



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113020/2018

5 **Held in Glasgow on 19 June, 11 September and 7 October 2019**

**Employment Judge: Mrs M Kearns
Tribunal Members: Mr KF Watson
Mr AB Grant**

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Miss C Stewart

**Claimant
Represented by:
Mr S Healey -
Solicitor**

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**SD Hotels Limited
t/a The Anchor Hotel**

**Respondent
Represented by:
Mr R Brown -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous Judgment of the Employment Tribunal was to dismiss the claims.

REASONS

1. The claimant worked for the respondent for just over three weeks from 16 April until 9 May 2018. On 30 July 2018, having complied with the early
10 conciliation requirements, she presented an application to the Employment Tribunal in which she claimed automatically unfair dismissal and maternity discrimination.

Issues

35 2. The issues for the Tribunal were:-
E.T. Z4 (WR)

- (1) Whether the dismissal of the claimant was automatically unfair under section 99 Employment Rights Act 1996 because the reason or principal reason for dismissal was pregnancy;
- (2) Whether the respondent discriminated against the claimant contrary to section 18(2) Equality Act 2010 by dismissing her because of her pregnancy or because of illness suffered by her as a result of it.

Evidence

3. The parties produced a joint bundle of documents and referred to them by page number ("J"). The claimant gave evidence on her own behalf and called her mother, Ms Wendy Islip as a witness. The respondent called Mr Russell Thompson, their former hotel manager.

Findings in Fact

4. The following material facts were admitted or found to be proved:-
5. The respondent is a limited company engaged in running the Anchor Hotel in Tarbert. The claimant was employed by the respondent as a housekeeper from 16 April until 9 May 2018. She was engaged to work 25 hours per week. Her role involved general hotel cleaning and making up bedrooms. Her normal start time was 9am. The claimant's home is approximately 30 minutes' drive from the respondent's hotel. In addition to her work at the hotel from around March 2018 the claimant was an agent for the Avon Cosmetic company, from which she received a small profit. She continued to work for Avon during and after her employment with the respondent.
6. On 19 April 2018 the claimant discovered that she was pregnant. As she had suffered two miscarriages the previous year she decided not to tell her employer at that stage.

7. On Thursday 3 May 2018 the claimant was late for work. There was no reason for this other than that her alarm did not go off. The claimant did not telephone the hotel to tell them that she was going to be late or to say that she was on her way. She arrived at work approximately 35 minutes late.
- 5 When she got to work she had missed calls on her phone from the manager on duty, Matthew Hoskin and could see that he had been trying to reach her. When the claimant did not turn up and did not telephone, Mr Hoskin had tried to get cover for her shift without success. When the claimant arrived, she went straight upstairs and started work.
- 10 8. The weekend of Friday 4 to Monday 7 May 2018 was a bank holiday weekend and the hotel was fully booked. The claimant was not scheduled to work on Friday 4 May or Saturday 5 May 2018.
9. Sunday 6 May 2018 was the claimants next working day. On that date she was scheduled to work from 9am. When the claimant woke up that morning,
- 15 she was sick. At that time, she put her sickness down to a bug because she had not suffered from morning sickness during her two previous pregnancies. She telephoned the respondent at approximately 8.35am and spoke to the manager, Russell Thompson. The claimant explained to Mr Thompson that she was sick and would not make it into work that day. Mr
- 20 Thompson said he would see her the next time she was in at work.
10. The claimant was not on the rota for Monday 7 or Tuesday 8 May 2018. Her next scheduled shift was on Wednesday 9 May 2018. On 9 May the claimant got up and was feeling quite sick, so she messaged a colleague Amy to say that she was feeling sick and did not think she was going to
- 25 make it into work. Amy told the claimant the correct procedure to follow. The claimant was sick twice that morning. The claimant telephoned her mother, Ms Islip at 8.30am and Ms Islip arrived shortly thereafter. The claimant telephoned the respondent at 8.55am, five minutes before her shift was due to start. The phone was answered by Russell Thompson. The claimant told
- 30 Mr Thompson that she was really sorry, but she was sick and would not be able to come into work as she had been up all night throwing up. Mr

Thomson replied: *"I'm sorry. That's not good enough. I'm going to have to find someone else to carry out your role."* The claimant then told Mr Thompson that she had found out she was pregnant and was going to go and get some anti-sickness tablets. Mr Thompson started to say that that did not change anything but he did not finish his sentence because at that point he was interrupted by Ms Islip who said: *"Are you telling me you're firing Chloe because she's pregnant?"* Mr Thompson asked who was speaking and Ms Islip said she was the claimant's mother. She then repeated the question angrily: *"Are you firing Chloe because she's pregnant?"* Mr Thompson said: *"No. She has phoned in sick a few times and I can't run a business like that. It's disrespectful to other employees on the job."* Ms Islip then said that she or her husband would come down to the hotel and sort him out. Mr Thompson said: *"Are you threatening me?"* Ms Islip changed the subject and said that she was a manager in the NHS and her husband was a manager in the local Co-op. She then said that she would make sure the reputation of the hotel was trashed in the village and they would not get any business from any local people anymore. At that point Mr Thompson said that the conversation was not productive and that Ms Islip was not his employee, so they should end the conversation there. There followed a circular conversation with Ms Islip saying: *"You can't fire Chloe for being pregnant"* and Mr Thompson saying: *"I'm not. I'm firing her because she gave no notice before her absences and it's disrespectful to other people and we can't run a business with people not showing up for work and not giving notice that they're not coming in"*. In response to this Ms Islip said: *"Well, we're sorry about that"*. Mr Thompson replied: *"I'm afraid sorry doesn't clean the hotel rooms. We've got a full hotel and a lot of work to get done"*. Mr Thompson then said: *"Once everyone has calmed down I can reconfirm everything with you if you need things reconfirmed"*. At that point Ms Islip's end of the phone was hung up. The call lasted just over eight minutes.

11. Mr Thompson dismissed the claimant before she told him she was pregnant. At the point where he formed the intention to dismiss her and communicated to her that she was dismissed, he did not know that she was pregnant. Her

pregnancy and/or illness suffered by her as a result of it were no part of the reason for her dismissal. The reason why Mr Thompson dismissed the claimant was because she was repeatedly absent without giving notice; he considered this disrespectful to her colleagues; and he felt that he could not run a business with people not showing up for work and not giving notice that they're not coming in.

12. Later that day Mr Thompson had a thought that he was not scheduled to be in work the next day and that Matthew Hoskin, who was fairly inexperienced as deputy manager would be there. He had visions of the claimant showing up at the hotel the next day with her mother and her mother's husband and he decided to telephone her to confirm the position. The claimant's phone went straight to voicemail and he left a message in the following terms: *"Hi there Chloe, it's Russell from the Anchor Hotel. Just to confirm we won't be carrying on with your employment. "*

13. Later that morning the claimant's mother, Ms Islip went to the local Citizens' Advice Bureau to take some advice. At 12 noon the claimant attended an appointment with her GP. The entry on her medical record (J84) states, so far as relevant: *"9/05/2018 Consultation seen with mum. See telephone consultation. Nausea started Friday. Has only vomited 3 times in totalWorks as cleaner - called in sick today for second time ever and was sacked on the phone. Mum has spoken to citizens advice - pursuing discrimination asking for letter to confirm attendance today and pregnancy - agreed. Discussed charge to collect when ready...."*

9/05/2018 Telephone encounter 8 weeks pregnant, c/o morning sickness since Friday. Midwife has told her can get an anti-sickness medication. Feels nauseous all the time, vomited twice this morning..."

14. At around 5pm on Wednesday 9 May the claimant received the voicemail message Mr Thompson had left confirming that her employment had terminated.

15. Approximately a week later Mr Thompson sent the claimant an undated letter (J37) in the following terms:

"To Chloe Stewart

It is with regret that we are not continuing with your employment at The Anchor Hotel & Restaurant.

In your last 3 shifts here you were 35 minutes late on Thursday 3rd May with no explanation or courtesy call to inform us you were running late and were unreachable by telephone when the Duty Manager tried to contact you.

On Sunday 6th May you informed the hotel 25 minutes before your shift was due to start that you would not be attending work that day.

On Wednesday 9th May you saw fit earlier in the morning to message a colleague that you wouldn't be in that day but did not see fit at the time to inform the hotel management and then finally (after being reminded of the correct procedure by your colleague) only informed the hotel management 5 minutes before your shift was due to start that you would not be attending work that day.

We are unable to operate our business with staff that do not give their employers or colleagues the courtesy of giving adequate notice that they will not attend work or will arrive late for work. You have no contracted working hours and you are still within your 12 week probation period in the hotel (employment commencing on 16th April 2013) so unfortunately we have taken the decision to remove you from our KTW (Key Time Worker) rota.

Kind regards

Russell Thompson ..."

16. Following receipt of the letter the claimant and her mother arranged and attended a meeting at the CAB. With their assistance the claimant then sent Mr Thompson a letter of grievance dated 21 May 2018 (J38). The claimant

enclosed with it a brief letter from her GP (J39) dated 9 May 2018 confirming that she was 8 weeks pregnant and suffering from pregnancy related nausea and vomiting. The grievance stated: *"As I feel that I have been discriminated against and treated unfavourably because of absence caused by pregnancy related illness I am raising a formal grievance."* The respondent did not respond to the grievance.

Observations on the Evidence

17. This was a 'he said/she said*' case, where there were two conflicting accounts of the key conversation and the outcome largely depended on which account was correct. It was therefore important to analyse the evidence in a forensic way to try and get at the truth. The Tribunal considered the differing witness accounts of the key passages of evidence. In this case everything turned on what was said by the claimant and Mr Thompson and in what order during the telephone conversation on Wednesday 9 May 2018. Mr Healy submitted that the claimant's account of that conversation was corroborated by her mother and that it should accordingly be given more weight. We have carefully considered all the evidence, including that of the claimant's mother Ms Islip.

18. The claimant's evidence in chief on the first day of the hearing was as follows: *"On 9 May I got up and was feeling quite sick so I messaged a colleague Amy and said I was feeling sick and didn't think I was going to make it into work. She told me the correct procedure. I was sick twice that morning. My mum came to see me. [Ms Islip's evidence was that the claimant had telephoned her at 8.30am]. By the time I was fit to phone it was 8.55, so 5 minutes before my shift was due to start. I phoned at 8.55 and spoke to Russell Thompson. I phoned in and said I was really sorry that I was sick and wouldn't be able to come into work. I said I've got something to tell you. The reason I'm being sick is that I've got morning sickness. That I'm 8 weeks pregnant. I said I was going to try and go to the doctor or midwife that day and get sickness medication to enable myself to get into work and*

he said: "Being pregnant and sick doesn't clean this hotel" so not to bother coming back to work, that he'd find someone else. After that my mum could see I was getting quite upset and she took the phone off me because she heard it as it was on loud-speaker. She took the phone off me and said: Are you sacking my daughter for being pregnant?" He never answered so my mum said she was a manager with the NHS and it was employment law that you couldn't sack someone for being pregnant. He said: "I'm away to think about it and I'll phone you back. At 5pm that night I realised I had a voicemail." That was as far as the claimant got on the first day of the hearing because objection was taken to her going further when there was no prior notice of any voicemail in her pleadings. The case was adjourned at that point for further and better particulars. The claimant resumed her evidence on 11 September 2019.

19. The key passage of the claimant's cross examination regarding the telephone conversation of 9 May was as follows:

Mr Brown: *Is it not correct that Mr Thompson said to you: "That's not good enough. You are due to start in five minutes and we have a full hotel. I'm going to have to find someone else to do your job. You then said you were pregnant in reaction to what he had just said to you?"*

Claimant: *"I disagree with that."*

Mr Brown; *"Why did you phone five minutes before your shift and decide to tell the whole story?"*

Claimant: *"Because I sensed from his tone he was annoyed with me, so I thought I'd tell him why I was sick"*

Mr Brown: *"He dismissed you first and you reacted by saying you were pregnant?"*

Claimant: *"No. I didn't want to tell him I was pregnant because I had had two miscarriages before that and I didn't want to tell him I was pregnant, but I realised I had to."*

20. The difficulty with these answers by the claimant is that on her evidence, she spoke first, before Mr Thompson said anything: *7 phoned at 9.55 and spoke to Russell Thompson. I phoned in and said I was really sorry that I was sick and wouldn't be able to come into work. I said I've got something to tell you. The reason I'm being sick is that I've got morning sickness. That I'm 8 weeks pregnant. I said I was going to try and go to the doctor or midwife that day and get sickness medication to enable myself to get into work and he said: "Being pregnant and sick doesn't clean this hotel" so not to bother coming back to work, that he'd find someone else.* Thus, on the claimant's testimony there was no evidence that Mr Thompson had said anything before she told him she was not coming to work and was sick because she was pregnant. So, on her own case, Mr Thompson had had no opportunity to display an annoyed tone so as to prompt her to tell him something she did not want to reveal. (Obviously, we assumed he must have said 'Hello, the Anchor Hotel' or something first, but at that point he would not know who was calling).

21. We considered the evidence of Ms Islip. Ms Islip's evidence was that the claimant had made the call on loud-speaker and that she (Ms Islip) had listened. Her account of the call was similar to the claimant's: *"Chloe went on the phone on loud-speaker. She told RT she was really sorry she couldn't manage in today because she was being sick. She said she had something to tell him that she was pregnant and suffering from morning sickness and she was going to see the doctor and get something for her sickness. He then said that being sick and pregnant was not going to clean his rooms and he'd need to get somebody else and not to bother coming back."* In other words, that the claimant delivered her entire message before Mr Thompson spoke and dismissed her.

22. One of the main indicators of a witness's credibility is whether they quickly make appropriate concessions. Mr Healey asked Ms Islip: *"It might be put to you that you threatened Mr Thompson and said you would send your husband down?"* Ms Islip responded: *"No. I said my husband was a manager and I did say I could send my husband over to tell him employment*

law and the Equality Act. I didn't say he was coming to do anything to him. I just said employment law." In cross examination on the point Mr Brown asked: "Russell Thompson says you said your husband would come and see him and he'd sort him out?" Ms Islip replied: "No. I didn't say that. I said my husband would come over to give him advice about employment law. They were obviously not following employment policies and needed advice." Mr Brown then queried: "So it was Just a friendly gesture?" and Ms Islip responded: "Of course it was." We understood Ms Islip's loyalty to her daughter and her reaction as a mother to hearing her daughter being dismissed. If she had conceded that she had threatened to send her husband over in the heat of the moment, but realised she should not have done so, that would have been believable. However, her statement that when she told Mr Thompson she would send her husband over it was to give him employment law advice as a friendly gesture was not credible in the circumstances and her lack of frankness on this point undermined the rest of her evidence in our view.

23. In addition, the claimant conceded that her mother *had*, at one stage said the words: "Well, we're sorry about that" in relation to the claimant repeatedly giving short notice of her absences. The claimant also accepted that Mr Thompson could have then said: "Sorry doesn't change the fact I have a hotel to clean and no time to get other staff in". By contrast, Ms Islip stated that Mr Thompson had "definitely not said that there were difficulties with the claimant giving little warning of her absences and that she (Ms Islip) had "definitely not said "Well, we're sorry about that". She also categorically denied that Mr Thompson had replied in the terms accepted by the claimant as possibly having been said above. Thus, there was a significant inconsistency between the claimant and Ms Islip on this exchange.

24. For all the reasons set out above, therefore, where there was a conflict in the evidence, on balance we preferred Mr Thompson's evidence to that of the claimant and her mother. In particular, we accepted his account of the telephone conversation on 9 May 2018 and made findings in fact accordingly.

Applicable law

Automatically Unfair Dismissal

5 25. Section 99 Employment Rights Act 1996 ("ERA") provides so far as relevant as follows:

"99 Leave for family reasons

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

10 (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.*

15 (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. .."*

20 26. Regulation 20 of the Maternity & Parental Leave Regulations 1999 ("the MAPL Regs") provides, so far as relevant as follows:

"20 Unfair dismissal

(1) *An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if -*

(a) *The reason or principal reason for the dismissal is of a kind specified in paragraph (3), or*

(b) *.....*

(2) *.....*

5 (3) *The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with -*

(a) *The pregnancy of the employee;*

(b) *.....*

10 Pregnancy/ Maternity Discrimination:

27. Section 18 Equality Act 2010 provides as follows:-

“18 Pregnancy and Maternity Discrimination: Work Cases

15 (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*

20 (b) *Because of illness suffered by her as a result of it.*

.....

(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”*

(7) *Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as -*

(a) *It is in the protected period in relation to her and is for a reason mentioned on paragraph (a) or (b) of subsection (2), or*

(b) *It is for a reason mentioned in subsection (3) or (4).”*

Discussion and Decision

Automatically Unfair Dismissal

28. Section 99 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a prescribed kind. Regulation 20 of the Maternity & Parental Leave Regulations 1999 prescribes pregnancy among those reasons. We did not conclude that the claimant's pregnancy was the reason or principal reason for her dismissal in this case. On the evidence we accepted, Mr Thompson dismissed the claimant before she told him she was pregnant. At the point where he formed the intention to dismiss her and told her that she was dismissed, he did not know that she was pregnant. Her pregnancy was therefore no part of the reason for dismissal. We accepted Mr Thompson's evidence that the reason why he dismissed the claimant was because she was repeatedly absent without giving notice; he considered this disrespectful to her colleagues; and he could not run a business with people not showing up for work and not giving notice that they're not coming in. This claim therefore does not succeed and is dismissed.

Maternity Discrimination

29. Section 18 Equality Act 2010 provides (so far as relevant for present purposes) that a person (A) discriminates against a woman if A treats her unfavourably because of either her pregnancy, or because of illness suffered by her as a result of it. The unfavourable treatment complained of by the claimant was her summary dismissal on 9 May 2018.
30. Mr Healey valiantly argued that even if Mr Thompson's evidence about the telephone call of 9 May was accepted, we should still find that the claimant was dismissed because of pregnancy or pregnancy-related illness because when the phone call ended he knew she was pregnant and he should have changed his mind about her dismissal on finding this out. With respect to Mr Healey we did not consider this argument well founded. Finding something out after you have taken a decision for another reason and communicated it (i.e. after the act of unfavourable treatment has been done) does not retrospectively convert lack of knowledge into knowledge or one reason for the treatment into another.
31. With regard to Mr Healey's other points, we preferred Mr Thompson's evidence to that of the claimant and Ms Islip for the reasons given above. We did not find the claimant's notes on the dismissal letter to be of any assistance. The fact that the dismissal letter did not refer to pregnancy or maternity discrimination could be read either (i) in the way submitted by Mr Healey or (ii) as evidence that Mr Thompson did not think the claimant's pregnancy/ illness was of any relevance because it was no part of the reason for her dismissal. We were inclined toward the latter view. Finally, we agree that the respondent had some poor employment practices; in particular, their failure to respond to the grievance and their apparent failure to issue employment contracts or statements of employment particulars. We took these into account, but at the end of the day this case turned on what was said in the telephone conversation on 9 May and we have reached our conclusions on that for the following reasons.

32. It was not in dispute that the claimant received Mr Thompson's initial words -
"I'm sorry. That's not good enough. I'm going to have to find someone else
to carry out your role" - as a dismissal. On her own evidence, both she and
her mother reacted accordingly. The key issue is whether the unfavourable
5 treatment was because of the claimant's pregnancy or illness suffered by
her as a result of it. We concluded without hesitation that the unfavourable
treatment was not to any extent because of the claimant's pregnancy or
illness suffered by her as a result of it. Mr Thompson did not know that the
claimant was pregnant at the point where he decided to dismiss her and
10 informed her of this decision. He did not know at that point that she was
suffering from pregnancy related illness. Accordingly, neither were any part
of the reason for his decision. We would go further and say that we
accepted his evidence that the reason why he dismissed the claimant was
that, as set out in his undated letter; in her last three shifts she was "35
15 minutes late on Thursday 3rd May with no explanation or courtesy call to
inform us you were running late and were unreachable by telephone when
the Duty Manager tried to contact you.

*On Sunday 6th May you informed the hotel 25 minutes before your shift was
due to start that you would not be attending work that day.*

20 *On Wednesday 9th May you saw fit earlier in the morning to message a
colleague that you wouldn't be in that day but did not see fit at the time to
inform the hotel management and then finally (after being reminded of the
correct procedure by your colleague) only informed the hotel management 5
minutes before your shift was due to start that you would not be attending
25 work that day."*

*We are unable to operate our business with staff that do not give their
employers or colleagues the courtesy of giving adequate notice that they
will not attend work or will arrive late for work."*

33. As summarised above, we concluded that the reason for the unfavourable
30 treatment was the fact that the claimant (who had only just started work with
the respondent) was repeatedly absent without giving notice; that Mr

Thompson considered this disrespectful to her colleagues; and that he could not run a business with people not showing up for work and not giving notice that they were not coming in. The claimant's pregnancy and/or illness suffered by her as a result of it were no part whatever of the reason for her
5 dismissal. The section 18 claim accordingly also fails and is dismissed.

Employment Judge: M Kearns
Date of Judgment: 7 November 2019
Entered in register: 11 November 2019
and copied to parties

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