# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondents:** |
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| Ms K Gniba | **v** | The Forbury Limited (1)<br>Mr V Punchaye (2) |

**Heard at:** Reading **On:** 25-27 November 2019

**Before:** Employment Judge Anstis
Mrs J Wood
Ms B Osborne

**Appearances:**
**For the Claimant:** Mr L Werenowski (solicitor)
**For the Respondent:** Mr J Demeza (consultant)

## JUDGMENT

1. By consent: the first respondent must pay to the claimant £2,000 as compensation for unlawful deductions from wages.

2. The claimant's other claims are dismissed.

## REASONS

INTRODUCTION

1. Oral reasons for our judgment were given at the conclusion of the hearing. In accordance with rule 62(3) at the conclusion of the hearing Mr Werenowski requested written reasons on behalf of the claimant. These are those reasons.

2. The claimant worked as a waitress for the first Respondent, which is a small luxury hotel in the centre of Reading. The second Respondent is the general manager of the first Respondent.

3. She worked in the restaurant at the hotel, which is a fine dining restaurant. She started working on 26 September 2016. On her case her employment ended on 12 May 2017 when she was dismissed by the second Respondent. The Respondents say she was not dismissed and her employment continues to this day, albeit that she has not been at work since 12 May 2017.

4. We were told by the second Respondent that the claimant reported to the restaurant manager, who in turn reported to the food and beverage director. The food and beverage director then reported to the second Respondent. It was the claimant's case that the first Respondent had very high staff turnover, and that for periods of time during her employment there was no restaurant manager and the second Respondent was effectively her manager. Everything she complains about in her claim relates to actions taken (or not taken) by the second Respondent.

5. This claim was the subject of a case management hearing before Employment Judge Gumbiti-Zimuto on 21 September 2017 at which the following claims were identified:

    a. Automatic unfair dismissal under section 99 of the Employment Rights Act 1996 – that is, a claim that her dismissal was for a reason relating to her pregnancy.

    b. Direct pregnancy or maternity discrimination under s18 of the Equality Act 2010 – her dismissal and "*by not providing the claimant with solely morning shifts to account for her morning sickness*",

    c. Detriment under s47C of the Employment Rights Act 1996 (or alternatively victimisation under the Equality Act 2010) – "*after submitting a grievance concerning her shifts on 5 May 2017, instead of having a mixture of early and late shifts as before, the claimant was moved by the second respondent to only work late shifts*",

    d. Breach of contract – that is, her claimed dismissal without notice, and

    e. Unpaid wages, in accordance with a schedule of unpaid hours set out in the case management order and claim which totalled 290 hours.

6. In the course of his cross-examination of the second Respondent and his later submissions Mr Werenowski also addressed matters in relation to an alleged failure to carry risk assessments in advance of the claimant's pregnancy and in relation to ss64-68 of the Employment Rights Act 1996, but these were not issues that had previously been identified or which appeared in her claim form. There was no application to amend and we have kept ourselves to the issues which were identified in the case management order.

7. We heard evidence from the claimant, her partner Joshua Saunders (who was at the time these events occurred a chef employed by the first Respondent), her former colleague Ismini Papoutsi (who gave evidence via a video link from Greece) and from the second respondent.

THE DETRIMENT CLAIM

8. We can deal briefly with the detriment claim. This depends on the claimant's shifts having been changed from a mixture of shifts to only doing the late shift, following her complaint on 5 May 2017. An examination of the rotas for the two weeks following that complaint show that in the week following she had one early shift and in the week following that she had a shift that was effectively the most advantageous for her. Aside from the removal of her split shifts, there was no material change in her working arrangements and Mr Werenowski conceded this in his written submissions. This claim cannot succeed on the facts and is dismissed.

THE WORK, RISK ASSESSMENT AND SHIFT ARRANGEMENTS

9. The first Respondent's restaurant opens first thing in the morning for breakfast, continuing through to late at night for dinner. It is not disputed that on some occasions, particularly with Christmas parties, this could continue beyond midnight. The nature of the first Respondent's business is that while the kitchen will close at a particular time, if guests remain in the restaurant or bar the restaurant or bar will remain open until the last guests have finished. This is specifically acknowledged in the first Respondent's rotas where the last shifts of the day are said to finish at "close" rather than at any specific time.

10. In general, the first Respondent operates three shifts for its waiting staff. The first is a morning shift to cover breakfast and lunch, from around 06:00 to 14:00. The second is a split shift covering the breakfast and dinner periods, and the final shift being from 14:00 to "close". There appear to be variations to those shifts by an hour or so either way, although it was not suggested to us that for the purposes of this claim those variations made any difference. The arrangements were slightly different on Sundays, which was the quietest day of the week.

11. As may be expected, the work consisted of taking customer orders and relaying them to the kitchen, then collecting the orders from the kitchen and delivering them to customers. It also included additional duties such as: restocking mini-bars in guest rooms, delivering room service orders and cleaning the restaurant and setting it up for the next service (including ironing tablecloths). For those working at the end of the day this included moving around furniture so as to set the restaurant up for the breakfast service the following day. The work was physically demanding.

12. It is not disputed that the first Respondent required only two members of waiting staff to carry out the early breakfast shift, and that the early morning work included a requirement to restock guest mini-bars and move furniture.

13. At the end of March or start of April 2017 (there appears to be a dispute about exactly when this occurred, but it is a matter of days either side and it does not appear to be necessary for us to determine that point) the

second Respondent came across the claimant in distress at the back of the hotel. Her partner Joshua Saunders, who also worked at the hotel, was with her. Seeing her in pain, the second Respondent called an ambulance for her. During the course of this Mr Saunders told the second Respondent that the claimant was pregnant. It is agreed between the parties that this was the first the second Respondent knew of the pregnancy. No complaint is made of the second Respondent's conduct on that occasion.

14. On 18 April 2017 the second Respondent conducted a risk assessment in respect of the claimant's pregnancy. It was suggested by Mr Werenowski during his cross-examination of the second Respondent that the first Respondent was obliged to do this when employing women of child-bearing age, in advance of any pregnancy. That is one of a number of matters which the first Respondent should consider with its legal or HR advisers following the conclusion of this case, but as described above does not arise for decision as an issue in this case.

15. There is a dispute about whether the risk assessment that appears in the bundle is the same risk assessment as was completed by the second Respondent in the presence of the claimant, but that is not an issue we need to decide in this case. It is said by the claimant (and her partner) that the original version of the risk assessment had identified risks associated with heat and smells in the kitchen.

16. On 25 April 2017 the claimant went to her doctor and was issued with a fit note saying she had "*symptoms of fatigue, tiredness, vomiting, worse in evenings. Patient would benefit from early morning/afternoon rather than evening shifts*".

17. On 5 May 2017 the claimant wrote to the second Respondent saying, amongst other things:

> *"You have now assigned me to work evenings.*
>
> *I do not want to resign and I cannot at present work evenings. I have to work sensibly in view of my pregnancy and will not run. I cannot be treated less favourably because I am pregnant.*
>
> *Please arrange my work schedule so that I work mornings/afternoons."*

18. In an undated letter which appears to have been sent in reply to this the second Respondent provides the claimant with a copy of the risk assessment and outlines the risks identified and the steps he is to take in respect of them, which we summarise as follows:

    a. The removal of split shifts,

    b. No heavy lifting (with the claimant to call on assistance from other members of staff if any lifting was necessary),

c. No work in replenishing mini-bars (which involved bending down to check the mini-bars),

d. A chair to be made available for her at the rear of the restaurant to take breaks sitting down (and she could use that chair for sedentary activities such as polishing cutlery), and

e. That she was only to carry one plate on one small tray at any time.

We note that none of these amendments appear to be specific to the claimant's situation or her particular problems with morning sickness and are the sort of adjustments we would expect in respect of any pregnant employee holding the claimant's role.

He continues:

> *"You have now asked that you are not placed on an evening shift and have informed me that you are being treated less favourably due to being pregnant. I would like to point out to you that I am not of the opinion that you are being treated less favourably as a result of being pregnant. As you can see from the list* [of adjustments] *above and the requests you have made for adjustments to accommodate your pregnancy that I have agreed to all the adjustments to make you more comfortable during your pregnancy.*
>
> *At the moment, the morning shift is already covered by another member of staff and there is adequate cover. The member of staff that is currently working the morning shift is also pregnant and has stated that she is unable to do mini-bar duties etc. As a result, it would not be in the best interests of the business to have two members of staff working on the same shift, where neither of them are able to carry out some of the duties that are needed for the efficient running of the business.*
>
> *I have taken you off split shift and allocated to you only one full shift. I am unable to accommodate your request not to allocate you to the evening shift. There is not sufficient work to do in the morning to add more people to work."*

19. It was accepted by the claimant that a colleague who worked on the morning shift was pregnant and that their babies were due around the same time. While no-one was able to say that this colleague also suffered from morning sickness in the same way that the claimant did, the claimant herself said that on occasion when she had worked with her colleague in the mornings she had had to do all the work herself as her colleague was in the toilet all the time. From that we take it that her colleague's pregnancy was also causing health difficulties for her colleague. The claimant also accepted that work such as replenishing the mini-bars and moving furniture was part of the morning work. There would therefore

always need to be one of the two members of staff on that shift who could carry out that work.

20. Given this, Mr Werenowski's argument, developed in his cross-examination and submissions, was that the claimant ought to have been given priority on the morning shift over her other pregnant colleague, at least for the month for which her fit note in relation to morning sickness had been issued. The second Respondent's answer to that was that the person who was pregnant on the morning shift was specifically employed to work mornings as "breakfast supervisor".

21. The question for us, as framed in the case management order, is whether the refusal to transfer the claimant to the morning shift amounts to unfavourable treatment because of maternity or pregnancy. There is no need for any comparator for this.

22. We find that it does not. In the refusal to transfer, the second Respondent was simply maintaining the existing situation. There was no unfavourable treatment. It is not suggested by the claimant that she had any right to be provided with this transfer under her contract. While the circumstances described above may sometimes engage the protection of ss64-68 of the Employment Rights Act 1996, as described above that is not the nature of the claimant's claim in this case. A failure to provide more favourable treatment is not unfavourable treatment.

23. In any event, if this was unfavourable treatment it was because of the Respondents' view that they could not favour one pregnant employee over another, and not because of the claimant's pregnancy.

THE ALLEGED DISMISSAL

24. At the heart of the claimant's claim is the question of whether she was dismissed because of a reason relating to her pregnancy.

25. On 12 May 2019 the claimant was working a late shift. Towards the end of the shift, around 9 pm, she was so unwell that she went to the women's staff changing room at the hotel and was sick in the toilet there. Noticing her distress, she was accompanied to the toilet by her colleagues Ismini Papoutsi and Madalina Giurcan (or Grn). While she was recovering, the second Respondent came to the changing room to see what was happening. The claimant says that with Ms Papoutsi present (Ms Girucan having gone to get her some water) the second Respondent said, "*I don't need you here anymore because I don't need people who can't do anything.*" She says she took this to be a dismissal. The second Respondent denies saying this or dismissing her. He says that he told her that it would be better for her to go home for the rest of the shift rather than try to recover in the windowless changing room, and that he offered to get a taxi for her, which she refused. Both were cross-examined and neither wavered from their account of events.

26. The following day the claimant sent the second Respondent an email as follows:

> *"Last night at work I vomited and feel bad because of pregnancy.*
>
> *You told me not to come back to work and that I am dismissed because business is number one and I cannot feel sick during service. I did everything what I can, I had note from doctor about this.*
>
> *I will not be at work tonight because of this."*

27. The second Respondent replied the same day:

> *"The procedure of calling in sick is to call the hotel and speak to the duty manager to advise the duty manager that you are not coming to work I did not at any point tell you not to come to work. I advised you that you will need to look after yourself as you are not well and it's better for you to go home than to sit in the ladies toilet last night.*
>
> *I would also like to let you know that we had Ismini who was there at all time during our conversation."*

28. Thus the day after the events took place both sides set out in writing the positions that they still maintain more than two years later.

29. Also on 13 May the claimant exchanged a series of text messages with Ms Girucan which we have in the tribunal bundle. She asks for her help in "*confirm[ing] for me what … happened yesterday*". The claimant continues that "*They can't sack me when I am pregnant.*" Ms Girucan offers help and expresses her concern for the claimant and her unborn child. The claimant asks Ms Girucan to "*confirm for me after that he dismissed me because I felt bad*". Ms Girucan does not immediately do this, but later says "*I hear when he say you don't help me if you stay there … if you do nothing … nothing for my business*". When pressed by the claimant specifically about the question of dismissal Ms Girucan says, "*I think maybe he say like that now, to have no evidence against him*".

30. While Ms Girucan is evidently sympathetic to the difficult circumstances the claimant finds herself in, she is invited to, but does not, offer a clear endorsement of the claimant's position that the second Respondent dismissed her that evening. It appears (and see also the communication referred to below) that while sympathetic to the claimant's position Ms Girucan does not want to get involved in the dispute between her and the Respondents.

31. Around this time the claimant sent via Mr Saunders a sick note signing her off work for a month, to 15 June 2017. It appears there has been no further communication between her and the second Respondent except in the

context of this litigation. The following week the claimant commenced the ACAS early conciliation process.

32. Also the following week, presumably having been notified by ACAS of the likelihood of a claim, the second Respondent asked Ms Papoutsi to write down her account of what happened. She did so in a signed statement. It is not necessary for us to recite what that statement says except to say that it supports the second Respondent's version of events rather than the claimant's. There is a similar statement from Ms Girucan prepared some weeks later, apparently after her return from holiday.

33. The tribunal bundle also contains a further set of text messages, this time between Mr Saunders and Ms Girucan. This is undated but appears to be from around the time witness statements were exchanged in this litigation. The essence of that conversation is set out in the first message from Ms Girucan, where she says "[the second Respondent] *put me to write this statement, he call me in the office he ask me if I remember something about this, I start to talk with him about this but everything what I say was on* [the claimant's] *side and he say to me no you remember wrong. It was my manager and he put my to write how he remembered what had happened.*" Ms Girucan indicated that she was not willing to put this in a formal witness statement.

34. Ms Papoutsi did, however, file a formal witness statement on behalf of the claimant in this case. The essence of this was that that evening the second Respondent had told the claimant "*to go and to not come back*" and that he had similarly rejected the draft of her statement that she had prepared and had himself changed it to reflect his position on the evening's events. She had then been pressurised by the second Respondent into signing it and "*I did not feel I could argue as I wanted to continue to work at the hotel*". It was suggested by Mr Werenowski that Ms Papoutsi had been rewarded for this by receiving a better job at the hotel, but Ms Papoutsi herself did not suggest any link between this and her subsequent move to a different job, and this appears to be at best speculation on Mr Werenowski's part.

35. By the time of the hearing Ms Papoutsi was living and working in Greece. Mr Werenowski went to considerable lengths to arrange for her to give video evidence from Greece. Having confirmed that her witness statement was true, under the gentlest of questioning from Mr Demeza Ms Papoutsi immediately said it was not her view that the claimant had been dismissed by the second Respondent that evening, but that she had understood it as the second Respondent telling her to go home for the rest of the evening and come back to work when she felt better.

36. We understand the legal test on the question of whether there has been a dismissal in such circumstances to be not what the intention of the second Respondent was, nor what the interpretation of those words by the claimant was. Instead, it is an objective test, characterised by the understanding the reasonable listener would have had of those words in

the context and circumstances in which they were used (see Harvey DI[230]).

37. Unusually in this case we have a "reasonable listener" who has given evidence. That is Ms Papoutsi. She was directly involved in the events in question. She heard what was said. By the time of her oral evidence to us she owed no loyalty to one side or the other. She readily admitted that she did not consider it to be a dismissal. This was not a question of her being harried by cross-examination into admitting something she did not want to, or of any language difficulties or difficulties with the video link. We are satisfied that what she told us was an accurate statement of her views.

38. Faced with this, Mr Werenowski in his submissions said that we should prefer her written statement, prepared for the purposes of this hearing, to her oral evidence. He said that this was because the written statement had been produced closer in time to the relevant events.

39. We do not accept this. It was clear to us that Ms Papoutsi understood the questions she was being asked on the video link and gave her honest response to them. There is a risk in any case where a witness statement is prepared for someone that they do not fully review or understand that statement. If so, then their oral evidence and cross-examination is their opportunity to correct that, which is what occurred in this case. Her oral evidence is her correct account of events.

40. Against that it is not necessary for us to examine the question of whether the original statements from Ms Papoutsi and Ms Girucan are correct or were interfered with by the second Respondent in some way. The question is whether there was a dismissal. Where the evidence (independent of those statements) is that there was not a dismissal we do not need to explore exactly what occurred in relation to those statements. The same applies in relation to the more general allegations of poor conduct or staff management alleged against the second Respondent by the claimant. Where there is clear evidence that there was no dismissal it is not necessary for us to explore those matters.

41. The claimant was not dismissed by the second Respondent, so her claims in relation to dismissal cannot succeed.

UNPAID WAGES

42. In relation to the question of unpaid wages, there was much about this claim that gave us cause for concern. It was agreed between the parties by the time of the hearing that the claimant was due money for overtime worked, but the Respondents had not disclosed timesheets that showed how much they considered due, apparently on the basis that it was for the claimant to prove her case.

43. It is, of course, for a claimant to prove their case, but that does not mean that the Respondents are not under an obligation to disclose relevant

documents. That is particularly so in the case of pay and hours where the respondents are under various record keeping obligations under the National Minimum Wage and Working Time Regulations.

44. It was the Respondents' case that the money was not due since their practice was that any overtime work was to be compensated by time off in lieu rather than paid. However, they offered no documentation to show that this arrangement had been agreed with their employees, or how it operated. Record keeping appeared to rely on manual alterations to the rota, but the Respondents did not disclose any of the resulting timesheets until prompted by the tribunal during the course of the hearing.

45. Fortunately, again at the prompting of the tribunal, the parties were able to resolve the question of unpaid wages between themselves so we are not required to determine what unpaid wages are due. At the invitation of the parties we have incorporated their agreed figure into this judgment by consent.

46. As we said during the course of the hearing, and as we now formally record, we do not think that the Respondents responded in a satisfactory manner to this part of the claim, and we urge the first Respondent to consider with its advisors its current practices on recording and paying for hours worked. It appears to us based on what we have seen during this case that aside from the question of failing in its obligations to its employees, the first Respondent may be in danger of breaching the record keeping requirements of the National Minimum Wage and Working Time Regulations.

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**Employment Judge Anstis**
**27 November 2019**

Sent to the parties on: .....20.12.19.....

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For the Tribunal Office

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