary hearing on 1 November 2016 for case management purposes. The issues for our determination were set out as follows:

1. **Automatically unfair dismissal claim - section 99 ERA 1996**

1.1. Did the Claimant resign or was she dismissed? The Claimant's case is that she was dismissed by text by the second respondent followed by a letter with her P45 and P60.

1.2. If she was dismissed what was the reason for the dismissal? Was the reason or principal reason for dismissal related to pregnancy, childbirth or maternity? If so, the Claimant will be treated as automatically unfairly dismissed.

2. **Section 26: Harassment related to sex**

2.1. Did the respondent engage in unwanted conduct as follows:

2.1.1. On 2 May 2016 the second respondent asking the Claimant if she would have an abortion and saying that he thought she should have an abortion.

- 2.1.2. The second respondent informing the Claimant that he would have to see how her being pregnant “affects him”.
  - 2.1.3. After notifying them of her pregnancy, the second and third respondents insisting that the Claimant come in on her off-days, to clean pipes and move barrels.<sup>1</sup>
  - 2.1.4. The third respondent asking the Claimant if her parents were “disappointed”. The Claimant says that this was said as if she should be ashamed because she was pregnant.
  - 2.1.5. On Saturday 7 May 2016 the second and third respondent’s son James Smith, an employee of the first respondent, saying “she can’t talk to me like that, I will ruin the c\*nt”.
  - 2.1.6. On 8 May 2016 the second respondent insisting the Claimant come to work on her day off.
  - 2.1.7. On Sunday 8 May 2016 the third respondent telling the Claimant she was a “lazy f\*\*\*ing cow” and using other expletives.<sup>2</sup>
  - 2.1.8. The third respondent saying to the Claimant “how do you think you can raise a kid?” The Claimant’s case is that this was said in a manner to indicate that she was unfit to raise a child.
  - 2.1.9. The loss of her home which was connected to her employment. The respondents’ case is that the Claimant lost the accommodation consequent upon her resignation.<sup>3</sup>
- 2.2. Was the conduct related to the Claimant's gender?
  - 2.3. Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - 2.4. If not, did the conduct have the effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - 2.5. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**3. Section 18: Direct discrimination because of pregnancy/maternity**

- 3.1. Knowledge of pregnancy is admitted. The respondents admit that the Claimant informed the second respondent of her pregnancy on 2 May 2016.

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<sup>1</sup> Stated in further particulars to be the mornings of each of 4 and 8 May.

<sup>2</sup> The ‘other expletives’ alleged to have been used were provided by the Claimant in further particulars, and are mentioned below.

<sup>3</sup> Mr McNamee confirmed that this point was not being pursued as an allegation of harassment.

- 3.2. Has the respondent subjected the Claimant to the following unfavourable treatment falling within section 39 Equality Act, namely:
- 3.2.1. Her dismissal (if dismissal is proven);
  - 3.2.2. The loss of her home which was connected to her employment;<sup>4</sup>
  - 3.2.3. Failing to carry out a risk assessment. The respondents admit that no risk assessment was carried out in the seven day period between the Claimant notifying the second respondent of her pregnancy and the termination of her employment, but deny discrimination and say that it would have been carried out had the Claimant remained in employment;<sup>5</sup>
  - 3.2.4. Any of the treatment not found to have been harassment.
- 3.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- 3.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. **Section 27: Victimisation**

- 4.1. Has the Claimant carried out a protected act? The Claimant relies upon her appeal against dismissal. It is an issue as to whether the Claimant presented an appeal against her dismissal.
- 4.2. If there was a protected act did the respondents fail to acknowledge or respond to the appeal because the Claimant had done a protected act?

5. **Unpaid annual leave – Working Time Regulations**

- 5.1. The respondent's case is that the leave year from 1 April to 31 March each year and therefore only 5 weeks of the leave year had elapsed by termination of employment.
- 5.2. How much of the leave year had elapsed at the effective date of termination?
- 5.3. How much pay is outstanding to be paid to the Claimant?<sup>6</sup> The Claimant is ordered below to give further and better particulars of this claim.

6. **Breach of contract**

- 6.1. The Claimant does not seek damages for the "manner of dismissal" but confirms that she seeks an uplift for an

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<sup>4</sup> ditto

<sup>5</sup> Mr McNamee confirmed that this allegation was not being pursued.

<sup>6</sup> The Claimant alleged in further particulars that Martin Lloyd had agreed that two weeks from 2015/16 could be accrued over.

unreasonable failure to follow the ACAS Code, if dismissal is proven. This is a remedy issue.

- 6.2. The Claimant claims non-payment of bonus at the rate of £50 for every £1,000 of takings that were in excess of £16,000 takings (not profit) per week. The Claimant as manager had direct access to the tills and knew the takings. The respondent's position is that there was no such contractual term. It is an issue for the tribunal as to whether this was a term of the Claimant's contract and if so, whether or not it was breached.

## 7. Remedies

- 7.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 7.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest. The Claimant also seeks an uplift for unreasonable failure to comply with the ACAS Code.

- 8 As all parties are professionally represented we are not setting out the statutory provisions.

### *The facts*

- 9 Because of the particular circumstances of this case in this section we are setting out basic facts, and also the evidence of the witnesses concerning material issues which are in dispute. We make further findings of fact about those issues when considering our conclusions below.
- 10 In this case witnesses gave dramatically different versions of what occurred, and in several critical respects the evidence cannot be reconciled. The differences cannot be explained away as being lapses of memory, nor by saying that they were different interpretations of events, and that those different interpretations were understandable. We are quite clear that some of the evidence given to the Tribunal is simply false. It is our task to do the best we can to ascertain what did occur, and then decide upon the legal consequences.
- 11 By way of background, the Claimant on the one hand and Ms Haddon and Ms McGarry on the other were close friends at the material time. That friendship has obviously dissipated. That change is a key element in this case.
- 12 The Beehive is a busy public house. The public area is on the ground floor. On the first floor is a private flat used by Mr & Mrs Smith from time to time. Their normal residence is in Kent. There is also an office on the first floor. There are further rooms which were used by the Claimant for residential purposes, but which do not form a self-contained flat.
- 13 The Claimant has significant experience in the hospitality industry from 2006. She became the Assistant Manager of The Beehive in August 2015, and was promoted to the position of Manager in January 2016 after the previous Manager left. Her role as the manager was a

supervisory one, and she was responsible for delegating specific tasks to the 16 or so staff employed at the establishment.<sup>7</sup>

- 14 Two issues arise concerning the Claimant's contractual terms with which we deal at this stage. In the bundle was a document consisting of six pages containing what was agreed were the terms and conditions governing the Claimant's employment. These are clearly generic terms and conditions, and had not been prepared specifically for the purposes of the employment of the Claimant. It is fortunately not necessary to set out any of the detailed provisions. The holiday entitlement was 28 days each year, and the leave year was from April to March. There was a specific provision that any holidays not taken by the end of a year would be forfeited. The Claimant alleges that at the end of the leave year 2015/16 she had 10 days due to her, and that Mr Lloyd specifically agreed with her that those days could be carried over. There was no documentary evidence on this point.
- 15 The clause relating to hours of work provided that there were no normal working hours, and work could not be guaranteed. The standard terms in this respect appear to us to be more relevant to a more junior member of staff who reported to the Claimant as the Manager, rather than being relevant to her. The Claimant set the rota, including the times when she was to be on duty.
- 16 The first specific incident to which our attention was drawn occurred on 17 January 2016. We record this simply because some reference was made to it by the Respondent rather than it being of any particular significance in these proceedings. On the day in question the Claimant had delegated her responsibility for supervising the closing of The Beehive, and the associated cleaning. The necessary works were not undertaken, and when a barmaid called Nikki opened up the following morning she found that the bar was in a poor state. There was in the bundle a list which she had prepared setting out 12 categories of defects. That document also records that the Claimant saw each of the five members of staff who were on duty that evening individually and kept a record of having spoken to them, while not giving them formal verbal warnings. We conclude that the Claimant was doing exactly what she was supposed to do as the Manager in those circumstances.
- 17 The Claimant had become pregnant in February 2016, and took a pregnancy test in the presence of Ms Haddon and Ms McGarry. This must have been in mid-March 2016. As stated above at that date the Claimant was good friends with each of them. We were shown a Whats App message from the Claimant of 28 March 2016 apparently to Ms McGarry, but also possibly to others, which includes the follow:

So I'm 6 weeks one day baby has heart beat already and everything!

The relevance is that the Claimant appears to be genuinely excited and there is no suggestion of her considering an abortion.

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<sup>7</sup> Not all staff were of course on duty at any one time. They worked shifts and had days off.

- 18 On 1 May 2016, the Claimant unfortunately broke her wrist when she fell over in the accommodation which she occupied above the public area. The Claimant attended at a hospital and wrist was put in plaster. It remained in plaster at all times material for the purposes of this claim and as a result the Claimant's ability to assist with the normal functions of the public house was materially restricted.
- 19 The Claimant decided to tell Mr Smith of her pregnancy on 2 May 2016. It is concerning this conversation that the first differences in the evidence become apparent. We heard evidence about 2 May 2016 from the Claimant, Ms Sanderson, Mr Tom Smith, Ms Haddon and Ms McGarry. It is agreed that the conversation took place in the office on the first floor of the property. Only the Claimant and Mr Smith were present during the conversation. It was Ms Haddon's evidence that she overheard the conversation from the landing on the first floor. Ms Sanderson gave evidence that she arrived at The Beehive for her shift, which was from 11.30 am to 5 pm, and saw the Claimant upset. The Respondents dispute that Ms Sanderson was at the property at all.
- 20 It is the Claimant's case that after she had told Mr Smith that she was pregnant he asked if she would have an abortion and when she said she would not do so because she had previously had an abortion, and did not want to go through that again Mr Smith said that he thought she ought to have one. She took that as him telling her to have an abortion. The Claimant also alleges that Mr Smith said he would have to think how the pregnancy would affect him. The Claimant says that she then left the office and met Ms Sanderson in the bar and told her what had happened. The Claimant said she was crying at the time. Ms Sanderson supports that aspect of the Claimant's evidence and added that the Claimant had told her that Mr Smith had also asked who was the father of the baby.
- 21 Mr Smith's evidence was that he showed nothing but concern and interest for her and her unborn child, and treated her with respect. He said that he had asked who the father was and whether the father was happy about the pregnancy and was supportive of her. Mr Smith denied asking if the Claimant would have an abortion and said that the Claimant had herself volunteered that she had previously had one. He added in cross-examination that the Claimant had expressed concern about damage having been caused to the foetus because she had been drinking.
- 22 Ms Haddon said that as she was walking across the landing from having had a shower she overheard the conversation. She said that the Claimant told Mr Smith that she had only discovered the previous night that she was pregnant when she had been to the hospital following breaking her wrist. Ms Haddon also said that the Claimant said that she did not know if she was going to keep the baby or not, to which Mr Smith expressed concern, and asked who the father was. Ms Haddon then said that the Claimant went back into the bedroom where she and Ms McGarry were and told them that Mr Smith had been horrible and had

told her she should get an abortion. She said that the Claimant was not crying nor distressed.

- 23 The evidence of Ms Haddon was supported by that Ms McGarry insofar as the conversation in the bedroom was concerned. Ms McGarry further told us that Ms Haddon then told her that what the Claimant had said to them was a lie. Ms McGarry accepted that she did not raise the matter with the Claimant, even though they were good friends at the time. Ms McGarry also said that the Claimant had told her and Ms Haddon that she was going to tell Mr Smith of her pregnancy, and that Ms Haddon then deliberately eavesdropped on the conversation. That is different from the evidence of Ms Haddon which was to the effect that her overhearing of the conversation was accidental.
- 24 It is not in dispute that during the subsequent week the Claimant copied some of the company's business documents. The reason for that action was not satisfactorily explained by the Claimant.
- 25 One of the specific allegations by the Claimant is that Mr Smith and Mrs Smith insisted that she come in on one of her days off to clean pipes and move barrels. The Claimant simply asserted in paragraph 18 of her witness statement that she was called in for such purposes. There is no other evidence concerning the moving of barrels, and that part of the Claimant's allegation is unsubstantiated.
- 26 There was evidence before us as to the cleaning of the beer lines. Our findings of fact are quite straightforward. Such cleaning takes place once a week on Wednesdays. On 4 May 2017 Courtney Wilson was due to undertake the task, but called in sick. At 08.50 am the Claimant sent a message to Ms McGarry asking if she could remember how to do it, or whether she (the Claimant) needed to come in to talk Ms McGarry through the process. Ms McGarry replied saying that she had never done it on her own, and did not want to have the responsibility. The Claimant then said at 09.08 am that she would be in within half an hour to guide Ms McGarry, as she (the Claimant) could not physically do it. As mentioned, the Claimant had a broken wrist at the time. The rota shows the Claimant as due to have that day off.
- 27 Ms McGarry then noted that Mr Lloyd was there, to which the Claimant replied:
- He doesn't wanna do it as he is wearing a suit is what he said to me. And I'd rather I come and tell you then [sic] him they're cunts and he will just patronise you xxx
- 28 The exact day does not matter, but it is agreed that during the latter part of the week of 2 May 2016 Mrs Smith visited The Beehive and spoke to the Claimant. The evidence of Mrs Smith is that on that occasion she met the Claimant in the office and said to her that congratulations were in order, for which the Claimant thanked her. The Claimant's evidence was that Mrs Smith asked generally about the Claimant's parents and said that she bet that they felt disappointed. The Claimant took that to mean that she should be ashamed because she was pregnant.
- 29 We now come to the events of the weekend of 7 and 8 May 2016 out of which these proceedings flow. The bar was busy on the Saturday night.



The Claimant was on duty. The basic facts are agreed. Mr James Smith was in the bar with his girlfriend. He went into the kitchen where the Claimant, Ms McGarry and Ms Haddon were and said that more assistance was required behind the bar, and also to clear used glasses.

- 30 The Claimant's evidence is that Mr Smith was drunk, he was aggressive and rude, was continually going behind the bar, and the Claimant asked him to stop. She was assertive with him. The Claimant alleges that Mr Smith said to Kester, another member of staff (from whom we did not hear):

She can't talk to me like that, I will ruin the cunt.

- 31 Mr Smith's version of events was that he was not drunk, that there was complete chaos in the bar, and the staff behind the bar were overwhelmed. He asked for assistance from those in the kitchen, to which the Claimant became abusive and aggressive using extreme expletives with a raised voice. The Claimant did not initially go through to the bar but did so later and created a scene in front of the remaining customers, saying how awful his parents were. Mr Smith said he stayed until almost closing time to assist the staff and had to cancel his plans to go out for dinner.

- 32 Ms McGarry gave evidence which broadly supported that of Mr Smith. There is a discrepancy over times which we have noted in that her shift finished at 5.30 pm, and Mr Smith said that he did not arrive until about 7.30 pm.

- 33 Mr & Mrs Smith had decided to stay at the public house on the night of 7/8 May 2016. Mr Smith sent a text message to the Claimant at 01:08 on the Sunday morning, 8 May, saying that is what they would do. The Claimant replied saying that she was staying with her mother because of her broken wrist, that Ms McGarry was out, and the alarm was on.

- 34 It is the responsibility of those closing the bar at night to clean the bar and the tables, wash the glasses, restock the bar with bottles and so on. A cleaner was employed during the morning on every day except Wednesdays and Sundays. The cleaner's responsibility was to vacuum the carpets and clean the toilets. Ms McGarry had agreed with the Claimant that she could stay at The Beehive for the night as it was her responsibility to clean it on the Sunday morning when the normal cleaner was not on duty.

- 35 Ms McGarry and Ms Haddon went out clubbing and Ms McGarry returned at about 6.30 am. She decided to carry out her cleaning duties before going to bed and disarmed the alarm for that purpose. She retired to bed at about 7.30, and accepted before us that she had not done a good job on the cleaning after her night out. A small point which is relevant is that in order to clean the porch she had taken the security chain off the inner front door.

- 36 Unbeknown to Ms McGarry, Mr and Mrs Smith were staying the night at The Beehive. Mrs Smith came down to the ground floor to obtain some milk for morning tea at about 9.40 am. She was surprised that the alarm was not set and that the chain had been taken off the front door and left

on the bar. She also found, in general terms, that the bar was not in the condition in which it ought to have been. Mr Smith made a list of six items on a blank till roll, adding: It appears everyone wants to get away early. Please get this sorted. Tom'

- 37 Mr Smith then knocked on the Claimant's bedroom door and found Ms McGarry there. The Claimant was at her parents' house. There was a discussion about the cleaning, the result of which was that Ms McGarry agreed to come downstairs and help Mr and Mrs Smith finish the cleaning. Mr Smith then telephoned the Claimant just before 10 am and asked her to come in immediately. The Claimant did so and arrived at 10.25 am. In evidence to us the Claimant agreed that the state of the bar was unsatisfactory, and the work which should have been done after closing time on the previous evening had not been completed.
- 38 We saw extracts from the Respondent's CCTV system of what then occurred. It was correctly pointed out by Mr McNamee that the Respondent had not retained the CCTV recording from the previous evening which would have shown what steps were taken to close and tidy the bar after the last customers had left.
- 39 There was no sound on the CCTV recording. Further, it was not possible to see the expression on the faces of those involved. We saw a discussion involving the Claimant and Mrs Smith, and then also involving Ms McGarry. Mrs Smith was gesticulating and doing most of the talking. In the further particulars provided by the Claimant it is alleged that Mrs Smith said as follows:
- [Mrs Smith] just started shouting and insulting her. The first thing was along the lines of what the f\*\*\* do we pay for, that she had not put chains on bottled up etc that she was f\*\*\* useless and lazy, who the f\*\*\* was meant to clean the pub that morning she had better start f\*\*\* cleaning as the pub was a state.
- The Claimant tried to explain that [Ms McGarry] was due to clean and that she had checked all the usual close down jobs were done at the end of night and the chains were most definitely on. [Mrs Smith] just kept on shouting and bashing around on the bar then came out the main pub area, repeating how she was a lazy f\*\*\* cow and that [Mr Smith] said chain wasn't on and 'is she saying he is a liar' and how f\*\*\* dare I as I'm a lazy useless c\*\*\*.
- 40 Mrs Smith denies using that language, but accepts that she was annoyed because, she said, the Claimant had failed to ensure that the cleaning had been done on the previous night, and it had been left to her, her husband and Ms McGarry to do it. She accepts she referred to the bar having been 'left like a pigsty'. She says the Claimant became abusive and defensive.
- 41 Ms McGarry said she could not hear anything properly as she was Hoovering. We do not accept that evidence. The CCTV recording shows her with a dustpan and brush, and then a mop and bucket at the relevant time, but not with a vacuum cleaner. She used the vacuum cleaner later. There is a partial transcript below of Ms McGarry's message left for the Claimant and one element of that is material.
- 42 The Claimant then made a telephone call from inside the building. Mr Smith then appeared at about 10:29, and he showed the Claimant the

list mentioned above. There was a discussion which involved Mrs Smith for a while before she continued cleaning the top of the bar. The discussion continued between Mr Smith and the Claimant, with Mr Smith gesticulating vigorously and shaking his head.

- 43 Mr Norman then came into the bar at about 10:42. He and the Claimant went outside, sat at a table and had a long discussion. About five minutes later two others arrive in a truck. It is apparent from the manner in which the truck was driven onto the pavement to park that they did not simply see the Claimant and Mr Norman and decide to stop. We find it difficult to accept the evidence of the Claimant and Mr Norman that they were just passing and saw the Claimant in tears. That affects the credibility of the evidence, but the fact that the two individuals joined the conversation is not relevant.
- 44 At 10:52 the Claimant and Mr Norman go back inside the building, not accompanied by the others. There was first of all a discussion involving the Claimant and Ms McGarry, with Mr Norman standing by. Mr Smith then appeared with a case of wine and he and the Claimant had a discussion behind the bar as Mr Smith was restocking a shelf. Mr Norman and the Claimant then left the building, and as they left Mr Norman went towards the window and wagged his finger at Mr Smith inside. One of the others who was there restrained him from going back inside.
- 45 It is the Claimant's evidence that she was so upset that she told Mr and Mrs Smith that she was going home, to which Mr Smith said 'All right – go'. Ms McGarry's evidence was that all she heard was the Claimant saying: 'Tom, I am leaving.' Mr Smith's evidence was that the Claimant emphasised that she was leaving and said to him: 'You don't understand, I'm leaving and I'm not coming back.' Mr Smith said that he took that as a resignation, and replied: 'OK, Annie'. Mrs Smith's evidence was exactly the same as that of Mr Smith.
- 46 The Claimant's cousin, Ian Rae, gave evidence. He said that he saw the Claimant at her parents' house at about 12.30 pm and that she was very distressed. She said that she had had a traumatic experience at work, and would not be able to go in to work at the time when she was due to be in later in the day. Mr Rae volunteered to make a telephone call to inform Mr or Mrs Smith. He spoke to Mr Smith at about 1 pm. Mr Rae told Mr Smith that the Claimant was very upset, was going to seek medical advice, and she would not be able to come in to work. Mr Smith then said that he accepted the Claimant's resignation, to which Mr Rae said that the Claimant had not resigned. Mr Rae's evidence to us was that there had not been any discussion between the Claimant and him about resignation, and that he assumed that she had not resigned as he was ringing only to say that she would not be coming in to work that day.
- 47 There are important exchanges of text messages by 'WhatsApp' between the Claimant and Ms McGarry starting at 14:52 on 8 May. They started with a message from Ms McGarry saying that she was tired as she had only had three hours sleep. There was then an exchange about staffing in which the Claimant asked Ms McGarry if she had tried

everyone and that Mr and Mrs Smith and Mr Tom Smith would have to work as well as 'martingale'. Shortly thereafter Ms McGarry said that she did not want to go back to work.

48 There is then an exchange as follows at 15:08:

The Claimant. Speak to your dad and tell him lorraine basically threatened your job anyway when she said about you saying anything. But I an biased as I'd love everyone to leave lol xxxx

Ms McGarry. I'm gonna look for other jobs but yeah well they will get what they deserve ... They were watching cctv when I left with Connie about an hour ago xxxx

49 There were then various exchanges from which it is clear that Ms McGarry was disenchanted with her lot at The Beehive.

50 On 9 May at 12:46 Mr Smith sent a text message to the Claimant as follows:<sup>8</sup>

Annie. Further to your tendering your resignation as Manager of The Beehive yesterday and same being accepted. Would you kindly inform me as to when you intend to return premise key's and collect your personal belonging's, wages and P45. Thank's. Tom

51 The Claimant replied to Mr Smith at 16:55 as follows:

Good afternoon Tom Just to notify you I have not handed in my resignation I left the premises due to the stress of the situation and the abuse I received yesterday morning you were informed of this on the phone yesterday afternoon. However my mum and cousin will be moving my stuff out of the flat due to my current situation and collecting my wages this evening at about 8. Regards. Annie

52 On 9 May 2016 at 17:20 the Claimant sent a message to Ms McGarry asking her to ring her. Ms McGarry replied saying that she would do so, and then wrote saying that Mr Smith had spoken to her:

Ms Mc Garry. Asked me if you said you were quitting I said I didn't hear her say that. He was like are you sure

The Claimant. Sorry if he is nasty to you xxx

Ms McGarry. I was like no she didn't say she's quitting she said she's leaving now And no he's being well nice to me xxx

53 There was then the long voice message left for the Claimant by Ms McGarry at 17:55. We have listened to that message. Ms McGarry related the conversation with Mr Smith about what Ms McGarry had heard on 8 May. We set out extracts:<sup>9</sup>

Niamh, like are you sure you didn't hear anything' and I said 'no'. I didn't hear her say she is leaving (mumbles) forever, I heard her say she is going home and that was it and then he was like 'you need to tell the truth' and I was like 'I'm telling the truth' and he was like 'oh no darling I don't want to put you under any pressure to be honest' and I was like 'well no like you said I'm going to tell the truth in every situation if I heard what I heard then that's when I will speak out and say something' and he said 'what did you hear' and I said 'I don't really want to discuss it with you now Tom but I did hear stuff and if it needs to be brought up then I'll have to be telling the truth' and he said 'no I completely understand and then he said 'she seems to think its

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<sup>8</sup> The message is timed on one copy at 12:46 and on another at 13:46. The reply is timed at 16:55 and also 17:55.

<sup>9</sup> This is taken from the agreed transcript.

because she was pregnant that we wanted to get rid of her but really, he said that you would, I was that you was, I was really supportive. I asked her to let me know what she was doing because she said she wasn't sure if she was going to keep it she was going to put it up for adoption or terminate the baby' and I just said 'Oh really, she never mentioned that to me' and he said 'well I was waiting for her to say something and now its turned out that she thinks we wanted to get rid of her because she was pregnant' and I just said 'oh well that's not my business Tom really, that's for you to deal with. Um like Annie is my friend, you are my manager therefore that is how it is and I'm going to support her as a friend.

. . . Annie they're all shitting themselves, all of them, they're all shit scared, they all been well nice to me today, Martin's been well nice to me, um I was just like 'oh', they were like 'how you feeling' and I was just like 'I'm really run down, tired' They was like 'maybe we can send you home and if you don't feel well a bit later instead' and I was like 'hm that's a first'

. . . And then another thing Tom said to me was Tom's out 'but she come to speak to you before she spoke to me' and I said 'right' and he was like, I said, 'no, all she said is she's leaving and he was like 'yeah but I could just use that and say that' well he didn't say that but he said 'well I could say that she said to you she was leaving but in what context' and I said like 'no context, she just said she was leaving like she's going home now. So I just said oh ok I thought she'd be back later, that's what I thought and then turns out she didn't come back later um so yeah' and he was just like 'oh OK then' but they are just trying to get me on their side and I'm really not doing it like 'do you think I want to be on your side when I heard the way your fucking wife was speaking to her', like that's wrong. Like, and like Kester said 'Lorraine isn't our manager, she's none of our managers, she just owns the pub with Tom so really, as a manager Tom should not be letting her speak to you like that because that's not the right way to talk to someone. Um and I was like 'I completely agree'. But yeah like they are all shitting themselves all upstairs in the office like talking about it wondering what they can do, they are all so scared and you need to let me know what's happened so I can know why they are so scared.

- 54 The Claimant then left a short message for Ms McGarry at 18:11 which included the statements that she had not resigned and that 'they are aware that how they have treated me isn't acceptable and now they're panicking.'
- 55 Ms McGarry's evidence was that she was under the impression at the time that what the Claimant was saying was true, but that the Claimant was in fact manipulating her. She added in cross-examination that before the WhatsApp conversations started there was a 'live' telephone conversation between her and the Claimant during which the Claimant told Ms McGarry what the Claimant alleged Mrs Smith had said, and Ms McGarry relied on that information during subsequent conversations.
- 56 The Claimant visited her GP on 9 May 2016 and was provided with a form Med3 for the period from 9 to 23 May 2016 stating that the Claimant had been advised that she was not fit for work. The condition was stated to be 'Stress at work'.
- 57 On the evening of 9 May 2016 the Claimant's mother and Mr Rae went to The Beehive to collect the Claimant's belongings as mentioned in the Claimant's message to Mr Tom Smith. Mr Lloyd handed an envelope to the Claimant's mother containing a P45, P60 and a letter.<sup>10</sup> The letter stated that the Claimant had informed Mr Smith three times that she was

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<sup>10</sup> The form P60 had earlier been prepared as part of the normal end of financial year routine.

leaving and not coming back, thus having resigned. He then added that he was not prepared to accept her attempt to rescind the resignation. He also mentioned that he had learned that the Claimant had been copying private documentation.

58 There was no evidence of anything further occurring between the parties until the Claimant sent a letter to Mr Smith dated 6 June 2016 as follows:

I wish to appeal the decision to dismiss me, I did not resign and I made this very clear to you that I had not resigned, you have also effectively evicted and all of this because I was pregnant.

59 There was no response to that letter. Mr Smith's evidence was that somebody else opened it, placed it on Mr Smith's desk, and it effectively became buried in other correspondence. On an unknown date it was discovered by Mr Smith, and he decided not to take any action on it because it was his position that the Claimant had resigned.

60 The Claimant contacted ACAS under the early conciliation procedure on 4 July 2016, the certificate was issued on 21 July 2016, and the claim was presented on 17 August 2016.

61 There is a claim for accrued leave pay. The relevant box was ticked on the claim form ET1. We deal with that here. The Claimant agreed that the leave year commenced on 1 April each year, and that the annual entitlement was 28 days. It was also agreed that before the end of her employment she had taken more than her *pro rata* entitlement for 2016/17. The issue is whether Mr Lloyd had agreed that the Claimant could carry over unused leave from 2015/16. We find that the Claimant has not discharged the burden of proof in that respect. That claim must therefore be dismissed.

62 There is also a claim for a bonus. There is a considerable measure of agreement about this matter. Mr Smith maintained that any payments were discretionary, but accepted that he paid a bonus of £50 if weekly takings were over a particular amount, with a further £50 for each additional fixed amount. The claim is for the week to the close of 8 May 2016.

63 We deal with this claim here and we find that it fails. We accept that during the final week the Claimant did not work for the whole of that week, and therefore was not eligible for payment of any bonus. It is not necessary to go into the potentially difficult question as to whether the bonus was truly discretionary, or whether it had achieved sufficient status to become a contractual matter.

#### *Submissions*

64 Miss Crew made submissions on behalf of the Respondents first. She referred us to a passage in the judgment of Rimer LJ in *Willoughby v. CF Capital plc* [2012] ICR 1038 CA. That is summarised in the headnote as follows:

*Held*, . . . That as a general rule a notice of resignation or dismissal, whether given orally or in writing, had effect according to its terms, as interpreted objectively in accordance with the ordinary principles of contract law, and such a notice, once given, could not be withdrawn

except by consent; that, however, the circumstances in which the notice was given might require the recipient, before accepting or otherwise acting on it, to satisfy himself that the giver did in fact really intend to give notice of resignation or dismissal and to allow the giver an opportunity to satisfy him that there was no such intention;

Miss Crew also referred us to *J & J Stern v. Simpson* [1983] IRLR 52 EAT but we do not think that that takes the point further. Mr McNamee replied for the Claimant.

- 65 Each of Miss Crew and Mr McNamee agreed that the issues were as set out above subject to two points. Mr McNamee said that the Claimant was not pursuing the points in issues numbered 2.1.9 and 3.2.3 were not being pursued. He further stated that a factual allegation that Mr James Smith had purposely caused a mess in the bar on the evening of 8 May 2016 was withdrawn.
- 66 Counsel agreed that this was a case which above all depended upon the credibility of witnesses. As Mr McNamee put it, the parties are far apart. Various discrepancies in, or the extension of, the evidence of witnesses was pointed out. Because credibility is the major element for consideration we are not recording the detailed submissions made on the point, but rather we are setting out our conclusions having taken into account those submissions. Where there is any submission which is particularly relevant, then we will refer to it.

#### *Conclusions*

- 67 We have had the benefit of seeing and hearing the witnesses give evidence to us. That is material not only as to the evidence of facts which was provided, but also as to the emotion or feelings of the witnesses. It is not possible adequately to convey those matters in a written document. We have also noted carefully the manner in which the witness statements have been prepared. Although the Claimant's statement lacks precision in various respects, it appears to us to set out what the Claimant wished to tell us clearly in her own words what occurred.
- 68 As a further preliminary point, we make it clear that in coming to our conclusions we have considered the whole of the evidence relating to the incidents giving rise to the disputes before us, rather than looking at each allegation discretely.
- 69 We start with the relationship among the Claimant, Ms McGarry and Ms Haddon. They had been friends but at this hearing Ms McGarry and Ms Haddon gave evidence for the Respondents. We have recorded above the differences in the evidence concerning the conversation between the Claimant and Mr Smith about the Claimant's pregnancy. It was the evidence of Ms McGarry that the Claimant had been saying that she intended to leave the pub and that 'she intended to word her resignation in a way to be able to twist it to sound like she was fired to initiate an employment tribunal to get money.' She further said that the Claimant had said that she would 'till build' to obtain money for herself and her baby.

- 70 Ms Haddon included similar evidence in her witness statement. In other words, they are saying that the Claimant was creating a scheme to leave the employment in circumstances such that she could bring a claim to the Tribunal, and also that she would commit fraud by misuse of the till behind the bar. That, it was said, was planned for the weekend of the next Bank Holiday. A previous employee had in fact been dismissed for theft by till building. The Claimant had been instrumental in gathering evidence which resulted in his dismissal. It was accepted during this hearing that the amount which could possibly be obtained by the practice of till building was only in the hundreds of pounds.
- 71 We do not accept the basic proposition put forward on behalf of the Respondents that the Claimant was seeking to set up some incident or other so as to enable her to leave the employment in ambiguous circumstances in the hope of obtaining a substantial payment from the Tribunal. That would have been an extraordinarily risky step to take. The Claimant had a secure job, and had the benefit of accommodation. She also had the benefit of being able to take maternity leave. To engineer a termination of the employment would have meant the Claimants giving up all those benefits and putting herself out of work at a time when she was pregnant. There is of course no certainty whatsoever that any application which the Claimant could have made to the Tribunal at the conclusion of such a scheme would be successful, nor that the Claimant would be awarded a significant amount of money.
- 72 The first factual allegations relate to the conversation between Mr Smith and the Claimant on 2 May 2016 are issues 2.1.1 and 2.1.2. We cannot possibly make precise findings of fact as to exactly what each said to the other. We have to reconstruct the conversation as best we can. The evidence of Ms McGarry, Ms Haddon and Ms Sanderson concerning matters both before and after the conversation is important, and we have set that out above. We prefer the evidence of the Claimant and Miss Sanderson as to the effect that the conversation had had on the Claimant. We find that she was distressed by what had been said. We consider the evidence of Ms McGarry and Ms Haddon about 2 May to be contrived.
- 73 We can entirely believe Mr Smith was concerned as to how the Claimant's pregnancy would affect the business. The Claimant had the advantages mentioned above, and to some extent those advantages to her were of equal disadvantage to Mr Smith. He would have had to make alternative arrangements for the management of The Beehive during the Claimant's maternity leave, without the ability to use the accommodation in the building.
- 74 On balance we find that Mr Smith did say he would consider how the pregnancy would affect him, and also suggest to the Claimant that she at least consider having an abortion. These allegations are pleaded as harassment based upon the protected characteristic of sex. We note that the protected characteristic of pregnancy and maternity is not covered by section 26, but we consider that the allegations are covered by the protected characteristic of sex. This was clearly unwanted conduct and



violated the Claimant's dignity and created a hostile environment for the Claimant.

- 75 The third allegation (Issue 2.1.3) is that the Claimant was required to come in on days off to clean pipes and move barrels. We find that that allegation is unsubstantiated. It is also alleged (Issue 2.1.6) that Mr Smith required the Claimant to come into work on 8 May 2016 on a day off. That is erroneous. On the Claimant's own case she was due to work later in the day and it was not a day off. It is true that Mr Smith called the Claimant and she came in at about 10.30, but the reason for that was because of the state of the bar, and was not connected in any way with the Claimant's pregnancy.
- 76 There is an allegation that Mr James Smith made a comment about ruining the Claimant (Issue 2.1.5). There is insufficient evidence for us to find on a balance of probabilities that the comment in question was made. It was said to have been made to a friend of the Claimant, and there was no corroborating evidence.
- 77 There are three allegations of comments said to have been made by Mrs Smith. They are issues 2.1.4, 2.1.7 and 2.1.8. We have stated that unfortunately there is no sound on the CCTV, but we were able to see the gesticulations of Mr Smith and Mrs Smith. We can also understand that they were annoyed to have found the bar in a mess. We also have the message from Ms McGarry in which she twice mentions the manner in which Mrs Smith had spoken to the Claimant, although without being specific about the words which had been used. We find these allegations proved as a matter of fact. We also conclude that they amounted to harassment as they were each related to the Claimant's pregnancy and therefore her sex.
- 78 We now turn to the question as to the termination of the Claimant's employment. Again, we have of course to make findings based on such evidence as there was before us. We have already rejected the argument that the Claimant was seeking to effect a termination in ambiguous circumstances. What we have to decide is whether she did resign as a matter of law as she was leaving the bar on 8 May 2016 at about 10:55. For the Claimant we have her own evidence, that of Mr Rae, and the email of 16:55 on 9 May. The fact that the email states that there had not been a resignation is not conclusive but it is material evidence. If there had been a resignation then the email would not have had the effect of rescinding it. For the Respondents we have the evidence of Mr Smith and Mrs Smith. Ms McGarry gave evidence for the Respondents but she was not able to say that the Claimant had resigned. Finally, we have the various exchanges between the Claimant and Ms McGarry, and the long message from Ms McGarry to the Claimant. We find the message from Ms McGarry particularly important. It is apparent from it that Ms McGarry did hear what was said by the Claimant. It is also apparent that what she understood the Claimant to have been saying was that she was going home and would be back later.

- 79 We find that the Claimant did not intend to resign. We further find that her words could not reasonably have been interpreted as a resignation. There had obviously been an argument following which the Claimant had left the building. The circumstances were that the Claimant had been summoned by Mr Smith at a time when she was not due to be working. That is very different from those where an employee simply walks out during normal working hours without reason and states that she is leaving. Finally, based upon *Willoughby*, Mr Smith should have satisfied himself as to the Claimant's true intention.
- 80 We find that there was an actual dismissal of the Claimant by the First Respondent when her P45 was prepared and handed to the Claimant's mother on 9 May 2016. For the purposes of the claim of unfair dismissal we must decide whether the reason, or principal reason, was the Claimant's pregnancy. That is issue 1.2. There is also a claim of direct sex discrimination where the unfavourable treatment in question was the dismissal (Issue 3.2). The test in the latter case is whether the Claimant's pregnancy was a substantial or effective cause, but it need not have been the sole or even the principal cause.
- 81 Having found that there was an actual dismissal, it is the responsibility of the employer to show the reason, or principal reason, for the dismissal. Miss Crew's submission was that there was no dismissal but a resignation, and suggested that the reason was because the state in which the bar had been on the morning of 8 May 2016. However there was no evidence to support that suggestion as Mr Smith was insistent that the Claimant had resigned. The claim of unfair dismissal must therefore succeed.
- 82 We must also consider the allegation of discrimination. From the primary facts as found we must ask ourselves whether there is evidence from which we could reasonably conclude that the dismissal was to any extent because of the Claimant's pregnancy. If we decide that we could so conclude then it becomes the Respondents' responsibility to show on a balance of probabilities that there was no discrimination because of the Claimant's pregnancy.
- 83 We have made findings of fact as to the conversation between the Claimant and Mr Tom Smith on 2 May 2016. We consider as a consequence that there is sufficient material from which we could reasonably conclude that the dismissal of the Claimant was at least to some extent because of her pregnancy. We make the same point as above about the absence of any reason for the dismissal having been put forward. The claim in Issue 3.2.1 therefore succeeds.
- 84 There is in issue 4 a claim of victimisation. The Claimant relies on the appeal letter of 6 June 2016 as a protected act, and it is clearly such an act. The alleged detriment is the failure to acknowledge or respond to that appeal. We have to decide if there is sufficient evidence from which we could reasonably conclude that the failure to respond was because the appeal letter made reference to treatment related to the Claimant's pregnancy.

- 85 In our judgment this head of claim fails. There is nothing from which we could conclude that if the letter had simply referred to an appeal against dismissal, without reference to pregnancy, then Mr Smith would have dealt with it any differently.
- 86 The issue numbered 5 relates to accrued leave pay. We have found against the Claimant on the facts above. The final issue is number 6.2 and relates to the bonus. We have deal with that matter above also.

*Summary*

- 87 There are three Respondents to these proceedings. We have deliberately not sought to set out above which of the Respondents is liable for any matters which we have found to be unlawful conduct. We now do so.
- 87.1 The First Respondent. The company is liable to the Claimant in respect of the claim of unfair dismissal under the Employment Rights Act 1996. It is also liable to the Claimant under section 109 of the Equality Act 2010 for such acts of Mr Smith and Mrs Smith as we have found to be unlawful.
- 87.2 Mr Thomas Smith. Mr Smith is liable to the Claimant in respect of allegations or issues 2.1.1, 2.1.2 and 3.2.1.
- 87.3 Mrs Lorraine Smith. Mrs Smith is liable to the Claimant in respect of allegations or issues 2.1.4, 2.1.7 and 2.1.8.
- 88 A finding that the Claimant was unfairly dismissed has been made. The Tribunal has an obligation under section 112 of the Employment Rights Act 1996 to explain potential remedies to the Claimant. The Claimant is requested to inform the Tribunal and the First Respondent within 14 days of the date upon which this document is sent to the parties as to whether she wishes to apply for an order for (a) reinstatement or re-engagement under sections 114 or 115 of the 1996 Act, or for (b) compensation under sections 118 to 126 of that Act in respect of the finding that the Claimant was unfairly dismissed. If she is to seek reinstatement or re-engagement then a preliminary hearing to be held by telephone will be arranged to discuss the appropriate case management orders.

**Employment Judge Baron  
Dated 22 November 2017**