



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Z Porter

**Respondent:** Luxford Bar Ltd

**Heard at:** London South Croydon

**On:** 14 May & 13 September 2019

**Before:** Employment Judge Tsamados  
Ms V Stansfield  
Mrs R C Macer

## Representation

**Claimant:** Mr A Otchie, Counsel, on 14 May 2019  
The Claimant in person, on 13 September 2019  
**Respondent:** Ms R Holder, HR Manager, on 14 May 2019  
Ms R Akinyosoye, Director, on 13 September 2019

# RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

- 1) The Claimant's complaints of automatic unfair dismissal and pregnancy/maternity discrimination fail and are dismissed;
- 2) The complaints in respect of arrears of wages, holiday pay and notice pay are dismissed on withdrawal by the Claimant.

# REASONS

## Claim and issues

1. By a Claim Form received by the Employment Tribunal on 4 October 2017 the Claimant, Ms Zanele Porter, brought complaints of pregnancy or maternity discrimination and outstanding entitlement to arrears of wages, holiday pay and notice pay against her former employers, the Respondent,

Luxford Bar & Kitchen. In its Response, the Respondent denied the complaints.

2. A telephone Preliminary Hearing on case management took place on 26 March 2019 and was conducted by Acting Regional Employment Judge Davies. At that hearing, AREJ Davies identified a further complaint of automatic unfair dismissal on the basis of pregnancy/maternity. The Claimant was ordered to provide further and better particulars of her complaints and given leave to amend her claim to include the automatic unfair dismissal complaint. AREJ Davies also amended the name of the Respondent to Luxford Bar Ltd.
3. The Claimant's solicitors subsequently provided further and better particulars of the claim in a document dated 30 April 2019 which is at pages 25 to 27 of the bundle.
4. At the start of the hearing I identified the issues arising in each complaint:

Unfair dismissal

- 4.1 What was the reason or principal reason for the Claimant's dismissal?
- 4.2 Was it for one of the prohibited reasons within section 99 of the Employment Rights Act 1996 ("ERA"), ie because of pregnancy, childbirth or maternity or because of ordinary, compulsory or additional maternity leave?

Pregnancy & maternity discrimination

- 4.3 Did the Respondent treat the Claimant unfavourably contrary to section 18 of the Equality Act 2010 ("EQA") as alleged at paragraph 4 a-f of her further and better particulars?
  - 4.4 Did the unfavourable treatment take place during the protected period?
  - 4.5 Was any of the unfavourable treatment because of the pregnancy or an illness suffered as a result of it; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?
5. The Claimant did not have any complaints in respect of notice pay, unpaid wages and holiday pay despite ticking boxes to this effect in her claim form. These complaints are recorded as dismissed on withdrawal.

**Documents**

6. The Claimant provided the Tribunal with one copy of her bundle of documents which consisted of 39 pages although subsequently pages 40 to 70 were added. We refer to this bundle as "C1" followed by the page number where necessary.

7. We heard evidence from the Claimant and on behalf of the Respondent from Ms Rebecca Akinyosoye, the Director of the Respondent company, and from Ms Rochelle Holder, the Respondent's HR Manager. This evidence was given by way of written statements which were contained within C1 and in oral testimony.

### **Preliminary applications**

8. At the start of the first day of the hearing, the Respondent indicated that it wished to call a further witness for which it had no written statement of evidence. This was in respect of Ms Selina Osei an employee of the Respondent. The Claimant's Counsel objected. The Respondent indicated that her evidence was quite short and so I directed her to draft a written statement whilst the Tribunal adjourned to read the existing witness statements and the documents in C1. I indicated that we would review the contents on receipt, hear from the Claimant's Counsel as to whether he still objects to its admission. We would then decide the relevance of the content to the issues before us and weigh up the prejudice caused to either party if it were admitted or rejected.
9. I also directed the Claimant to provide a further four copies of C1 for use by the Tribunal and the Respondent. I indicated that she could arrange for copies to be made during our reading adjournment.
10. We were provided with a typed witness statement for Ms Osei consisting of 4 short paragraphs. On recommencing the hearing, we heard submissions from each party as to whether or not to allow the Respondent to admit the witness statement and evidence of Ms Osei.
11. After a short adjournment, I informed the parties that we had decided to allow Ms Osei's statement and evidence. It was relevant to the Claimant's allegation of unfair treatment. It was very short and the Claimant had read it. Any matters arising from it could be dealt with by her Counsel in supplementary questions in her evidence in chief or in questions put in cross examination of Ms Osei.
12. At the start of the second day of the hearing, the Claimant appeared in person. Her solicitors had sent an email to the Tribunal at 19:12 on 12 September 2019 advising that they were no longer acting. The Claimant stated that she had been told that she no longer needed a lawyer and that she could not afford one in any event. I explained to her that we had only returned the parties today because her barrister at the end of the first day of the hearing insisted that he be allowed to make oral closing submissions. The Claimant had not appreciated that the second day was purely to hear closing submissions.
13. In addition, the Claimant's solicitors had sent an email to the Tribunal at 18:55 on 12 September 2019 seeking to amend the Claimant's claim form to include Ms Akinyosoye as a second Respondent because the Respondent company had "just folded" (sic). The Claimant was totally unaware of this application and did not wish to pursue it. Ms Akinyosoye denied that the company had "just folded" and indicated that the business was still trading. I was grateful to

the Claimant for not pursuing the application which in any event came too late and was for a misconceived reason.

## **Findings**

14. I set out below the findings of fact the tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.
15. The Claimant was employed by the Respondent as a Bar Tender from 13 January 2018 until her dismissal on 13 June 2018.
16. The Respondent limited company operates as a bar and restaurant in Peckham in London trading under the name Luxford Bar & Grill and at the material time employed 9 staff. The sole Company Director (and in fact the owner) is Ms Rebecca Akinyosoye and the HR Manager is Ms Rochelle Holder. Ms Akinyosoye took a hands-off role in the business. For example, she was not responsible for organising staff rotas, Ms Selina Osei was.
17. We were taken to the Claimant's terms and conditions of employment at C1 40-43 dated 22 January 2018 and electronically signed by the Claimant and Ms Holder on behalf of the Respondent. This indicates that the Claimant was employed as Front of House Staff and not Bar Tender, although in fact the Claimant was waiting on tables and working behind the bar.
18. Her hours of work were stated to be on a flexible basis inclusive of weekends and bank holidays. Further, all members of staff were required to be available to work on Fridays, Saturdays and Sundays as per the needs of the business (at C1 41). From April 2018 onwards the Claimant was working 30 hours per week although this was reduced during the latter part of the employment.
19. The Claimant's probationary period was 6 months (as at C1 40). At the time of her dismissal the Claimant was still under probation. During the probationary period the Claimant was entitled to one week's notice of termination (as at C1 42).
20. The document also referred to a separate Grievance and Disciplinary Policy at C1 42 but a copy of this was not provided to the Claimant.
21. Ms Rochelle Holder, the HR Manager, was employed by the Respondent from the end of 2015 onwards. She worked part-time evenings and weekends and from home. The Respondent employed an external HR Consultant who Ms Holder spoke to from time to time. She spoke to the Consultant after the Respondent made the decision to dismiss the Claimant.
22. The staff's work rotas for the week ahead were sent by email to them on the Sunday before the week in question. They could not be changed by the staff directly. We were referred to copies of staff rotas at C1 52-70. The rotas were prepared by Selina. Ms Akinyosoye and Ms Holder were not involved in this process.

23. The Claimant alleges that her hours of work were cut from 30 to 16 per week after she notified the Respondent of her pregnancy. In evidence Ms Osei said that the Claimant asked to reduce her hours, that they talked about what hours she could and could not do and that when the Respondent was preparing the rotas it took this into account. She further stated that if it was an issue for the Claimant, she could have raised it when the rota went out. But the Claimant raised no concerns. In any event staff hours were reduced for all staff as a result of budgetary concerns.
24. We considered the Claimant's rotas at C1 52-70. From these we could only identify her normal pattern of afternoon and evening working on one weekend, that is 9 and 10 June 2018 at C1 69. This did not support the Claimant's evidence that her hours were cut in half other than in the week before her employment ended. Further, the rotas do not support her evidence at paragraph 6 of her witness statement (that by way of alienation and punishment, from 19 March 2018 she was suddenly changed from night to day shifts for a period of 4 to 5 weeks) beyond a change from night to day shifts for one day on 25 March 2018.
25. The Claimant was pregnant when she commenced employment although we were not told whether she knew this at that time. Towards the end of February 2018 in confidence the Claimant told her work colleagues, Bonnie and possibly Rachel, that she was pregnant and then Bonnie told Ms Osei a few days later. Further, the Claimant told Ms Holder in private at a 121 meeting in March 2018.
26. We were referred to the notes of two of the Claimant's 121 meetings with Ms Holder at C1 45 and 46. One set of notes is for the meeting on 11 May 2018 and the other for one held on 23 March 2018. These meetings were recorded but the recordings have not been provided by the Respondent. The typed notes were written by Ms Holder and she says they are accurate. They were not given to the Claimant at the time and she only saw them when they were provided as part of these proceedings. The Claimant accepts that they are generally accurate save that she never asked for a pay rise as set out at C1 46.
27. We note from the 121 meeting notes at C1 46 dated 23 March 2018 that the Claimant was 4 months pregnant with a due date of 24 August 2018. This note states that the Claimant was managing well, had been given easier shifts without requesting them, but appreciated this, that she planned to work until the end of June/beginning of July giving her two months in which to prepare for the baby coming. The notes end by stating that the Claimant will give notice and also bring in SMP (Statutory Maternity Pay) papers to acknowledge that she will not be getting SMP. The Claimant was told in the meeting that she was not eligible for SMP. She states that she checked with The Department for Works & Pensions ("DWP"), who told her she was eligible because she had been employed for 26 weeks.
28. The Tribunal is aware that as a matter of law, the Claimant did not and could not qualify for SMP because of the dates of her pregnancy. She needed to have 26 weeks of employment with the Respondent as at 15 weeks before

the expected week of childbirth. This date was 25 August 2018 and 15 weeks before was 14 May 2018. It was therefore impossible for the Claimant to qualify for SMP from the Respondent given that her employment commenced on 13 January 2018. Ending the Claimant's employment on 13 June 2018 did not affect her entitlement to SMP because at that stage she had none. In any event the Claimant did receive Maternity Allowance from the DWP. Her baby daughter was born on 24 August 2019.

29. The Claimant alleges that Ms Osei made comments whenever she said anything which she thought related to her pregnancy. These are set out at paragraph 4 of her further and better particulars at C1 26 and additional comments alleged to have been made by Ms Osei and her friends when they came to the bar or restaurant at paragraphs 11 and 12 of the Claimant's witness statement. It was accepted that the Claimant did not raise these matters with Ms Holder or the Respondent's management. We heard evidence from Ms Osei in which she denied that she or her friends made such comments. On balance of probability we cannot find that the remarks were made because the Claimant is making assertions which are unsupported by any evidence and denied by the person she alleges made these comments.
30. The Claimant stated that she did not raise these comments at the time because the Respondent is a small company and they are all friends. She further stated that when she has raised matters in the past, they have come back to her through others.
31. Ms Holder was unaware of the comments at the time. Whilst she is now aware, she has not investigated them and saw no reason why she needed to.
32. The Respondent was experiencing financial problems. Ms Akinyosoye told us, and we have no reason to dispute this, that the Respondent was not making a profit and had not done so for 3 years. As a result, the Respondent had reduced its opening from 7 to 5 days a week (closing on Mondays and Tuesdays) and changed the opening hours from 12 to 11 pm to 4 pm to 11 pm. The busiest days were the weekends, and these were not suitable for the Claimant. Ms Akinyosoye said that she regularly reviewed the business module to determine which days and hours were busy, and for most of the time she had been funding the business from her own pocket and that was how they were able to keep going. Ms Holder told us, and again we have no reason to doubt this, that she was told that the Respondent had financial problems and that there was a need to reduce staff levels. She also told us that it was a joint decision by her and Ms Akinyosoye to make the Claimant redundant.
33. Ms Akinyosoye in her written evidence stated that the Claimant was selected for redundancy solely on performance measures. In oral evidence she said it was for budget and performance, that the Claimant was within probationary period, that she had looked at the notes of her 121 meetings, the Claimant was not completing the work within the hours, which the Claimant had agreed were suitable for her to work and other staff were aggrieved over comments that she had made about them.

34. In particular, we were referred to comments that the Claimant had made about Elizabeth, the new Supervisor, in which the Claimant had started a rumour that she was not good at her job and that the Respondent found her incompetent and was going to dismiss her. Ms Holder had discussed the Claimant's concerns about not being supervised adequately by Elizabeth at the 121 meeting held on 11 May 2018, the notes of which are at C1 45. Her intention was to discuss the rumour with the Claimant on 13 June 2013, but the Claimant walked out of the meeting before Ms Holder had the opportunity to do so.
35. In oral evidence Ms Holder told us that this was not discussed with the Claimant at the time because it was still under investigation and they had not had a chance to do so. In her witness statement Ms Holder said that she had intended once again to address this issue but could not do so because the Claimant walked out of the meeting.
36. The Claimant's evidence is that it was not discussed and the first time she was aware of this issue was during the Tribunal proceedings.
37. Ms Holder had a meeting with the Claimant on 13 June 2018 in her office at which she told her that due to financial reasons the Respondent was letting her go. Ms Holder gave evidence that she told the Claimant that because she was in her probationary period, she had to work one week's notice. She states that the Claimant became visibly upset during the meeting and in the end walked out of the office before the conversation had been concluded. She further states that the Claimant had said that she was never coming back, that she tried to contact the Claimant after the meeting but received no response.
38. The gist of the meeting is not denied by the Claimant. Her evidence was that she did become tearful and upset during the meeting and she left but did not say she was never coming back but asked for a further meeting. She also states that Ms Holder told her she would email her work rota for the following week, but she did not receive an email and so did not attend work further.
39. As far as is relevant to the claim we find that the Claimant was told that she was dismissed on a week's notice by reason of budgetary cuts, that she became upset and left. There was no further contact between the parties other than in the course of these proceedings.
40. The Respondent took on new staff between April and the beginning of June 2018. Beth and Chloe who were employed as part-time evening front of house, Sakeelah, Bar Tender weekends, Rachael weekends front of house, Selinda, Bar Tender weekends and Tyrone who worked mainly events every Sunday or shifts where others did not turn up. The point we took from this was that the Respondent took on staff working a variety of part-time hours at times that the Claimant was not able to by reason of her requiring quieter hours.
41. A number staff left or were dismissed. Terry was made redundant before the Claimant was dismissed and Chloe, Rachael, Kumal and Tyrone after the Claimant had left (two of them for misconduct and two for budgetary reasons).

42. From this we can determine that 4 of the 6 staff taken on were dismissed after the Claimant and one existing member of staff before her dismissal. This was out of a workforce of 9 including Elizabeth, the Supervisor.
43. It was accepted that there was no written confirmation of the dismissal, no right of accompaniment was notified, and the Claimant was not told of a right of appeal. The Claimant did not appeal, but in evidence said she was not sure who she could have appealed to had she done so.
44. We heard evidence as to the Claimant's food breaks and allergies and the refusal by Ms Osei to let her bring in her own food. This was denied by Ms Osei. However, in any event we could not see the relevance of this to the matters that we had to decide.

### Closing submissions

45. At the end of the first day of the hearing, we had finished hearing evidence and invited the parties to provide written submissions so as to avoid the need for them to return on a further day. The Claimant's Counsel insisted that he wanted to give oral submissions and so a further day was set of which one hour would be given for submissions and then the Tribunal would sit privately in Chambers to reach its decision.
46. As already explained above, the Claimant was unrepresented on the second day of the hearing. In addition, the Respondent was represented by Ms Akinyosoye and Ms Holder was not present. Neither party appeared prepared to make closing submissions, which was the sole purpose of the hearing on the morning of the second day. I did invite them to say anything by way of emphasising or summarising any points. They gave brief submissions which we took note of.
47. I expressed the view that it was a shame that they had both come all this way at the insistence of the Claimant's Counsel at the first hearing. The Claimant said that she had been misadvised.

### Essential law

48. Section 99 ERA:

*'[(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—*

*(a) the reason or principal reason for the dismissal is of a prescribed kind, or*

*(b) the dismissal takes place in prescribed circumstances.*

*(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.*

*(3) A reason or set of circumstances prescribed under this section must relate to—*

*(a) pregnancy, childbirth or maternity,*

*(b) ordinary, compulsory or additional maternity leave,*

*[(ba) ordinary or additional adoption leave,]*

*(c) parental leave,*

*[(ca) ordinary or additional paternity leave, or]*

*(d) time off under section 57A;*

*and it may also relate to redundancy or other factors...'*



49. Section 18 EQA:

- '(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—*
- (a) because of the pregnancy, or*
- (b) because of illness suffered by her as a result of it.*
- (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
- (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*
- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
- (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*
- (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*
- (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy...'*

**Conclusions**

50. The burden of proving unlawful discrimination is set out in section 136 of the Equality Act 2010, which states:

*'... (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision....'*

51. What this boils down to is the following: where the Claimant proves facts (the primary facts so-called) from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.
52. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster** [2005] IRLR 258.
53. The Respondent is a small employer with limited financial and administrative resources. Ms Akinyosoye is the sole Director but delegated day to day running of the business to Ms Holder with regard to HR and Ms Osei with regarding to staff, in particular in producing the weekly rota which could not be changed by staff. Whilst Ms Holder had access to an external HR Consultant, she is not herself qualified in HR and neither is Ms Akinyosoye.
54. There is a contract of employment and recorded 121 meetings of which we have notes of two. But beyond that matters were not documented and it is fair to say that the processes followed by the Respondent were rudimentary. The contract referred to a Grievance and Disciplinary Policy, but this was not given to the Claimant or provided at this hearing. We formed the impression

that the Respondent was doing the best it could with limited resources and numerous part-time staff.

55. We have considered the primary facts.
56. The Claimant had not passed her probationary period. She advised two members of staff that she was pregnant in February 2018, they passed this onto Ms Osei and the Claimant told Ms Holder in March 2018. Passing no criticism, the Claimant was pregnant before she commenced employment. The only significant of this was that she could not qualify for SMP.
57. The Respondent considered matters relating to her pregnancy and planned maternity leave at the 121 meeting held on 23 March 2018. The Claimant was told at that meeting that she did not qualify for SMP. Whilst the Claimant believes that she did or would have qualified for SMP had she completed 26 weeks service this was a misunderstanding of the statutory requirements and is unfortunately a common mistake.
58. The Respondent reduced the Claimant's hours to take into account her pregnancy flowing from her request to reduce her hours, but without consulting her as to the extent of the reduction. However, she was at liberty to raise any concerns when the rotas were sent each week but did not do so. The rotas do not support the claimed reduction in hours in any event.
59. The Respondent was experiencing serious financial difficulties. It initially reduced the hours of staff across the board, reduced the days and hours of opening to focus on busier days and times, and then made some staff redundant.
60. The Claimant was one of the staff made redundant as a result of the financial difficulties having considered the following: that she was in her probationary period, her 121s, her work not being completed, and members of staff being aggrieved by her comments. The tipping point related to difficulties that the Claimant had between herself and the newly appointed Supervisor, Elizabeth.
61. Whilst the Respondent intended to raise this matter at the dismissal meeting, the Claimant became upset on being told that she was redundant and left before the meeting got to that point.
62. The Claimant did not return to work her notice period as required because she did not receive a work rota for that week.
63. There was no further contact between the parties prior to the instigation of these proceedings.
64. There was no evidence supporting the Claimant's assertions as to adverse comments made about her pregnancy by Ms Osei and her friends.
65. Whilst we were initially concerned that the issue as to the Claimant's comments about Elizabeth was cited as one of the reasons for choosing the Claimant for redundancy when it had not been raised at the dismissal

meeting, we were ultimately satisfied that had the Claimant not left the meeting prematurely it would have been raised. The Respondent clearly had it in mind as part of the reason for her selection and the failure to raise it alone does not give rise to an adverse inference in view of our other findings.

66. We did not draw an adverse inference from the failure to investigate the allegations made in the proceedings that Ms Osei and her friends had made adverse comments about the Claimant's pregnancy. The Claimant did not raise them during her employment and the Respondent saw no reason to do so. Given the Respondent's size, rudimentary procedures and limited knowledge of HR matters notwithstanding its access to an HR Consultant this did not appear untoward. However, the Respondent would be well advised to investigate allegations of discrimination made by members of staff even after they have left to determine whether there is any substance to them or not.
67. On this basis the Claimant does not satisfy the initial burden of proof and so her complaints fail. We cannot find that the principal reason for dismissal is pregnancy, childbirth or maternity or to avoid paying her SMP. She was dismissed by reason of redundancy. Further she was not discriminated against because of her pregnancy, childbirth or maternity.
68. The Respondent's procedure and conduct in carrying out the Claimant's dismissal was far from ideal. Were this a claim for ordinary unfair dismissal, had the Claimant got 2 years' service, the Respondent would have been in extreme difficulties in defending that claim. The Respondent would do well to take advice from its external HR Consultant generally in and prior to future similar circumstances or even look at materials available free of charge on the ACAS website or telephone the ACAS advice line.
69. We therefore dismiss all of the Claimant's complaints.

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Employment Judge Tsamados

Date 20 November 2019